



Department of Energy
Washington, DC 20585

February 23, 2017

BY CERTIFIED MAIL AND
ELECTRONIC MAIL

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Re: OHA Case No. WBR-17-0001

Dear Ms. Garde and Ms. Curtis:

This letter concerns the Complaint of Retaliation filed on behalf of Sandra C. Black (Ms. Black) with the Department of Energy's (DOE) Office of Inspector General (OIG) under Title 41 United State Code, Section 4712 (the Act). Ms. Black asserted that her employer, Savannah River Nuclear Solutions, LLC (SRNS), retaliated against her by terminating her employment as a result of her disclosures to the Government Accountability Office (GAO) regarding abuses of authority by SRNS management. The OIG reviewed Ms. Black's Complaint and issued a report on January 24, 2017 (the OIG Report), finding that Ms. Black established by a preponderance of the evidence that information she disclosed to GAO regarding possible abuses of authority by SRNS management constituted protected disclosures under the Act. Additionally, the OIG found that these disclosures were a contributing factor in Ms. Black's termination, and SRNS failed to show by clear and convincing evidence that it would have terminated Ms. Black absent the disclosures to GAO.

Section 4712(c) of the Act requires that no later than 30 days after receiving the OIG Report, the head of the agency shall determine whether there was a sufficient basis to conclude that the contractor subjected the employee to a reprisal prohibited by the Act. The Act additionally provides that the head of the agency shall issue an order denying relief or granting corrective action. Pursuant to DOE Delegation Order No. 00-002.16, the Office of Hearings and Appeals (OHA), has been designated to act as the "head of the agency" for purposes of issuing any order pursuant to the Act.

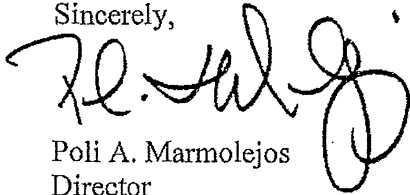
OHA has carefully reviewed the submissions of both Ms. Black and SRNS regarding their responses to the OIG report, including the remedy to be ordered, and the record compiled by the



OIG. Following this review, we determine that there is a sufficient basis to conclude that SRNS subjected Ms. Black to a reprisal prohibited by the Act. As a result of this determination, as detailed in the decision, we order SRNS to reinstate Ms. Black to the same or a comparable position, pay compensatory and emotional distress damages, and pay reasonable costs and expenses incurred by Ms. Black in connection with bringing the Complaint. Additionally, we will be forwarding a copy of the decision to the Office of Environmental Management and the Headquarters Director of the Employee Concerns Program (ECP) for their consideration of whether any specific actions respecting the ECP at the SRS are appropriate.

If you have any questions regarding this matter, please contact Janet N. Freimuth, Chief, Employee Protections and Exceptions, Office of Hearings and Appeals, at janet.freimuth@hq.doe.gov, or (202) 287-1439.

Sincerely,



Poli A. Marmolejos
Director
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Enclosure

cc:

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Washington, DC 20585

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

In the Matter of: Sandra C. Black)
Date of Report: January 24, 2017) Case No.: WBR-17-0001

Issued: FEB 23 2017

Order

On January 24, 2017, the U.S. Department of Energy (DOE or Department) Office of Inspector General (OIG) issued a report of its findings regarding a Complaint of Retaliation filed by Sandra C. Black (Ms. Black) under the Pilot Program for Enhancement of Contractor Protection from Reprisal for Disclosure of Certain Information (the Act), 41 U.S.C. § 4712.¹ Ms. Black, a former employee of Savannah River Nuclear Solutions (SRNS), a DOE contractor, alleges that she made various protected disclosures under the Act and that SRNS retaliated by terminating her employment. Ms. Black requests that DOE grant her relief. For the reasons discussed in this Order, the Department determines that Ms. Black is entitled to relief.

I. Background

A. The Enhancement of Contractor Protection from Reprisal for Disclosure of Certain Information Act

The Act prohibits a federal contractor or grantee from retaliating against an employee for making certain types of disclosures related to a federal contract or grant. 41 U.S.C. § 4712. SRNS had a contract with DOE during the time period relevant to Ms. Black's Complaint and, therefore, was covered by the Act.

