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EXECUTIVE SUMMARY

Report of Prohibited Personnel Practices OSC Matter MA-07-0385 (Diem-Thi Le)

This memorandum summarizes the Report of Prohibited Personnel Practices (the "Report") prepared by the U.S. Office of Special Counsel in connection with a complaint filed by Diem-Thi Le, an employee of the Defense Contract Audit Agency (DCAA). Le alleged that she had suffered a variety of personnel actions because of whistleblowing protected by 5 U.S.C. § 2302(b)(8). The personnel actions she cited included lowered performance ratings for 2007 and 2008, as well as decisions denying to her cash performance awards in 2006, 2007 and 2008. OSC also investigated whether DCAA violated 5 U.S.C. § 2302(b)(8), (9) and (12) by threatening to discipline Le, if she used agency documents in making disclosures to OSC. The Report concluded that DCAA violated the foregoing statutes and recommended that OSC seek appropriate corrective and disciplinary action.

I. Factual Background

Le joined DCAA in January 1989. She worked as a Senior Auditor in its Santa Ana Branch Office (SABO) from January 1991, until her promotion on June 21, 2009, to the position of Auditor/Course Developer. As a Senior Auditor, Le was responsible for auditing government contracts to insure that contractors complied with standards and rules applicable to federal contracting. On November 13, 2005, she submitted a hotline complaint to the Department of Defense Office of Inspector General (OIG). Subsequently, she made the same allegations to the U.S. Government Accountability Office (GAO) and the Defense Criminal Investigative Service (DCIS). She charged that certain SABO supervisors issued or caused to be issued unjustified findings that contractors had complied with applicable contracting standards. In particular, Le contended that the supervisors approved findings of compliance not supported by audit work papers, or they simply changed or deleted findings of noncompliance. Le specifically implicated three supervisors — Dahr Thorpe, the Branch Manager at SABO, and her subordinate supervisory auditors: Angie Thomas and Sharon Kawamoto. According to Le, these supervisors approved the issuance of the flawed audit reports in order to meet productivity goals.

In support of her allegations, Le identified at least 10 flawed audits, including audits of government contractors Fluor, Parker Hannifin and Interstate Electronics. Reports issued by the OIG, DCIS and GAO ultimately sustained the substance of Le's allegations. In addition, her allegations led to hearings before the Senate Committee on Homeland Security and Governmental Affairs, at which Le testified on September 10, 2008. Because Le's disclosures were largely sustained, she was protected from reprisals by 5 U.S.C. § 2302(b)(8), as well as other statutory provisions. Unlawful reprisals warrant both corrective and disciplinary action.

II. DCAA Officials Took Personnel Actions Against Le Because of Her Protected Disclosures

Once DCAA supervisors came to believe that Le made the disclosures about SABO's auditing practices, they took a series of retaliatory actions against her. They denied her a cash award for the performance year ending June 30, 2006, although she had received an outstanding performance rating. Then, they lowered Le's performance ratings in 2007 and 2008 to fully successful, although she had received outstanding performance ratings in each of the four preceding years. They also failed to give Le performance awards in 2007 and 2008.

Ample evidence supported the inference that these actions were retaliatory. DCAA supervisors first became critical of Le's performance immediately after DCIS began investigating the disclosures Le made. Indeed, DCIS interviewed Thorpe in connection with its investigation of Le's allegations on the morning of July 26, 2006. Just a few hours later, Thorpe, along with Thomas and Kawamoto, who DCIS had interviewed on July 24 and 25, respectively, attended a retirement luncheon. At the luncheon, the three supervisors cornered an official in charge of human relations and stridently complained about Le's performance. The supervisors also solicited guidance regarding how to handle Le. The timing of these attacks on Le's performance strongly indicated that Le's supervisors had decided to retaliate against Le.

This inference is consistent with evidence establishing that SABO supervisors felt deep anger over the investigations Le had initiated. Thorpe stated that her blood pressure rose when DCIS interviewed her. She also accused the DCIS interviewer of lying during the interview and threatened to seek the help of friends in the agency, if the investigation continued. Likewise, Thomas, shortly after her interview, wrote an emotional e-mail charging that the DCIS investigator had accused her of lying. Moreover, Thomas asserted:

Based on Mr. Blackburn's [the DCIS investigator] attitude today and the tone of his line of questioning, I feel very threatened and am very concerned about how his conclusions will affect me and my career especially since he appears to be on some sort of witch hunt where he isn't interested in finding out the truth but in finding someone or some people in management to hold up as sacrificial lambs because of allegations made by a person or persons who are obviously not privy to or have not considered all of the facts surrounding certain audit issues and are, therefore, not qualified to make the appropriate determination on the audit opinion.

Thomas added that she "was not sure why anyone would subject themselves to a job where your judgment is questioned and your integrity and credibility is maligned"

The lack of merit in the actions DCAA supervisors took against Le also supports the inference that those actions were retaliatory. The oral attacks on Le's performance at the retirement luncheon occurred only 26 days after the ending of a performance year in which Le

was rated outstanding. Indeed, as noted, Le had also been rated outstanding for the three years before that. No documentation indicates that Le's historical performance had deteriorated so severely in 26 days that supervisors would require advice from the head of human relations in handling her.

