



NATIONAL SCIENCE FOUNDATION  
OFFICE OF INSPECTOR GENERAL  
OFFICE OF INVESTIGATIONS

**CLOSEOUT MEMORANDUM**

**Case Number: I-12070045**

Page 1 of 1

We received an allegation of misuse of a National Science Foundation (NSF) award<sup>1</sup> made under the American Recovery and Reinvestment Act (ARRA). The complainant<sup>2</sup> also alleged that he had been removed as Principal Investigator (PI) for first making the same allegations to the awardee<sup>3</sup>.

Pursuant to ARRA's prohibition against retaliation, our office conducted an investigation of the reprisal claim and issued a Report of our findings to NSF. Based on our report, NSF issued a Final Decision that the awardee presented clear and convincing evidence that it would have removed the PI from the award notwithstanding his allegations of misuse of NSF funds, and therefore did not engage in an unlawful retaliation.

Our investigation did not find evidence that the allegations of misuse of NSF funds were substantiated or actionable with respect to the NSF award.

This case is closed with no further action taken.



# **OIG Report on American Recovery and Reinvestment Act Reprisal Claim**

## **Executive Summary**

- Allegation** On June 29, 2012, NSF OIG received information from a Complainant alleging misuse of funds under an NSF award to a university (the University) made under the American Recovery and Reinvestment Act. The allegation involved an NSF award for which the Complainant was the Principal Investigator (PI). The Complainant stated he had made a similar complaint to the University, but his allegations were denied, and the University removed him as PI from the award in retaliation for filing the complaint.
- Claimant** The Complainant is a professor at the University in the Materials Science & Engineering Department. The Complainant has been a PI on one other NSF award and currently has a proposal with NSF pending.
- OIG Investigation** OIG conducted an investigation into the Complainant's allegation that the University removed him as PI in retaliation for making a complaint to the University. OIG interviewed the Complainant and relevant University staff, and also reviewed emails and other documentation provided by the Complainant and by the University.
- The award funded a program to increase the number of underrepresented undergraduate students seeking [REDACTED] related degrees at the University. The Complainant filed a complaint with the University questioning certain costs charged to the award, and alleging improprieties in the behavior of the Program Coordinator and co-PI.
- The University reviewed the award expenditures, and informed the Complainant that the review found no unallowable expenses charged to the award. The University also found that the issues and conflicts had been caused by an ineffective team structure and failed communication. The University concluded that the Complainant had not been engaged in the award to the extent required of a PI, and that he was to be removed as PI. The University declined to provide the Complainant with a copy of the full review, and did not give him an opportunity to respond to the University's conclusion by producing evidence of his own regarding his level of engagement before being removed as PI.

## I. Factual Background

OIG conducted an investigation into the Complainant's<sup>1</sup> allegation that his University<sup>2</sup> removed him as PI in retaliation for making a complaint. OIG interviewed the Complainant, the award's co-PI<sup>3</sup>, the award's Program Coordinator<sup>4</sup>, the Dean of the College of Engineering<sup>5</sup>, the Associate Provost of Faculty Affairs<sup>6</sup>, the Assistant Director for [REDACTED] in [REDACTED]<sup>7</sup>, the [REDACTED] Financial Compliance Coordinator<sup>8</sup>, a Director in [REDACTED]<sup>9</sup>, and the Associate Vice President of Research.<sup>10</sup> OIG also reviewed emails and other documentation provided by the Complainant and by the University.

### a) The Award

On August 16, 2009, NSF granted a 3 year award (the Award)<sup>11</sup> to the University. The Award was made with American Recovery and Reinvestment Act (ARRA) funds and subject to the terms and conditions of ARRA.<sup>12</sup> The Award was under the direction of the Complainant as PI.<sup>13</sup> The project came about as the result of a collaboration between the Program Coordinator, who was a graduate student, and the Complainant. The project was modeled after a similar NSF-funded program at the [REDACTED].<sup>14</sup> The goal of the project was to increase the number of underrepresented students seeking [REDACTED] related degrees at the University through encouraging enrollment in introductory level courses and employing undergraduate student interns to conduct field and lab research, present their work at conferences, and conduct [REDACTED] related outreach.<sup>15</sup> The Program Coordinator had been an organizer with the program as an undergraduate at the [REDACTED], and brought the idea for the project to the Complainant, his academic advisor at the time, because as a graduate student the Program Coordinator could not submit an NSF proposal himself.<sup>16</sup>

The Program Coordinator took on the primary role in drafting the proposal for the Award.<sup>17</sup> The Complainant was also involved in drafting the proposal. He provided guidance to

[REDACTED]

<sup>12</sup> TAB 1

<sup>13</sup> TAB 1

<sup>14</sup> TAB 2, pg 1; [REDACTED]

<sup>15</sup> TAB 2, pg 3

<sup>16</sup> TAB 3, pg 5

<sup>17</sup> TAB 3, pg 13

the Program Coordinator, revised the proposal, and drafted the Award budget.<sup>18</sup> The co-PI was included on the proposal because of a need for someone in the [REDACTED] Department to be involved.<sup>19</sup> He was not involved in drafting the proposal, other than providing biographical details.<sup>20</sup>

The Program Coordinator ran the day-to-day operations of the program, including overseeing the academics, research and outreach components, recruiting and supervising all undergraduate interns, coordinating field trips and summer research activities, and handling paper work to reimburse student interns for travel expenses, supplies, and other costs associated with their internships.<sup>21</sup> It was intended that the Complainant and co-PI would provide guidance to the Program Coordinator, and that the Complainant would handle the administrative tasks associated with the Award, including approving all award expenses.