Under the Act, firms such as SRNS are prohibited from retaliating against an employee based on disclosures to various entities or individuals, including the Government Accountability Office (GAO), federal employees responsible for oversight of the contract, and contractor personnel responsible for investigating, addressing or resolving misconduct. 41 U.S.C. § 4712(a)(1). The Act protects a disclosure of information that the employee reasonably believes is evidence of: (1) gross

¹ The Act is now the Enhancement of Contractor Protection from Reprisal for Disclosure of Certain Information, 41 U.S.C. § 4712.



mismanagement of the contract, (2) a gross waste of federal funds, (3) an abuse of authority relating to the contract, (4) a substantial and specific danger to public health or safety, or (5) a violation of law, rule, or regulation related to the contract. *Id.*

An employee who believes that he or she has been subjected to a reprisal may submit a complaint to the Inspector General's office of the relevant executive agency. 41 U.S.C. § 4712(b)(1). That office shall investigate the complaint and submit a report of its findings unless it determines that the complaint is frivolous, fails to allege a prohibited reprisal, or has previously been addressed in another Federal or State judicial or administrative proceeding initiated by the complainant. *Id.*

Within 30 days of receipt of the Inspector General report, the head of the executive agency must determine whether there is a sufficient basis to conclude that the contractor has subjected the complainant to a prohibited reprisal. 41 U.S.C. § 4712(c)(1). The agency head must also issue an order denying relief or taking one or more of the following actions: (1) ordering the contractor to take affirmative action to abate the reprisal, (2) ordering the contractor to reinstate the complainant to the position held prior to the reprisal with compensatory damages, to include back pay, employment benefits, and other terms and conditions of employment that would apply to the person in that position had the reprisal not been taken, and/or (3) ordering the contractor to pay the complainant an amount equal to the total of all costs and expenses, including attorneys' fees and expert witnesses' fees, that were reasonably incurred by the complainant in connection with bringing the complaint, as determined by the agency head. *Id.*

The DOE Office of Hearings and Appeals (OHA) is the quasi-judicial arm of the Department that issues Departmental decisions with respect to any adjudicative proceedings which the Secretary may delegate, including "whistleblower" complaints filed with the agency. *See* DOE Delegation Order No. 00-002.16. Pursuant to this delegation of authority, OHA has been designated to act as the "head of the agency" for purposes of issuing any order pursuant to the Act.

B. Factual Background

Ms. Black began working as a contractor employee at DOE's Savannah River Site (SRS) in 1980 and was promoted through various positions. OIG Investigation Record ("R.") at 10. In October 1994, Ms. Black became the senior investigator of the contractor Employee Concerns Program (ECP). *Id.* In August 2008, SRNS took over the relevant DOE contract for SRS, and approximately one year later, in November 2009, SRNS promoted Ms. Black to Manager of the ECP. *Id.* at 10-11. "ECPs" are common at nuclear facilities, and a DOE Order establishes a DOE ECP program and related DOE contractor responsibilities. *Id.* at 125 (DOE Order 442.1A). An ECP is a program that provides an independent avenue in which employees can freely and openly express concerns related to, but not limited to, the environment, safety, health, and management. *Id.*

As the ECP Manager, Ms. Black reported to the SRNS Vice President for Corporate Services. R. at 789. Beginning in 2013, Ellen Elizabeth "Beth" Bilson (Ms. Bilson) held this position. *Id.* Ms. Bilson, in turn, reported to the SRNS President. *Id.* at 798. In May 2014, Carol Johnson (Ms. Johnson) became SRNS President. *Id.*

As Ms. Black's supervisor, Ms. Bilson completed Ms. Black's performance reviews. R. at 791. Ms. Black's most recent performance review, for the fiscal year 2013, reflected an overall competency rating of "frequently exceeds." *Id.* at 237. Ms. Bilson wrote that Ms. Black's

performance “allowed for the success of the company in ways that would not be possible without her.” *Id.* Subsequent to that appraisal, Ms. Bilson awarded Ms. Black a merit salary increase that included a handwritten note thanking Ms. Black for her “hard work and the success of [the] program[,]” noting that it was “crucial to all.” *Id.* at 331. Six months later, in September 2014, Ms. Bilson awarded Ms. Black the Key Contributor Award, recognizing her for her contribution that was “significant and beyond [the] normal performance level.” *Id.* at 329. The award consisted of a \$2,500 bonus and specifically noted that Ms. Black continued to “encourage open communication between employees and management to resolve conflicts through collaboration and mediation.” *Id.* at 330.

