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Hand-Delivered

November 3, 2017

Complaints Examining Unit
Office of Special Counsel
1730 M Street, NW, Suite 218
Washington, DC 20036

Re: ***Helen Foster v. U.S. Dept. of Housing and Urban Development***
(Whistleblowing Complaint) PPP Complaint of Retaliation in Violation of 5 U.S.C. § 2302(b)(8); and Notice of PPP in violation of 5 U.S.C. § 5 USC 2302(b)(12), concerning the merit system principle in 5 USC § 2301(8)(A).

Request for Referral to Conciliation/Settlement Negotiations at CEU

To Whom It May Concern:

Please be advised that Helen Foster has engaged undersigned counsel and the attorneys of PASSMAN & KAPLAN, P.C. to represent her in regards to various allegations against the U.S. Department of Housing and Urban Development. A copy of Ms. Foster's power of attorney, which includes a Privacy Act release, executed in favor of PASSMAN & KAPLAN, P.C. is attached. Ms. Foster requests that all communications in this matter be directed to her undersigned counsel.

Ms. Foster ("Complainant") claims that the Department of Housing and Urban Development (hereafter "HUD," "Department," or "Agency") has engaged in Prohibited Personnel Practices as described below.

Reprisal for Protected Whistleblowing in Violation of 5 U.S.C. § 2302(b)(8)

Prior to her protected disclosures, which are described below, the Complainant served in a very high-level Senior Executive Service position as the Department's Chief Administrative Officer. (Attachment 1 & 2) Subsequent to her disclosures, the Complainant was reassigned to much lesser duties as the Department's Chief Privacy and FOIA Officer, reporting to the Deputy Chief Administrative Officer – a position that was once her subordinate. The Complainant has suffered much humiliation and loss of reputation, and harm to career advancement, as a result of this retaliatory reassignment.

Disclosure #1: Violations of P.L. 101-136, sec 614; and the Antideficiency Act

On January 19, 2017, then-Acting Secretary designee Craig Clemmensen informed Complainant that Mrs. Ben Carson, wife of the incoming Secretary, Dr. Ben Carson, wanted to help redecorate the Secretary's office suite. Mr. Clemmensen asked Complainant to assist in getting Mrs. Carson funds for the project. Complainant informed Mr. Clemmensen that there is a statutory limit on funds. Mr. Clemmensen responded that the Office of "Administration has always found ways around that in the past." Mr. Clemmensen asked Complainant to check with Ms. Ada Rodriguez, the Administrative Officer for the Secretary's office. Complainant forwarded to Ms. Rodriguez a copy of the statute that limits the amount of money that can be used for decorating a Secretary's office to $5000, P.L. 101-136, sec 614.[1] (Attachment 3) Complainant advised others of Mr. Clemmensen's request.

On February 10, 2017, Mr. Clemmensen repeatedly told Complainant to "find money" for Mrs. Carson to purchase furniture for the Secretary's office. He repeatedly told Complainant that "Administration has always found money for this in the past," and that "$5000 will not even buy a decent chair." Complainant reminded Mr. Clemmensen of the statutory limit. Mr. Clemmensen's repeated statements to Complainant that "Administration has always found money for this purpose" are statements that the Agency has repeatedly violated the law in the past.

On February 22, 2017, Complainant sent an email to Sarah Lyberg, the Department's Budget Director, Office of the Chief Financial Officer, complaining that Complainant was still fielding questions from Department leadership about why Complainant refuses to authorize additional funds beyond the $5000 for redecorating the Secretary's office. (Attachment 4)

Disclosure #2: Anti-Deficiency Act; Budget shortfalls

On or about February 10, 2017, Complainant advised then-Acting Secretary, Craig Clemmensen, that her team has discovered over $10 million in accounting irregularities from 2016, based on the mismanagement of her predecessor, the former Chief Administrative Officer, Ms. Pat Hoban-Moore. (Attachment 5) Complainant advised Clemmensen that she believed these were potential Anti-deficiency Act violations. Complainant also advised that even if these shortfalls were legal, resulting 2017 funding will have to be explained to the Appropriations Committee.