**b) Breakdown in the Parties' Working Relationships**

A breakdown in the relationships between the parties began in the Fall of 2010. On [REDACTED] 2010 through [REDACTED] 2010, the Program Coordinator took a group of the project's interns to [REDACTED] to attend and present at the 2010 [REDACTED] Annual Meeting.<sup>22</sup> After the [REDACTED] trip, the Program Coordinator submitted an Expense Report which included \$757.04 for a two-day tour of [REDACTED] in [REDACTED], including a slow moving rafting trip.<sup>23</sup> All parties agree that before the trip, the Complainant had approved the trip to attend the [REDACTED] meeting<sup>24</sup> and had disapproved a plan to visit [REDACTED] during the meetings.<sup>25</sup> However, the Program Coordinator said that the Complainant did approve the two-day tour of [REDACTED], which took place after the [REDACTED] meeting,<sup>26</sup> but the Complainant said he had not been advised about the tour.<sup>27</sup>

After receiving the Expense Report from the Program Coordinator, the Complainant brought his concerns to the co-PI that the two-day tour should not be charged to a federal grant, but the co-PI thought that the expenses were typical for [REDACTED] related travel.<sup>28</sup> The Complainant then consulted [REDACTED] and was advised that the costs associated with the two-day tour were not appropriate to charge to the Award, especially because the Award had been made with

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<sup>18</sup> TAB 4

<sup>19</sup> TAB 3, pg 12

<sup>20</sup> TAB 3, pg 13

<sup>21</sup> TAB 2, pg 12

<sup>22</sup> TAB 5

<sup>23</sup> TAB 5

<sup>24</sup> TAB 4

<sup>25</sup> TAB 3, pg 25; TAB 4, pg 2

<sup>26</sup> TAB 3, pg 25

<sup>27</sup> TAB 6

<sup>28</sup> TAB 6

ARRA funds.<sup>29</sup> Based on the advice from [REDACTED], the Complainant chose not to approve any expenses associated with the two-day tour.<sup>30</sup>

The co-PI disagreed with the Complainant's decision not to approve the expenses associated with the two-day tour, and reimbursed the Program Coordinator the \$757.04 out of funds from the Department [REDACTED].<sup>31</sup> The co-PI also suspected that the Complainant's decision not to approve the expenses, as well as his future questioning of Award expenses, was related to the Program Coordinator's decision prior to the [REDACTED] trip to switch academic advisors from the Complainant to the co-PI.<sup>32</sup> Because of the Complainant's decision not to approve the expenses, as well as subsequent disagreements about the hiring/selection process for student interns and supplementary compensation for the Program Coordinator, in early 2011, the co-PI informed the College of Sciences that he would no longer continue with the project unless he was made the sole PI or given joint financial approval authority.<sup>33</sup>

The co-PI's request to be made sole or joint PI was not granted, but he agreed to stay on the project if the Program Coordinator's future salary support was assured by the Complainant, and if the Department of [REDACTED] was reimbursed \$800 for past and future use of poster printing and other supplies.<sup>34</sup> The co-PI admitted to OIG that the request for \$800 was an attempt to recoup the \$757.04 which the Department of [REDACTED] reimbursed to the Program Coordinator for the two-day tour, and did not have any relation to reimbursement for supplies.<sup>35</sup> After being informed by [REDACTED] that a direct payment could not be made from the Award to the Department of [REDACTED],<sup>36</sup> and after being denied the use of indirect costs from the College of Engineering,<sup>37</sup> the Complainant opted to make a personal donation of \$800 to the Department of [REDACTED] because he believed that the project could not be successfully completed without the space and resources provided by the Department of [REDACTED].<sup>38</sup>

Following the Complainant's donation, there were no notable issues between the parties for approximately one year. However, further conflicts arose in the Spring of 2012. One of those conflicts concerned drafting the Award's final report. In January 2012, the Complainant and the Program Coordinator met to finalize a schedule for the final semester of the project and the completion of the final report.<sup>39</sup> The Program Coordinator failed to meet all but the first listed deadline in that schedule, and the Complainant felt that the Program Coordinator was not

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<sup>29</sup> TAB 7

<sup>30</sup> TAB 4

<sup>31</sup> TAB 8, pg 16

<sup>32</sup> TAB 8, pg 21

<sup>33</sup> TAB 9

<sup>34</sup> TAB 10

<sup>35</sup> TAB 8, pgs 31, 35

<sup>36</sup> TAB 4

<sup>37</sup> TAB 4

<sup>38</sup> TAB 11, pgs 40-41

<sup>39</sup> TAB 12

devoting the appropriate amount of his time to completion of the report.<sup>40</sup> The Complainant also believed that the Program Coordinator was refusing to provide copies of the student interns' presentations of their research, which the Complainant claimed he had instructed the Program Coordinator to maintain. The Complainant told OIG that the presentations were integral for drafting the final report, but would not have prevented the Complainant from completing a final report on time to NSF if necessary.<sup>41</sup> The Program Coordinator acknowledged to OIG that he did not meet the deadlines, but felt he could not finish the final report because he had not received proper guidance from the Complainant, and also said he did not keep copies of the missing presentations because he was not instructed to.<sup>42</sup> The Program Coordinator was ultimately able to obtain many of the presentations by searching for them online.<sup>43</sup>

Another conflict involved a Spring Break trip in 2012. The Complainant rejected the use of project funds for this trip because he considered the trip to be outside the scope of the project and because there were not sufficient funds to support it.<sup>44</sup> The Program Coordinator was able to find alternate funding to take the student interns on the trip, but the Program Coordinator charged some of his time leading the trip and some student time preparing for the trip to the Award, which the Complainant considered to be inappropriate.<sup>45</sup> Also, the Complainant questioned student time charged to the Award related to an outreach event in March 2012. The Complainant had questioned a student about a note on her timesheet that read "Incentive for working all of TFB (from [REDACTED])."<sup>46</sup> In her response, the student explained that the students had been instructed by the Program Coordinator that any students who worked the full 8 hour days at the outreach event may clock an extra 8 hours because they were having trouble finding people to work both days; she had added a half-hour.<sup>47</sup> Although the Complainant was successful in removing this student's "incentive" time from the Award, he suspected other students had submitted incentive hours for the event and did not know if the Program Coordinator had given similar instructions on other occasions. The Program Coordinator told [REDACTED] and OIG that the students were instructed to record anything over 8 hours in a day that they actually worked at the event to a different day, that this is the only instance he gave this instruction, and that he never instructed students to record incentive hours.<sup>48</sup> The Complainant was never provided with this explanation.<sup>49</sup>