With this background, it must be inferred that the decision to deny Le a cash award was also a reprisal. Thorpe made that decision within a couple of months of the retirement luncheon, although Le had received an outstanding rating in 2006. In the absence of reprisal, that rating would have certainly resulted in a cash award. Although DCAA management denied that an outstanding rating necessitated a cash award, an outstanding rating was sufficient grounds for such an award. Indeed, it was unprecedented, at least in the recent past, for SABO to deny a cash award to an auditor who had been rated outstanding. From 2005 to 2008, SABO issued 28 outstanding ratings to auditors, and all those auditors received cash awards, except for Le in 2006. Le herself received outstanding ratings in each of the three years before 2006 and each time received a cash award. Significantly, all auditors who received outstanding ratings received cash awards in the same amount, suggesting that the awards were granted for outstanding performance, rather than for specific accomplishments that might justify varying awards.

Based on the foregoing evidence, it may be presumed that subsequent personnel decisions against Le were tainted by the same retaliatory animus that infected the decision to deny her a cash award in 2006. Thus, when Sharon Kawamoto in 2007 and Kim Trainor, Le's subsequent supervisor, in 2008 rated Le only fully acceptable, after she had earned outstanding performance ratings for the prior four consecutive years, reprisal is indicated. This is especially true because during the 2007 and 2008 time frames the animus toward Le continued unabated. Throughout 2007 and 2008, the investigations of SABO continued, and findings were periodically issued indicating that Thorpe, Thomas and Kawamoto had acted improperly in approving flawed audit reports. Moreover, in the same time frame, Kawamoto held a team meeting and warned her auditors, including Le, that they could be disciplined for making false charges against fellow employees. In testimony, Trainor gave an overview of her management assessment of the impact of Le's disclosures. She opined that the investigations of SABO "destroyed the office," and that, as a result of the investigations, "people's lives and work lives have just been torn apart." She added that Le's presence in SABO "was a detriment to the rest of the people," that is, "30 plus other people," and declared that Le should have been moved out of the office. She blamed Le for "making our environment, you know, people are – they are not happy at work there." DCAA management also prohibited Le from working on audits of contractors whose audits were being investigated as a result of Le's whistleblowing disclosures.

Accordingly, the sudden decline in the level of Le's 2007 and 2008 ratings may be attributed most reasonably to animus resulting from her protected disclosures. While this conclusion might be inappropriate if convincing evidence showed that Le's performance seriously deteriorated, no such evidence exists. To the contrary, the evidence shows that Kawamoto and Trainor were incapable of setting aside their animus against Le in assessing her performance. Before both Kawamoto and Trainor rated Le fully successful, they prepared draft

appraisals rating her unacceptable. It is implausible that Le's objective performance could have fallen so precipitously from outstanding, a rating that Le received for four consecutive years. Moreover, neither Kawamoto nor Trainor could articulate legitimate reasons for their seeming difficulties in determining whether Le's performance warranted a satisfactory or, instead, an unacceptable rating. This suggests, at the very least, that the performance assessments of Kawamoto and Trainor were unreliable. Moreover, it may be inferred that Kawamoto and Trainor both decided to raise Le's ratings from unacceptable to fully successful only because they feared that the lower rating would reveal their retaliatory animus, given Le's long history of outstanding performance. In any event, if Le's performance had suffered such a drastic decline, Kawamoto and Trainor would have carefully documented this fact and devoted extensive efforts to maintaining Le's performance at the outstanding level. Yet, in the two years of Kawamoto's and Trainor's supervision of Le, her supervisors attempted to counsel her formally only once and even then their animus was plain. Because she was reduced to tears during the counseling and showed signs of stress, her supervisors referred her to the Employee Assistance Program, claiming, without a sensible foundation, that they feared that Le might become violent or that her behavior was the product of menopause. In addition to the absence of efforts to counsel Le, Kawamoto and Trainor both notified Le in her formal mid-term evaluations in 2007 and 2008, that she was performing at least at the fully successful level.

A separate reprisal against Le occurred when DCAA issued a written directive on August 31, 2007, explicitly threatening her with adverse personnel actions, if she used any agency documents in connection with her complaint to the Office of Special Counsel. By making this threat, DCAA also violated 5 U.S.C. §§ 2302(b)(8)(B) or (b)(9)(C). These provisions forbid agencies from taking or threatening personnel actions against employees who make whistleblowing disclosures to OSC or the Inspector General of an agency or who cooperate with or disclose information to these entities. The Merit Systems Protection Board has extended these protections against reprisals to even those who only intend to make protected disclosures. *Sirgo v. Dept. of Justice*, 66 M.S.P.R. 261, 266 (1995); *Mausser v. Dept. of Army*, 63 M.S.P.R. 41, 44 (1994); *Harvey v. Merit Sys. Prot. Bd.*, 802 F.2d 537, 547 (D.C. Cir. 1986).

III. Recommendations

Based on the prohibited personnel practices described above, Le is entitled to corrective action. Disciplinary action should also be considered against DCAA officials who committed the prohibited personnel practices. 5 U.S.C. § 1214(b)(2)(B) and (C) and 5 U.S.C. § 1214(f). The corrective action should make Le whole. This would include compensating her in the amount of \$2,250, plus interest, for the cash award she lost in 2006. That is the amount awarded to other employees who were rated outstanding. In addition, Le's fully successful ratings in 2007 and 2008 should be replaced with outstanding ratings, and she should receive cash awards in the amount given to other SABO employees who received such awards after receiving outstanding performance ratings. Le's HAPS ratings in 2007 and 2008 were also downgraded. If DCAA still retains them in its files, they should be purged. To the extent that Le can establish

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that she incurred medical costs or took leave because of the stress of reprisals, Le should be compensated for these losses.

As for the August 31 Directive threatening Le with disciplinary action, if she should engage in protected conduct, DCAA has already rescinded it. However, disciplinary action should be considered against officials responsible for issuing the Directive, as well as for committing the other reprisals set forth above.