On or about February 14, 2017, Complainant advised Sarah Lyberg, Budget Director, of the funding shortfalls that her staff had discovered. Complainant informed Ms. Lyberg that she (Complainant) had already advised Acting Secretary Craig Clements on the matter and expressed her opinion to him that the Appropriations Staff would have to be informed because this amount was too big to cover without an unfunded request. Complainant also advised Ms. Lyberg that the past representations by her predecessor to the Appropriations Staff may have been false or misleading.

On May 23, 2017, Complainant briefed the new Chief Operating Officer, David Eagles, on the budget shortfall issue.

[1] P.L. 101-136, Sec 614 provides: "During the period in which the head of any department or agency, or any other officer or civilian employee of the Government appointed by the President of the United States, holds office, no funds may be obligated or expended in excess of $5,000 to furnish or redecorate the office of such department head, agency head, officer or employee, or to purchase furniture or make improvements for any such office, unless advance notice of such furnishing or redecoration is expressly approved by the Committees on Appropriations of the House and Senate."

On or about June 2, 2017, in response to an inquiry from David Eagles, Complainant provided him with a copy of the Office of Administration's unfunded request list for fiscal 2017. The number one item was $10.8 million to make up for the funding shortfall caused by the fiscal mismanagement of Complainant's predecessor, Ms. Hoban-Moore. (Attachment 6 & 7) Complainant explained that Ms. Hoban-Moore was running a "Ponzi -like" scheme using the next year's money to make up for the previous year's debt.

Later that same day, Mr. Eagles advised Complainant that he was bringing back the position of "Assistant Secretary for Administration," (ASA) the position that Complainant's position as the Chief Administration Officer and the Chief Human Capital Officer position were created to fill. When Complainant asked Mr. Eagles where the money for the salary for this position would come from, Mr. Eagles told Complainant that Complainant should not worry about it. In a follow-up email with Mr. Eagles, Complainant asked him if he was aware that this Assistant Secretary for Administration position completely subsumes her position. Complainant asked Mr. Eagles if he was, in essence, asking Complainant to leave the agency. Mr. Eagles responded by asking Complainant to call him. When Complainant called Mr. Eagles, he did not answer the phone.

On June 20, 2017, Complainant was informed that agency leadership is unwilling to report the $10.8 million funding deficit to the Appropriations Staff. Complainant emailed Budget Director. Sarah Lyberg twice stating that if the appropriations staff is not asked for funding to cover the shortfall, that Complainant was being asked to continue potentially illegal practices. (Attachment 8 & 9)

Disclosure #3: Violation of the Freedom of Information Act Improvement Act, P.L. 114-185.

On or about February 13, 2017, Acting Secretary Craig Clemmensen asked Complainant to find two FOIA requests related to hiring practices. Complainant discovered these requests were submitted by the Democratic National Committee and related to HUD appointee Lynn Patton. (Attachment 10 & 11) Complainant provided copies of the FOIA requests to Mr. Clemmensen as he directed. Next, on or about February 16, 2017, Complainant was informed by Kevin Simpson, lead attorney for Administrative and Ethics section in the Department's Office of General Counsel, that the OGC has been asked to discreetly handle these two FOIA requests outside of the normal FOIA processes, which would be handled in Complainant's office as Complainant was, in her position as Chief Administrative Officer, also the Chief FOIA Officer. When Complainant asked who made this decision, Complainant was told that it was Maren Kasper, senior White House Advisor to HUD at the time. Ms. Kasper was leader of the Trump Administration transition team at HUD. In a separate phone call with OGC FOIA counsel Dena Jih, Ms. Jih told Complainant that her supervisor, John Shumway, directed Ms. Jih to process the FOIA's without allowing Complainant or her staff to view the contents or the response. This is in direct violation of the FOIA Improvement Act, which makes the Chief FOIA officer, – which was part of Complainant's position – responsible to the Secretary for FOIA compliance. Complainant was advised that Ms. Jih was told that these FOIA requests are being kept from Complainant because Complainant is a "Democrat." The information responsive to the FOIA requests reveal that Ms. Patton wanted Ms. Kasper fired because she was critical of President Trump.