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<sup>40</sup> TAB 15

<sup>41</sup> TAB 11, pg 23

<sup>42</sup> TAB 3, pgs 57-58, 63

<sup>43</sup> TAB 3, pg 63

<sup>44</sup> TAB 4

<sup>45</sup> TAB 13

<sup>46</sup> TAB 14

<sup>47</sup> TAB 14

<sup>48</sup> TAB 3, pgs 79-80

<sup>49</sup> TAB 4

**c) The Complaint to the University**

On April 25, 2012, the Complainant sent a comprehensive complaint (the Complaint) to [REDACTED], asking the office to investigate various issues that he believed had arisen under the Award.<sup>50</sup> The Complaint detailed his concerns regarding the allowability of three field trips lead by the Program Coordinator. In addition to the [REDACTED] trip and the Spring Break trip, the Complainant said he suspected that unauthorized Award funds may have been spent on rafting in a Spring Break 2011 trip, although he acknowledged that he approved the trip and had no evidence of Award funds being spent on rafting.<sup>51</sup> The Complaint also included the Program Coordinator's failure to provide information for ARRA reporting, the Complainant's personal \$800 donation to the [REDACTED] Department which he felt he had no choice but to make so that the project could continue, the incentive hours from the March 2012 outreach event, the issues surrounding preparation of the final report, and the Complainant's perceived lack of support from the College of Engineering.<sup>52</sup> The Complaint also included emails to support these claims.

[REDACTED] assigned the Assistant Director for [REDACTED] and the Financial Compliance Coordinator to conduct a financial review of the Award, and asked the Associate Provost of Faculty Affairs to meet separately with the parties to attempt to informally mediate their issues.<sup>53</sup> The purpose of the mediation was to look into the problems from a personal perspective.<sup>54</sup> The mediations focused on options for effectively finishing the final report.<sup>55</sup> Ultimately no resolution was reached through the mediation. It was the Associate Provost of Faculty Affairs' assessment that the Complainant was unlikely to move off of his view of the situation and that it would be very difficult to repair the working relationships to the point where the project could continue with the same team structure.<sup>56</sup> At this point, completing the final report was all that remained to be done for the award.

The objectives of the [REDACTED] financial review were to determine the allowability of expenses posted to the Award and to provide recommendations to resolve questioned costs and improve internal controls.<sup>57</sup> [REDACTED] did not review the interpersonal conflicts or management issues associated with the Award, but did look at how those conflicts affected the financial management.<sup>58</sup> [REDACTED] reviewed all project costs charged to the Award from its inception through March 31, 2012, totaling \$143,214.66.<sup>59</sup> [REDACTED] also interviewed personnel associated with the Award, including the Complainant, the co-PI, and the Program Coordinator. The Complainant

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<sup>50</sup> TAB 15

<sup>51</sup> TAB 15, pgs 1-2

<sup>52</sup> TAB 15, pps 2-6

<sup>53</sup> TAB 16

<sup>54</sup> TAB 16

<sup>55</sup> TAB 16

<sup>56</sup> TAB 16

<sup>57</sup> TAB 17, pg 1

<sup>58</sup> TAB 17, pg 4

<sup>59</sup> TAB 17, pg 4

was asked questions about his involvement in the Award, but was not informed that it was an area of concern being looked into.<sup>60</sup> In [REDACTED] interview with the Complainant, he mentioned that he was considering making a complaint to NSF OIG. The Assistant Director for [REDACTED] [REDACTED] responded that he could, but that NSF OIG would only do the same financial review or audit that [REDACTED] is doing now.<sup>61</sup> [REDACTED] produced a [REDACTED] Review of Transactions dated June 13, 2012 (the Report).<sup>62</sup> The Report found “no unallowable expenses except a few minor errors that will be corrected.”<sup>63</sup> This included findings of “case closed” on any issues raised by the Complainant where the funds were ultimately not charged to the Award because of his intervention.<sup>64</sup> The Report further found that “the issues and conflicts were caused by an ineffective team structure and failed communication,” and recommended that “the College level management step in to settle the differences or reorganize the project team, but makes no further recommendations on this topic.”<sup>65,66</sup>

The Report questioned the effectiveness and the efficiency of separating the programmatic from the administrative duties of an award, which it asserted was not a logical way to manage a project.<sup>67</sup> It further noted that the Complainant’s direct involvement in the project was minimal after the Program Coordinator switched departments and that the Complainant was not mentoring any student interns or participating in the project activities.<sup>68</sup> The Report did not conclude that the Complainant was not adequately engaged nor did it recommend that he should be removed as PI. There was no analysis of the totality of the Complainant’s involvement in the Award, nor how the nature of this particular program may have influenced the extent to which his involvement was necessary, nor the particular reasons that the Complainant was not, or may not have been able to, be involved more in the programmatic aspects.

The University’s PI Handbook, which was referred to in the Report and by the Associate Vice President for Research in her interview with NSF OIG, defines a PI as:

[REDACTED]

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<sup>60</sup> TAB 4

<sup>61</sup> TAB 4

<sup>62</sup> TAB 17

<sup>63</sup> TAB 17, pg 1

<sup>64</sup> TAB 17

<sup>65</sup> TAB 17, pg 1

<sup>66</sup> At this time, OIG is not making any assessment regarding the findings of the Report.