During the early part of 2014, Ms. Black advised SRNS management that the ECP had investigated and substantiated an employee concern about SRNS’ handling of chemicals and found that SRNS had violated environmental regulations. *Id.* at 518-519. According to Ms. Black, the SRNS Executive Vice President sought the identity of the individual who filed the concern, asking Ms. Black who the “rat” was in the organization. *Id.* at 519. When the OIG asked Ms. Bilson and Ms. Johnson about the alleged “rat” comment, they told the OIG that they did not recall the comment. *Id.* at 792, 800.

Ms. Black stated that during the same period, she complained to SRNS management that the SRNS Deputy General Counsel was attempting to interfere with the ECP investigatory process. *Id.* at 520. Her complaint concerned an ECP investigation in which the ECP had “substantiated” an employee concern, and the SRNS Deputy General Counsel subsequently sought to have the ECP change that finding. *Id.* The OIG did not interview the SRNS Deputy General Counsel, but SRNS does not dispute that the incident occurred.

In early September 2014, the GAO notified the DOE SRS ECP Manager that it was conducting a review of whistleblower protection throughout DOE and would be conducting a site visit to the SRS as part of that review. *Id.* at 817. GAO coordinated its review through the DOE SRS ECP Manager, and GAO requested interviews with the SRNS ECP staff. *Id.* Ms. Bilson appointed Ms. Black to be the point of contact for the GAO audit. *Id.* at 530, 792.

Ms. Bilson explained to the OIG that the GAO audit seemed “unique” as its purpose was to examine how the contractor ECP interacted with the contractor Office of General Counsel (OGC) and other management offices. *Id.* at 792. Ms. Bilson told the OIG that prior to Ms. Black’s interview with GAO, Ms. Black asked if she should inform GAO about the difficult interactions she was having with the SRNS OGC, and Ms. Bilson informed Ms. Black that she was free to report anything. *Id.*

Ms. Black’s GAO interview occurred during the last week of October 2014. *Id.* at 813. A GAO representative told the OIG that Ms. Black revealed that SRNS, specifically the SRNS OGC, attempted to intervene in the ECP process. *Id.* According to the GAO representative, Ms. Black cited at least two instances in which the SRNS OGC directed the ECP to change findings that “substantiated” concerns, and on one occasion, attempted to prevent her from reporting a matter to DOE for evaluation under a federal law applicable to nuclear facilities. *Id.* Ms. Black informed GAO that these actions were “inappropriate interventions” and were “violations” of the ECP procedures. *Id.* The GAO representative reported to the OIG that she was surprised at how “forthcoming” Ms. Black was during the interview. *Id.*

On November 17, 2014, less than a month after Ms. Black's discussion with GAO, Ms. Bilson met with Ms. Black and discussed moving her from the ECP Manager's position to a newly created, non-managerial, Safety Conscious Work Environment position. *Id.* at 154, 438. That same day, Ms. Black sent an email to Ms. Johnson relaying this information, stating that she considered this new position to be "a punitive measure and retaliation." *Id.* at 438. Accordingly, Ms. Black requested a meeting with Ms. Johnson. *Id.* On the following day, November 18, 2014, Ms. Johnson met with Ms. Black. *Id.* at 440. One day later, Ms. Johnson emailed Ms. Black that she was "considering some options" based on their discussion and would be in touch with Ms. Black following the Thanksgiving holiday. *Id.*

According to Ms. Johnson's December 21, 2014, notes concerning the meeting, she "reconsidered" the transfer and "concluded that [she] would have [Ms. Black] report to [her] on an interim basis." *Id.* at 154. It is undisputed that Ms. Black was happy with this decision, viewing the higher reporting position as favorable to the independence of the ECP. *Id.* at 67, 154.

On December 1, 2014, Ms. Black and Ms. Johnson met to discuss what Ms. Johnson describes as "expectations." *Id.* at 54. Ms. Johnson stated to the OIG that, by the end of this meeting, she concluded that Ms. Black should be terminated, and she then advised the SRNS human resources office to prepare the paperwork in order to terminate Ms. Black after the Christmas holiday. *Id.* at 802-03. Without informing Ms. Black of the termination decision, Ms. Johnson met with Ms. Black again on December 15, 2014, to discuss the ECP assessment and procedural improvements. *Id.* at 154-155.