Complainant immediately went to Janet Golrick's office and spoke with Ms. Golrick and Mr. Clemmensen. Complainant told them both that Complainant was concerned that the action of processing these FOIA requests from the Democratic National Committee outside of the normal FOIA processes could be construed as an attempt to contravene the statute. Complainant stated that the recent FOIA Improvement Act explicitly made release of information under FOIA the responsibility of the designated Chief FOIA Officer, which was Complainant's position. Later that day, Complainant briefed Maren Kasper on the FOIA Improvement Act requirements, and was then permitted to handle these FOIA requests. (Attachment 12)

On or about February 17, 2017, Complainant reported this issue to the Department's Office of Inspector General (OIG), and expressed her concern that her job authorities were being usurped based on perceived political affiliation. (Attachment 13) To Complainant's knowledge, there was no follow-up conducted by the OIG's office. The OIG investigator did, however, confirm the essence of Complainant's concerns in an email exchange. On May 11, 2017, Complainant's Department-wide FOIA training program was canceled by Sheila Greenwood, Chief of Staff. That same day, Complainant sent a memo to Craig Clemmensen and Janet Golrick, citing her statutory authority as Chief FOIA Officer and recommending that the training campaign be continued. Complainant never received a response.

Prohibited Personnel Practice in violation of 5 USC § 2302(b)(12), concerning the merit system principle in 5 USC 2301(8)(A).

In addition to reprisals for protecting whistleblowing, the Complainant is also being the victim of a Prohibited Personnel Practice in violation of 5 USC § 2302(b)(12), concerning the merit system principle in 5 USC 2301(8)(A), due to the perception that Complainant is a "Democrat." The facts above describing the reprisal for Complainant's protected disclosure in relation to violation of the Freedom of Information Act Improvement Act (which are not being repeated here), demonstrate the attempts to subvert the FOIA process, and usurp Complainant's duties, because it was believed she was a Democrat.

There was no reason to remove Complainant from her position of Chief Administrative Officer, but for her protected disclosures and retaliation for perceived partisan politics. Complainant was hired at the Department of Housing and Urban Development in July 11, 2016, as the Deputy Chief Administrative Officer and Executive Secretary. A short time after, on or about October 31, 2016, the then-current Chief Administrative Officer, Ms. Pat Hoban-Moore, was reassigned to the Department's Alabama field office. A short time after, on or about December 25, 2016, Complainant was appointed as the Chief Administrative Officer. On January 18, 2017, Complainant received her Fiscal Year 2016 performance review with a rating of "Outstanding." The following month, Complainant received a performance award equal to 12% of her annual salary for that Outstanding performance. Consequently, it is clear, that Complainant was excelling in her positions of Deputy and then Chief Administrative Officer. There would have been no reason to remove Complainant from that position, but for the fact of the protected disclosures Complainant made and/or the fact that Complainant was perceived as a "Democrat" by a new Republican administration. Moreover, some of Complainant's disclosures were specifically about financial shortfalls caused by Ms. Hoban-Moore. Yet, curiously, on or about September 2017, Ms. Hoban-Moore was appointed on detail as Senior Advisor to the new Deputy Secretary

It is obvious that Complainant was viewed as a thorn in management's side because Complainant: 1) opposed the plan to provide Mrs. Carson with funds exceeding the statutory cap to redecorate Secretary Carson's office; 2) disclosed over $10 million in budget shortfalls caused by the mismanagement of her predecessor; 3) wanted these shortfalls reported to the Appropriations Staffs; 4) and objected to processing FOIA requests, which were made by the Democratic National Committee, outside of the normal FOIA process.