<sup>67</sup> TAB 17, pg 11

<sup>68</sup> TAB 17, pg 11



[REDACTED]<sup>69</sup>  
[REDACTED]

This is consistent with the NSF Grant Proposal Guide,<sup>70</sup> which states that the PI

is the individual designated by the grantee, and approved by NSF, who will be responsible for the scientific or technical direction of the project.<sup>71</sup> ... The NSF decision to support or not to support a proposed project is based to a considerable extent upon its evaluation of the proposed PI/PD and any identified co-PI/co-PD's knowledge of the field of study and his/her capabilities to conduct the project in an efficient and productive manner. ... The named PI/PD (and co-PI/co-PD) should be continuously responsible for the conduct of the project and be closely involved with the effort.<sup>72</sup> ... The Project Description should provide a clear statement of the work to be undertaken and must include: objectives for the period of the proposed work and expected significance; relation to longer-term goals of the *PI's project*; and relation to the present state of knowledge in the field, to work in progress by the PI under other support and to work in progress elsewhere.<sup>73</sup>

There was no analysis, in the Report or by the University<sup>74</sup>, comparing the Complainant's involvement in the project with either of these definitions, such as if it was consistent with the scope of work in the proposal submitted to NSF, or if his involvement, in its totality, had met his required responsibilities.

**d) The Complainant's Removal as Principal Investigator**

On June 20, 2012, the Associate Vice President for Research emailed the NSF Program Officer for the Award (the PO) to schedule a phone call to talk about the University's financial review.<sup>75</sup> In the phone call the next day, the Associate Vice President for Research informed the PO and two other NSF employees from the Division of Grants and Agreements that the University review found that the Complainant had not been very engaged in the work of the project or in its oversight, and therefore the University was considering removing him as PI from the Award.<sup>76</sup> On June 28, 2012, the Complainant met with the Associate Vice President for Research and the Dean of the College of Engineering to discuss the Report. At the meeting, the

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<sup>69</sup> TAB 18

<sup>70</sup> [nsf.gov/pubs/policydocs/pappguide/nsf13001/nsf13\\_1.pdf](http://nsf.gov/pubs/policydocs/pappguide/nsf13001/nsf13_1.pdf) / [goo.gl/CLmza](http://goo.gl/CLmza).

<sup>71</sup> Grant Proposal Guide (GPG), Introduction, D.1.h.

<sup>72</sup> GPG, II.B.2.a.

<sup>73</sup> GPG, II.C.2.d.i (emphasis added).

<sup>74</sup> TAB 19, pgs 33-35

<sup>75</sup> TAB 20

<sup>76</sup> TAB 21

Complainant was provided with a one page closing memorandum, which summarized the Report's findings.<sup>77</sup> The Complainant requested a copy of the full Report, but was denied because it was the University's policy not to provide copies of reports to complainants, in order to protect the investigative process.<sup>78,79</sup>

After telling the Complainant that the review found that all expenses charged to the Award were allowable and appropriate, the Associate Vice President for Research told the Complainant that the review also concluded that the conflicts were caused by an ineffective team structure and failure to communicate.<sup>80</sup> She also advised him that the reviewers observed from interviews that he was not involved in developing the project or carrying out the plan and that there was not a lot of evidence that he met on a regular basis with the Program Coordinator or others to discuss the project. She further explained that the disconnect between the planned activities and approval of expenses, and the heavy reliance on the Program Coordinator to provide information for the annual and final reports, showed that the Complainant was not engaged at a level that the University expects of a PI.<sup>81</sup> The Complainant told OIG that this was the first time that he was made aware that the University had concerns regarding his level of engagement in the project.<sup>82</sup>

The Associate Vice President for Research explained that the evidence came from interviews with students and the fact that the Complainant relied on the Program Coordinator to provide the materials necessary to write the final report.<sup>83</sup> The Associate Vice President for Research gave the Complainant an opportunity to provide his perspective, but he declined, stating that he would provide a response at a later time.<sup>84</sup> The Associate Vice President for Research told the Complainant that she had concerns he was letting a personal conflict affect his perspective on the grant, and the decision had been made that it was in the University's best interest to remove him as PI and to assign the co-PI as PI, who has had a more active role in carrying out the Award's goals and objectives.<sup>85</sup> She also noted that they knew the Complainant had expressed an intent to contact NSF OIG and that the University stands by the Report.<sup>86</sup>

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<sup>77</sup> TAB 22

<sup>78</sup> TAB 19, pg 45

<sup>79</sup> On June 25, 2012, the Complainant also filed a Public Records Request seeking a copy of the Report, but was denied by the University. TAB 23

<sup>80</sup> TAB 4

<sup>81</sup> TAB 4

<sup>82</sup> TAB 11, pg 28

<sup>83</sup> In our interview with the Associate Vice President of Research, she stated that in making the decision, the University took into account the work done by the Provost Office and the conclusions in the Report, and concluded that the Complainant's involvement in the Award did not meet the University's requirements for a PI.