On January 7, 2015, SRNS informed Ms. Black that her employment was terminated. *Id.* at 366. The termination document, titled "Constructive Discipline Assessment and Development," indicated that Ms. Black was being terminated for "unsatisfactory job performance." *Id.* SRNS offered Ms. Black a severance package, which included a release of all claims against SRNS, but Ms. Black declined the package. *Id.* at 372-381.

C. Procedural Background

Following her termination, Ms. Black retained counsel and filed a Complaint of Retaliation with the DOE OIG. *Id.* at 6, 27. Ms. Black filed the same Complaint in two other fora - the DOE SRS ECP under 10 C.F.R. Part 708, and the Department of Labor (DOL) Occupational Safety and Health Administration (OSHA) under 42 U.S.C. § 5851.² *Id.* at 17, 24, 29, 103-106.

In the Complaint, Ms. Black alleged that she was wrongfully terminated from SRNS for making protected disclosures and engaging in protected activity. *Id.* at 17. For each allegation, Ms. Black identified what she viewed as the most appropriate entity to consider the allegation. *Id.* at 17, 19. Consistent with her identifications, the OIG investigation focused on her disclosures to GAO and whether they evidenced an "abuse of authority." OIG Report at 18.

² OHA dismissed the Part 708 complaint, citing Ms. Black's DOL complaint and the Part 708 regulation requiring dismissal of a Part 708 complaint where the complainant has filed a second complaint based on the same facts in another forum. *Sandra Black*, WBA-15-0009 (2015), citing 10 C.F.R. §708.17(c)(3). To our knowledge, the case at DOL remains pending.

In a letter dated November 13, 2015, the OIG notified SRNS that it should preserve relevant documents, and the OIG specifically requested that SRNS provide the OIG with the following documents:

1. Any official or unofficial records relating to Ms. Black's hiring or work performance from January 2008 until her termination in January 2015.
2. Copies of any communications between Ms. Black and SRNS management from January 2008 until the date of her termination.
3. Any official or unofficial records relating to any reprimand or disciplinary action directed to Ms. Black during her employment at SRNS.
4. Any official or unofficial records relating to the termination of Ms. Black's employment with SRNS.
5. Any written SRNS policies or rules regarding the discipline or termination of its employees that were in effect between January 2013 and January 2015.

Id. at 48-49. The OIG also offered SRNS the opportunity to submit a statement concerning its position and to recommend individuals to be interviewed. *Id.* at 49.

Over the course of the OIG investigation, SRNS submitted five letters to the OIG. *Id.* at 51-173 (December 15, 2015 letter); 175-507 (January 28, 2016 letter); 509-512 (February 9, 2016 letter); 821-843 (April 11, 2016 letter); 845-855 (September 22, 2016 letter). The first four letters were from Mr. J. Hagood Tighe, of Fisher & Phillips, LLP. The fifth letter was from Adria Perez, of Kilpatrick Townsend, LLP. In that letter, Ms. Perez stated that SRNS had retained her firm to conduct an independent investigation of Ms. Black's complaint and that, based on that investigation, the firm concluded that the Complaint lacked merit.

In its submissions to the OIG, SRNS advanced arguments in support of its position that the Complaint lacked merit, and it attached a number of documents. SRNS denied that Ms. Black's disclosures to GAO were protected, arguing that such disclosures were part of her duties. *Id.* at 72. Moreover, SRNS denied that it retaliated against Ms. Black because of her disclosures to GAO, stating that at the time Ms. Johnson made her decision to terminate Ms. Black, Ms. Johnson was unaware that Ms. Black had participated in the GAO investigation. *Id.* at 73. SRNS alleged that Ms. Johnson terminated Ms. Black because Ms. Black "failed to show [Ms.] Johnson [that] she had the ability to lead the [ECP] as [Ms.] Johnson requested," *id.* at 51, 53, and because Ms. "Johnson lost confidence in [Ms. Black's] ability to operate [the] ECP as an asset." *Id.* at 75.