Although the Agency demoted Complainant from the position of Chief Administrative Officer on or about July 23, 2017, the SF-50 was not actually issued to Complainant until on or about October 24, 2017. (Attachment 14) Simultaneous with issuing the SF 50, Complainant was obtained, for the first time, the Position Description for the position of Chief Privacy Officer and FOIA Officer. However, the duties in the Position Description are totally blank! (Attachment 15)

Prohibited Personnel Practices: Whistleblower Reprisal in Violation of 5 U.S.C. § 2302(b)(8)

5 U.S.C. § 2302(b)(8) identifies the prohibited personnel practice of whistleblower reprisal:

> Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority […] take […] or threaten to take […] a personnel action with respect to any employee or applicant for employment because of— **(A)** any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences— **(i)** any violation of any law, rule, or regulation, or **(ii)** gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety

5 U.S.C. § 2302(b)(8). "Personnel action" in this context includes "a detail, transfer, or reassignment." *See* 5 U.S.C. § 2302(a)(2)(A)(iv). "Personnel action" in this context includes "any other significant change in duties, responsibilities, or working conditions." *See* 5 U.S.C. § 2302(a)(2)(A)(xii). The MSPB has held that removal of supervisory duties constitutes a "significant change in duties, responsibilities or working conditions." *See, e.g., Sanders v. Dept. of Agriculture,* MSPB Docket No. SF-1221-12-0771-W-2 (September 20, 2013)(Gutman, AJ); *cf. McDonnell v. Dept. of Agriculture,* 108 M.S.P.R. 443, ¶ 23 (2008) ("undermining […] supervisory authority constituted a significant change in duties, responsibilities, or working conditions, which is a 'personnel action' within the meaning of the WPA.").

The Merit Systems Protection Board (MSPB)—the adjudicative body chiefly responsible for federal sector whistleblower reprisal claims—defines protected whistleblowing as follows:

> […] the appellant must show by preponderant evidence that she engaged in whistleblowing activity by making a protected disclosure under 5 U.S.C. § 2302(b)(8), i.e., a disclosure of information that she reasonably believes evidences a violation of any law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. […] To establish that the appellant had a reasonable belief that a disclosure met the criteria of § 2302(b)(8), she need not prove that the circumstances disclosed actually established a regulatory violation or any of the other situations detailed under § 2302(b)(8); instead, she must show that the matter disclosed was one which a reasonable person in her position would believe evidenced any of the situations specified in § 2302(b)(8). The proper test for determining whether an employee had a reasonable belief that she made protected disclosures is this: Could a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee reasonably conclude that the actions of the government evidence wrongdoing as defined by the Whistleblower Protection Act?

Schneider v. Dept. of Homeland Security, 98 M.S.P.R. 377 (2005) at ¶8. A disclosure is protected if it is based on a reasonable interpretation of events, considering information available to the appellant when he made his disclosure. *Perry v. Dept. of Veterans Affairs,* 81 M.S.P.R. 298 (1999). The MSPB has found the evidence of reasonable belief of the whistleblower to be bolstered where the whistleblower himself has expertise in the subject matter of the disclosure. *C.f. Paul v. Dept. of Agriculture,* 66 M.S.P.R. 643, 648 (1995).

"Even if [...] the violations that the appellant reported were trivial, [...] there is no de minimis exception for the violation-of-law aspect of the protected disclosure standard." *Grubb v. Dept. of Interior,* 96 M.S.P.R. 377 (2004) at ¶26. Under the MSPB's standards, "*any* disclosure is protected (if it meets the requisite reasonable belief test and is not required to be kept confidential)" *Ganski v. Dept. of Interior,* 86 M.S.P.R. 32 (2000) at ¶12 (emphasis in original). The employee is not required to identify a statutory or regulatory provision by title or number in the whistleblowing disclosure itself when the employee's statements and the circumstances of those statements clearly implicate an identifiable law, rule, or regulation. *See Mogyorossy v. Dept. of the Air Force,* 96 M.S.P.R. 652 (2004) at ¶12. "The Board has held that the disclosure of a fraudulent claim on a travel voucher or excessive travel expenditures is a protected disclosure of a violation of law, rule, or regulation."