<sup>84</sup> TAB 19, pgs 38-39

<sup>85</sup> TAB 19, pg 41

<sup>86</sup> TAB 4

Later that day, the University submitted a request to NSF that the co-PI be substituted as PI on the Award, which was approved by NSF.<sup>87</sup> On June 29, 2012, OIG received an email from the Complainant alleging misuse of the Award's funds, inappropriate actions by personnel and administrators at the University, and retaliation by the University for bringing his concerns to its attention.<sup>88</sup> On July 10, 2012, the Complainant emailed the Associate Vice President for Research concerning the University's claim that he was not engaged in the project.<sup>89</sup> In his email, the Complainant pointed out that he had not been provided with any evidence supporting the University's position. He also offered to provide email evidence documenting his level of engagement in the project.<sup>90</sup> The Associate Vice President for Research responded that the University had conducted a thorough review and stood by its decision.<sup>91</sup> When asked in OIG's investigation why the Complainant was not allowed to put together a response to the University's findings before the decision to remove him was made, the Associate Vice President of Research said because it was in the project's best interest to make the change.<sup>92</sup>

**e) The Complainant's Engagement in the [REDACTED] Project**

The Program Coordinator said that when he first came to the Complainant about applying to NSF for the grant, it was part of his initial pitch that the Complainant was needed for the administrative duties, but that the Program Coordinator would take on the programmatic responsibilities, so that the Complainant's time commitment would be minimal.<sup>93</sup> It was intended from the outset that the Program Coordinator would handle the "nitty gritty" and day to day aspects of the project.<sup>94</sup> These intentions were reflected in the proposal, which listed the Complainant as the PI, but assigned the Program Coordinator the responsibilities of overseeing the academics, research and outreach components of the program, recruiting and supervising all undergraduate interns, coordinating field trips and summer research activities, and handling paperwork to reimburse student interns for travel expenses, supplies, and other costs associated with their internships.<sup>95</sup> The proposal stated that the Complainant will lead research projects for the program participants to work on.<sup>96</sup> The Award also only budgets 0.25 person-months of salary for the Complainant for each year of the Award. Although the Program Coordinator took on the primary role in drafting the proposal, he acknowledged that the Complainant was also

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<sup>87</sup> TAB 24

<sup>88</sup> TAB 25

<sup>89</sup> TAB 26

<sup>90</sup> TAB 26

<sup>91</sup> TAB 26

<sup>92</sup> TAB 19, pg 39

<sup>93</sup> TAB 3, pgs 5, 14

<sup>94</sup> TAB 3, pg 14

<sup>95</sup> TAB 2, pg 12

<sup>96</sup> TAB 2, pg 11

involved.<sup>97</sup> He provided guidance to the Program Coordinator, revised the proposal, and drafted the Award budget.<sup>98</sup>

For the first year and a half of the Award, the Program Coordinator had an office down the hall from the Complainant, and the two would have daily and sometimes hourly contact with each other.<sup>99</sup> In that first year, in addition to his administrative responsibilities, the Complainant attended three or four meetings with the Program Coordinator and the co-PI to discuss the direction of the project. The Complainant also attended one outreach event, several of the weekly meetings with the project participants, and provided feedback on any documents or reports related to the project.<sup>100</sup> The Program Coordinator said he copied the Complainant on all of the emails concerning the project, and the Complainant responded with feedback to approximately 1 out of every 10.<sup>101</sup> The Program Coordinator believed that this level of involvement from the Complainant allowed them to have a “great first year” for the project.<sup>102</sup>

The Program Coordinator said that after the Program Coordinator switched from the Complainant as his academic advisor, the Complainant continued to perform his same administrative responsibilities, but the face-to-face communications between the Complainant and the Program Coordinator were mostly replaced with emails. The Program Coordinator continued to copy the Complainant on all emails regarding the project, and the Complainant continued to respond with feedback, but the Program Coordinator said the feedback was primarily negative.<sup>103</sup> The Program Coordinator stated that he received very little guidance in decision making from the Complainant after the first year, other than to be informed when something was unsatisfactory.<sup>104</sup> In the Spring of 2011, the Complainant donated \$800 of his own money to the department of [REDACTED] when the co-PI demanded the money as a requirement of staying on the award, so that the project could continue. The Complainant continued to attend some of the outreach events; however, in the final year of the Award, he attended approximately one meeting per semester with the program participants, primarily because the time that the Program Coordinator scheduled the meetings for was a time period that the Complainant subsequently had to commit to teaching a class.<sup>105</sup> The Complainant did not act as a mentor for any of the student interns.<sup>106</sup>

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<sup>97</sup> TAB 3, pg 13

<sup>98</sup> TAB 4

<sup>99</sup> TAB 4

<sup>100</sup> TAB 3, pg 16

<sup>101</sup> TAB 3, pg 18

<sup>102</sup> TAB 3, pg 17

<sup>103</sup> TAB 3, pg 52

<sup>104</sup> TAB 3, pg 52

<sup>105</sup> TAB 11, pgs 37-38. The Complainant asked the Program Coordinator to reschedule the meetings so he could attend, but the Program Coordinator told him that was the only time that worked for all of the students.

<sup>106</sup> TAB 4

## **II. Reprisals Prohibited by ARRA**

ARRA prohibits an employee of any non-Federal employer receiving covered funds from being

discharged, demoted, or otherwise discriminated against as a reprisal for disclosing, including a disclosure made in the ordinary course of an employee's duties, to . . . an inspector general, . . . a person with supervisory authority over the employee (or such other person working for the employer who has authority to investigate, discover, or terminate misconduct), . . . the head of a Federal Agency, or their representatives, information that the employee reasonably believes is evidence of –

- (1) gross mismanagement of an agency contract or grant related to covered funds;
- (2) a gross waste of covered funds;
- (3) a substantial and specific danger to public health or safety related to the implementation or use of covered funds;
- (4) an abuse of authority related to the implementation of covered funds; or
- (5) a violation of law, rule, or regulation related to an agency contract (including the competition for or negotiation of a contract) or grant, awarded or issued relating to covered funds.<sup>107</sup>

Under recent revision of an analogous statute that protects federal employee whistleblowers, the Whistleblower Protection Enhancement Act of 2012, an employee “reasonably believes” that there has been a violation of law, rule, or regulation if “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 . . . evidence such violations.”<sup>108</sup>

## **III. NSF's Role**

### **a) Investigation of Complaints**

Unless the complaint is determined to be frivolous or not relating to covered funds, ARRA requires any inspector general which receives a complaint of a prohibited reprisal to investigate the complaint and, upon completion of such investigation, submit a report of the findings to the person, the person's employer, the head of the appropriate agency, and the Recovery Accountability and Transparency Board not later than 180 days after receiving the

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<sup>107</sup>The American Recovery and Reinvestment Act of 2009, Pub. L. No. 1115, § 1533(a), 123 Stat. 115, 297 (2009).