Mason v. Dept. of Homeland Security, 116 M.S.P.R. 135 (2011) (citing *Scott v. Department of Justice*, 69 M.S.P.R. 211, 237-38 (1995), aff'd, 99 F.3d 1160 (Fed. Cir. 1996); *Ward v. Department of the Army*, 67 M.S.P.R. 482, 486-87 (1995)). The Board has also held that disclosure of a falsification of a federal record in violation of 18 U.S.C. § 1001 constitutes a disclosure of a violation of law, rule or regulation. *See Berkowitz v. Dept. of the Treasury,* 94 M.S.P.R. 658 (2003).

In the context of whistleblower reprisal, "an abuse of authority 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." *E.g., Webb v. Dept. of the Interior,* 122 M.S.P.R. 248 (2015) at ¶ 10 fn.2; *Hood v. Dept. of Agriculture*, 96 M.S.P.R. 438, 443 (2004) at ¶10. The MSPB has clearly held that no *de minimis* standard applies to abuse of authority allegations. *E.g., Harris v. Dept. of Transportation,* 96 M.S.P.R. 487, 490 (2004) at ¶6. At least one MSPB administrative judge has found that an employee makes a nonfrivolous allegation of protected disclosure when alleging abuse of authority through officials expending government funds for travel if the travel has no benefit for the government and/or is for personal gain. *Cf. Spencer-Jefferies v. Selective Service System,* MSPB Docket No. DC-1221-08-0016-W-1 (July 10, 2008) (Zamora, AJ).

As the MSPB further instructs:

> An employee who establishes that she made a protected disclosure has the additional burden of showing that the disclosure was a contributing factor in the personnel action. Johnson v. Department of Defense, 95 M.S.P.R. 192, ¶ 8 (2003), aff'd, 97 Fed. Appx. 325 (Fed. Cir. 2004). An employee may demonstrate that a disclosure was a contributing factor in a personnel action through circumstantial evidence, such as the acting officials' knowledge of the disclosure and the timing of the personnel action. 5 U.S.C. § 1221(e)(1); Scott v. Department of Justice, 69 M.S.P.R. 211, 238 (1995), aff'd, 99 F.3d 1160 (Fed. Cir. 1996) (Table). Thus, an appellant's submission of evidence that the official taking the personnel action knew of the disclosure and that the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action, i.e., evidence sufficient to meet the knowledge/timing test, satisfies the contributing factor standard. See Horton v. Department of the Navy, 66 F.3d 279, 283 (Fed. Cir. 1995)**.**

Schneider, 98 MSPR 377 at ¶ 16. The MSPB instructs that "a personnel action taken within approximately 1 to 2 years of the appellant's disclosures satisfies the timing component of the knowledge/timing test." *Salerno v. Dept. of the Interior,* 2016 MSPB 10, ¶ 14(2016); *accord Special Counsel ex rel. Rector v. National Credit Union Administration,* MSPB Docket No. CB-1208-16-0012-U-1, ¶ 9 (January 29, 2016) (*citing Redschlag v. Department of the Army,* 89 M.S.P.R. 589, ¶ 87 (2001); *accord*

Knowledge for purposes of this provision can be either actual knowledge or constructive knowledge, the latter being shown "by demonstrating that an individual with actual knowledge of the disclosure influenced the official accused of taking the retaliatory action." *See Easterbrook v. Dept. of Justice,* 85 M.S.P.R. 60 (2000) at ¶11. Knowledge here is not limited to knowledge of the substance of the disclosure; "[t]o satisfy the contributing factor jurisdictional criterion, an appellant need only raise a nonfrivolous allegation that *the fact of* […] his protected disclosure was one factor that tended to affect in any way the personnel action." *Perkins v. Dept. of Veterans Affairs,* 98 M.S.P.R. 250 (2005) at ¶19 (emphasis in original) (disclosures to Office of Inspector General).