<sup>108</sup> 5 U.S.C. § 2302(b)

complaint.<sup>109</sup> The 180-day period can be extended per agreement between the IG and the complainant<sup>110</sup>, which was obtained in this case.

**b) Agency Action**

Not later than 30 days after receiving the inspector general report, the head of the agency shall determine whether there is sufficient basis to conclude that the employer has subjected the complainant to a prohibited reprisal.<sup>111</sup>

**c) Burden of Proof**

In alleging a reprisal prohibited by ARRA, an occurrence of a reprisal is affirmatively established by demonstrating that a covered disclosure was a “contributing factor in the reprisal.”<sup>112</sup> A disclosure can be demonstrated as a contributing factor to a reprisal through circumstantial evidence, such as if the official undertaking the reprisal knew of the disclosure or if the reprisal occurred within a period of time after the disclosure such that a reasonable person could conclude that the disclosure was a contributing factor.<sup>113</sup> If the occurrence of a reprisal is affirmatively established in this manner, “[t]he head of an agency may not find the occurrence of a reprisal . . . if the non-Federal employer demonstrates by clear and convincing evidence that the non-Federal employer would have taken the action constituting the reprisal in the absence of the disclosure.”<sup>114</sup>

**i. Contributing Factor**

The burden of proof set out in ARRA to affirmatively establish a reprisal is nearly identical to the burden set out in the Whistleblower Protection Act of 1989 (“WPA”).<sup>115</sup> Accordingly, the courts’ interpretation of the WPA may be informative in analyzing ARRA’s reprisal provision.<sup>116</sup> Under the WPA predecessor legislation, courts required a whistleblower to establish that the disclosure was a “significant” or “motivating” factor in a reprisal.<sup>117</sup> However, the “contributing factor,” standard, as established by the WPA and included in ARRA, is “something less than a ‘substantial’ or ‘motivating’ factor.”<sup>118</sup> The Federal Circuit stated that Congress included the “contributing factor” standard in the WPA specifically to overrule what it considered to be an excessively heavy burden which had been imposed on employees in

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<sup>109</sup> ARRA §§ 1553(b)(1) and -(2)

<sup>110</sup> ARRA § 1553(b)(2)(B)(i)

<sup>111</sup> ARRA § 1553(c)(2).

<sup>112</sup> ARRA § 1553(c)(1)(A)(i).

<sup>113</sup> ARRA § 1553(c)(1)(A)(ii).

<sup>114</sup> ARRA § 1553(c)(1)(B).

<sup>115</sup> 5 U.S.C. § 1221(e).

<sup>116</sup> The only court opinion to date to assess a reprisal claim against an ARRA-funded employer cited WPA case law to interpret ARRA § 1553, *Gerhardt v. D Construction, Inc.*, 2012 WL 893673, \*3 (N.D. Ill. 2012).

<sup>117</sup> *Marano v. DOJ*, 2 F.3d 1137, 1140 (Fed. Cir. 1993).

<sup>118</sup> *Gerhardt v. D Construction, Inc.*, 2012 WL 893673, \*3 (N.D. Ill. 2012) (citing *Addis v. Department of Labor*, 575 F.3d 688, 691 (7th Cir. 2009)).

whistleblower cases.<sup>119</sup> The “contributing factor” standard in the WPA means “any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision.”<sup>120</sup> There is no requirement that the whistleblower establish a retaliatory motive.<sup>121</sup> “The circumstantial evidence of knowledge of the protected disclosure and a reasonable relationship between the time of the protected disclosure and the time of the personnel action will establish, *prima facie*, that the disclosure was a contributing factor to the personnel action.”<sup>122</sup>

## **ii. Opportunity For Rebuttal**

Whistleblower protection is not intended to protect whistleblowers from their own conduct.<sup>123</sup> NSF cannot find that the Complainant’s removal as PI was a prohibited reprisal if there is clear and convincing evidence that the University would have removed him even in the absence of his complaint. The relevant factors to consider in this determination are the strength of the University’s evidence in support of its decision, the existence and strength of any retaliatory motive by the University, and any evidence that the University has taken similar actions against employees who are not whistleblowers but who are otherwise situated.<sup>124</sup>

## **d) OIG Findings**

The Complainant is an employee of the University, which is a non-Federal employer receiving covered ARRA funds in the form of the Award.<sup>125</sup> Beginning in the Fall of 2010, the Complainant made a series of disclosures to the Dean of the College of Engineering, who is his supervisor, and to ■■■■, which has authority to “investigate, discover, and terminate misconduct”, of what the Complainant believed to be violations of Federal law, rule and regulation relating to the Award. On April 25, 2012, the Complainant made a comprehensive disclosure to the University of all his concerns regarding the Award,<sup>126</sup> and ■■■■ issued the Report on June 13, 2012. The University knew of the Complainant’s disclosures at the time that it made the decision to remove him as PI on the Award.

The University claims that it would have removed the Complainant even absent his complaints to the University. The stated reason for the removal was that the Complainant’s level of involvement with the Award failed to meet the University’s standards required of a PI. There is no direct evidence that the University had a retaliatory motive in its decision to remove the Complainant as PI of the Award. In making the decision, the University took into account the

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<sup>119</sup> *Marano* at 1140 (citing 135 Cong.Rec. 5033 (1989) (Explanatory Statement on S.20)).

<sup>120</sup> *Id.* at 1140.

<sup>121</sup> *Id.* at 1141.

<sup>122</sup> *Horton v. Dep’t of Navy*, 66 F.3d 279, 284 (Fed. Cir. 1995).

<sup>123</sup> *See Watson v. DOJ*, 64 F.3d 1524, 1527 n.3 (Fed. Cir. 1995).

<sup>124</sup> *See Geyer v. DOJ*, 70 M.S.P.R. 682, 688 (1996), *aff’d*, 116 F.3d 1497 (Fed. Cir. 1997).

<sup>125</sup> TAB 1

<sup>126</sup> TAB 15

work done by the Provost Office, the conclusions in the Report, and the Complainant's reliance on the Program Coordinator to draft the final report and to provide him with copies of the students' presentations.<sup>127</sup>

The University's evidence in support of its decision relied heavily on the Report, which questioned the effectiveness and the efficiency of separating the programmatic from the administrative duties of an award, and raised concerns about the Complainant's level of engagement in the Award.<sup>128</sup> However, the Report was not a complete assessment of the adequacy of the Complainant's involvement. [REDACTED] interviewed the Complainant for the Report, and gave him an opportunity to discuss his involvement, but he was not told in the interview that his level of involvement was a concern for the University. The Report did not analyze the totality of the Complainant's involvement in the Award, nor how the nature of this particular program may have influenced the extent of his involvement, nor the reasons that the Complainant was not, or may not have been able to be, more involved in the programmatic aspects. There is no evidence that the Report or the University assessed whether the Complainant's involvement in the Award met the requirements of the University's or NSF's definitions of a PI. Specifically, the Report contains no analysis of whether his involvement was consistent with the scope of work in the proposal submitted to NSF, which is an element of both definitions. Further, the University did not give the Complainant an adequate opportunity to respond to the Report or to the allegation that he was not adequately engaged in the Award, and the University declined to review evidence to the contrary offered by the Complainant, all of which may have better informed the University whether the Complainant's involvement, in its totality, had met his required responsibilities. It was the opinion of the Provost Office that it was unlikely that the Award could successfully continue with the same team structure.<sup>129</sup>

The University told us that most PI changes are made at the department level, and the University does not keep statistics on those changes or the reasons that the changes are made.<sup>130</sup> The University cited four instances where [REDACTED] had been involved in the removal of a PI.<sup>131</sup> In only one of those cases the PI was removed for a lack of effort. The other instances involved a disciplinary action against the PI, a disagreement between a PI and co-PI where the co-PI agreed to step down, and a PI who had left the University, but initially remained on the award.<sup>132</sup> In this matter, the Complainant was replaced as PI with the co-PI, who had been subject to the same standards of involvement as the Complainant.<sup>133</sup> It is evident that the co-PI enjoys a better relationship with the Program Coordinator than does the Complainant, and that as a result he was more active providing programmatic guidance during the final years of the Award. However, it

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<sup>127</sup> TAB 19, pg 35

<sup>128</sup> TAB 17

<sup>129</sup> TAB 16

<sup>130</sup> TAB 27

<sup>131</sup> TAB 27

<sup>132</sup> TAB 27

<sup>133</sup> TAB 19, pg 34



is not clear, because the University did not assess it, whether the co-PI's involvement met the University's and NSF's definitions of a PI any more than the Complainant's involvement. The co-PI did not have any substantive involvement in drafting the proposal, and it was the intention that he would only act as a consultant and allow the project to use the Department of [REDACTED] resources as needed.<sup>134</sup> The Program Coordinator described the co-PI as a periphery player in the first year of the project.<sup>135</sup> After the first year of the Award, the co-PI was more active, providing guidance to the Program Coordinator in the direction of the project,<sup>136</sup> mentoring students, and helping to plan some of the programmatic elements. Even with the co-PI's increased role, it was the Program Coordinator who took on the responsibility for the programmatic work. The co-PI did not attend any of the weekly meetings with the project participants, or otherwise participate in the programmatic activities of the Award.<sup>137</sup>

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<sup>134</sup> TAB 8, pgs 9-10

<sup>135</sup> TAB 3, pg 14

<sup>136</sup> TAB 3, pg 52

<sup>137</sup> TAB 8, pg 41

NATIONAL SCIENCE FOUNDATION  
4201 Wilson Boulevard  
ARLINGTON, VIRGINIA 22230



OFFICE OF THE  
GENERAL COUNSEL

April 25, 2013

**VIA FIRST CLASS MAIL AND ELECTRONIC MAIL**



***Re: Decision on Complaint of Retaliation under the American Recovery and Reinvestment Act of 2009***



In accordance with section 1553(c)(2) of the American Recovery and Reinvestment Act of 2009 ("ARRA"), this letter serves as my decision on your complaint of retaliation, which was filed with the National Science Foundation's ("NSF") Office of Inspector General ("OIG") on June 29, 2012.<sup>1</sup> In your complaint, you assert that your employer, the [REDACTED] ("University"), removed you as Principal Investigator ("PI") on an NSF award<sup>2</sup> because you filed a complaint with the University alleging the misuse of grant funds and other inappropriate actions by University personnel and administrators. For the reasons outlined in detail below, I have determined that the University did not engage in unlawful reprisal against you when it removed you as PI.

**Facts and Background**

In the Factual Background section of its Report of Investigation ("ROI") prepared in connection with your complaint, the OIG accurately set forth the relevant facts and background of this matter. Thus, I hereby incorporate by reference this section of the ROI into my decision.

<sup>1</sup> I have been designated by the Acting Director of NSF to issue a decision on your complaint.

<sup>2</sup> The award in question is [REDACTED]

### Legal Standard

ARRA includes whistleblower provisions to protect employees who report concerns about the use of stimulus funds. A non-Federal employer receiving ARRA funds may not take adverse employment action against an employee who, in the ordinary course of his duties or otherwise, discloses to a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct), information that he reasonably believes is evidence of: (1) gross mismanagement of an agency contract or grant related to covered funds; (2) a gross waste of covered funds; (3) a substantial and specific danger to public health or safety related to the implementation or use of covered funds; (4) an abuse of authority related to the implementation or use of covered funds; or (5) a violation of a law, rule, or regulation related to an agency contract or grant, awarded or issued relating to covered funds. ARRA, Section 1553(a).