With these elements of the *prima facie* case met, the burden then shifts to the Agency to defend any adverse action by the very high standard of clear and convincing evidence. *See Whitmore v. Dept. of Labor,* 680 F. 3d 1353, 1367-68 (Fed.Cir. 2012).

In determining whether the agency has carried its burden, the Board will consider all the relevant facts and circumstances, including: (1) the strength of the agency's evidence in support of its action; (2) the existence and strength of any motive to retaliate on the part of agency officials involved in the decision; and (3) any evidence that the agency takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated.

See Shibuya v. Dept. of Agriculture, 119 M.S.P.R. 537 (2013) at ¶ 32. Motive to retaliate can both be found where the retaliating employee was the subject of the protected disclosure, as well as where the retaliating employee was in charge of the unit where the alleged violations cited in the protected disclosures occurred. *See Chambers v. Dept. of the Interior*, 116 M.S.P.R. 17 (2011) at ¶ 69 (citing *Carr v. Social Security Administration*, 185 F.3d 1318, 1322-23 (Fed.Cir. 1999)).

Complainant has met her *prima facie* case for a (b)(8) violation. Complainant's disclosures of violations of P.L. 101-136, of the Anti—deficiency Act, and the Freedom of Information Act Improvement Act were protected disclosures of violations of law, as well as gross mismanagement as well as gross mismanagement evidenced by the budget shortfalls. High-level Agency management knew of Complainant's protected disclosure. Agency management began curtailing Complainant's duties and authority, and ultimately reassigned her to a much lower responsible position just a matter of months after her disclosures, thus showing causal connection.

Under the MSPB's analysis, the Agency would likely be unable to meet its burden of showing clear and convincing evidence to justify Complainant's reassignment (and the threat thereof), clearly as demonstrated by Complainant' strong record of performance. The Agency has articulated no clear reason to justify Complainant's reassignment.

For these reasons, which Complainant believes would be further substantiated upon investigation, the Agency violated 5 U.S.C. §§ 2302(b)(8) and 2302(b)(12) when it reassigned Complainant from her position as the Department's Chief Administrative Officer, to the position of Chief Privacy and FOIA Officer, with no defined duties, where she now reports to a position that was once her subordinate.

Remedies Requested

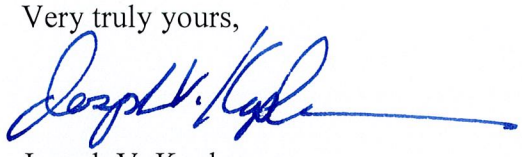
Complainant seeks make-whole relief, including but not limited to rescission of the reassignments, reinstatement to my position of Chief Administrative Officer, expungement of all records and files relating to her reassignment, a public apology to Complainant with copies issued to all Department employees for reassigning Complainant in violation of the Whistleblower Protection Act and a violation of other Prohibited Personnel Practices, payment of compensatory damages in such amount as an MSPB Administrative Judge would award after hearing, and reimbursement of Complainant's attorney's fees and costs in connection with this matter.

Settlement and Conciliation

Complainant believes that this Complainant is ideal for conciliation/settlement negotiations at the Complainants Examining Unit level under OSC's present CEU conciliation pilot program.

If you have any questions concerning the instant Complaint, please do not hesitate to contact undersigned counsel at the telephone number appearing in the letterhead to this Complaint. Otherwise, OSC's prompt attention to this Complaint is greatly appreciated.

Very truly yours,



Joseph V. Kaplan
JVK:hs

Enclosures:
Power of Attorney
OSC Form 11
Relevant supporting documents

cc: Helen Foster, Complainant