An individual alleging a reprisal is deemed to have affirmatively established the occurrence of the reprisal if the person demonstrates that a disclosure was a contributing factor in the reprisal. ARRA, Section 1553(c)(1)(A)(i). A Federal agency may not find the occurrence of a reprisal, however, if the non-Federal employer demonstrates by clear and convincing evidence that the non-Federal employer would have taken the action constituting the reprisal in the absence of the disclosure. ARRA, Section 1553(c)(1)(B).

### Analysis

In this case, the University has offered clear and convincing evidence that it would have removed you as PI from the award in question notwithstanding your disclosures.<sup>3</sup> Upon receiving your complaint in April 2012, the University's Provost Office and the Office of Senior Vice President for Research requested that the [REDACTED] ( [REDACTED] ) conduct a financial review of the [REDACTED] award. ROI, tab 17, p. 1. In addition, [REDACTED] the Associate Provost of Faculty Affairs, was asked to speak with you, [REDACTED] (the co-PI whom the University designated as PI to replace you), and [REDACTED], Program Coordinator, to address the award-related issues from a personnel perspective. ROI, tab 16, p. 2.

The discussions spearheaded by [REDACTED] were not successful in producing a resolution. After speaking with all parties, [REDACTED] concluded that it would be extremely difficult, if not impossible, to repair the working relationships to the point where the [REDACTED] project could continue with the same team structure. ROI, tab 16, pp. 10-11. The financial review that [REDACTED] prepared and issued in June 2012 reached a similar conclusion. ROI, tab 17. Specifically, [REDACTED] report identified numerous issues and conflicts that arose during the course of the award, and found that these issues and conflicts "were caused by an ineffective team structure and failed communication." ROI, tab 17, p. 1. The report questioned the effectiveness and the efficiency of separating the programmatic from the administrative duties of the award, which it asserted

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<sup>3</sup> Thus, for the purpose of this decision, it is unnecessary for me to assess whether your disclosures were a contributing factor in the University's decision.

was not a logical way to manage the project. ROI, tab 17, p. 11. The report concluded that “[i]f the PI cannot work with other project personnel to resolve the issue, the College level management needs to step in to settle the differences or reorganize the project team.” ROI, tab 17, p. 12.

The University took [REDACTED] recommendations seriously, and reviewed the manner in which the [REDACTED] project was being managed. Ultimately, the University determined that the project could not be completed if the current team structure remained in effect. ROI, tab 19, p. 27. [REDACTED], Associate Vice President for Research at the University, expressed significant concern that you were not directly involved in the planning and execution of the award. ROI, tab 19, p. 28. For example, according to [REDACTED], you failed to attend the vast majority of weekly meetings held with program participants. ROI, tab 3, pp. 33-34. [REDACTED] also indicated that you provided little, if any input, during the evaluation phase of the project, and that you provided little, if any, input as to how to sustain the project beyond the life of the award – critical responsibilities that reside with a PI. ROI, tab 3, p. 34. On the other hand, [REDACTED] indicated that [REDACTED] was actively involved in the mentoring of students, and in meeting with [REDACTED] about the project. ROI, tab 19, p. 41. Thus, the University determined that [REDACTED] was engaged in the project to a higher degree than you. *Id.* Consequently, because the University determined that [REDACTED] were primarily responsible for the execution of responsibilities in connection with the award, and that you were only tangentially involved, the University decided to replace you as PI with [REDACTED]. *Id.* In short, the University has presented persuasive evidence to demonstrate that you were removed as PI for legitimate, business-related reasons.

In addition, I note that, despite the fact that most personnel changes made in connection with a University award are undertaken at the local level, [REDACTED] identified several other occasions in which her office became involved in such decisions. ROI, tab 27. In fact, on at least one prior occasion, the University’s Office of Research was integrally involved in the decision to remove a PI for lack of effort and poor performance. ROI, tab 27. In that case, much like here, officials with the Office of Research worked with the funding agency to name a replacement PI to ensure that the project was completed in an effective manner. ROI, tab 27. Thus, I do not find that the actions of the University in this case to be anomalous.

Although I do not believe that the University engaged in unlawful retaliation by virtue of your removal as PI, I do agree with the OIG’s comment in its ROI that the University could have provided you with a more meaningful opportunity to respond to the conclusion that you were not heavily involved in the programmatic aspects of the award. At bottom, however, the University is the grantee and, consequently, is responsible for ensuring that the performance on the project is conducted in a timely manner, and in accordance with all performance objectives and other standards. Thus, absent a finding of unlawful reprisal, it is not appropriate for me to substitute my judgment for that of the University on how to manage an award that it receives. After extensive investigation and consideration, the University determined that replacing you as PI was in the best interests of the project and, as previously discussed, there is no evidence to suggest that this conclusion would have been different absent your disclosures.

For all of the foregoing reasons, your complaint is denied.

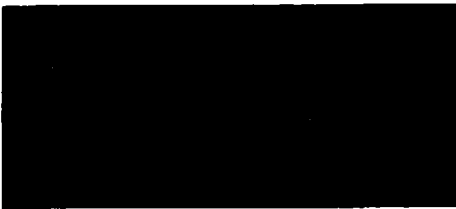
Should you have any questions about the foregoing, please contact [REDACTED] Assistant General Counsel, at [REDACTED].

Sincerely,

A handwritten signature in cursive script, appearing to read "Lawrence Rudolph".

Lawrence Rudolph  
General Counsel

cc:



Allison Lerner  
Inspector General  
NSF