After completing its investigation, the DOE OIG issued its report on January 24, 2017. In its report, the OIG analyzed the Complaint and the evidence gathered, using the burdens of proof set forth in the Act. The OIG determined that Ms. Black established by a preponderance of evidence that she reasonably believed that the information she provided to the GAO evidenced an abuse of authority. OIG Report at 18. Additionally, the OIG determined that Ms. Black established by a preponderance of the evidence that SRNS knew of Ms. Black's disclosures and that the disclosures served as a contributing factor in Ms. Black's termination. *Id.* Finally, the OIG found that SRNS

did not provide clear and convincing evidence that it would have terminated Ms. Black in the absence of those disclosures. *Id.*

OHA received the OIG Report on January 24, 2017. In a January 26, 2017, letter to the parties, we gave the parties an opportunity to file submissions. We advised Ms. Black that she should file a submission on her requested remedies, and advised SRNS that it could file a response to that submission. In addition, we advised both parties that they could file comments on the OIG Report.

Ms. Black filed two submissions, one setting forth her requested relief, Black Requested Remedies (February 3, 2017), and a second in support of the OIG Report, Black Response (February 9, 2017). SRNS also filed two submissions. The law firm that originally participated in the OIG investigation responded to Ms. Black's requested remedies, SRNS Response to Remedies (February 10, 2017). The second law firm - the one that reported the results of its own investigation to the OIG - filed a submission, contending that the OIG Report was flawed and ignored factual and legal defects in Ms. Black's case, and that the OIG's investigative process violated SRNS' due process rights and is not entitled to any deference. SRNS Response (February 10, 2017) at 1, 8-10.

II. Analysis

A. The Governing Standards

As noted above, the Act prohibits reprisal against a contractor employee for disclosing certain information to certain entities or individuals (hereinafter referred to as a protected disclosure). The Act further indicates that the legal burdens of proof to be applied by the OIG during its investigation and by the head of the agency in making its decision are the same as those applied under the Whistleblower Protection Act, a statutory whistleblower provision applicable to Federal employees. 41 U.S.C. § 4712(c)(6), *citing* 5 U.S.C. § 1221(e). Section 1221(e) provides that the employee has the burden of demonstrating, by a preponderance of the evidence, that he or she made a protected disclosure and that the disclosure was a contributing factor in the personnel action that was taken. Once the employee meets that burden, the employer has the burden of demonstrating, by clear and convincing evidence, that it would have taken the same personnel action in the absence of the disclosure or protected activity. 5 U.S.C. § 1221(e); *see Marano v. Dept. of Justice*, 2 F.3d 1137, 1141 (Fed. Cir. 1993); *Ellison v. MSPB*, 7 F.3d 1031, 1034 (Fed. Cir. 1993).

B. Whether Ms. Black Demonstrated that She Made a Protected Disclosure that was a Contributing Factor In Her Termination

1. Whether Ms. Black Made a Protected Disclosure

In its report, the OIG found that Ms. Black made a protected disclosure when she conveyed to GAO information concerning the following four incidents:

1. The ECP investigated an allegation that SRNS retaliated against an employee for making a disclosure involving the servicing of glove boxes. The ECP investigation found that the allegation was "substantiated." The SRNS Deputy General Counsel told Ms. Black to change the finding to "unsubstantiated."

This exchange prompted Ms. Black to complain to Ms. Bilson, who agreed with Ms. Black not to change the finding.

2. The ECP investigated an allegation by nuclear safety employees that they did not report health and safety issues for fear of reprisal. The ECP investigation found that the concern was "substantiated." The ECP reported this result to SRNS senior management, who disagreed, and one of the SRNS vice presidents wrote a rebuttal in which he identified the employees who said they feared retaliation for raising health and safety issues.
3. The ECP investigated an allegation that the SRNS chemical reuse program had violated environmental regulations. When Ms. Black reported the results of the investigation to SRNS senior management, the SRNS Executive Vice President sought the identity of the "rat" who made the allegation.
4. The ECP investigated an allegation that SRNS had failed to pay certain employees for their lunch period, in violation of federal law. The ECP investigation found that the allegation was "substantiated" and informed SRNS management and the DOE SRS ECP Manager. Ms. Black objected to the SRNS Deputy General Counsel's request that she close the matter and transfer it to him for further action.

OIG Report at 8-10. The OIG found that Ms. Black's discussions with GAO of these alleged improprieties were disclosures of information that she reasonably believed constituted an abuse of authority and, therefore, were protected disclosures. *Id.* at 18.

SRNS does not dispute that the four incidents cited by the OIG occurred. Instead, SRNS disputes the OIG's finding that, when Ms. Black disclosed this information to GAO, she made a protected disclosure under the Act. SRNS Response (February 10, 2017) at 3.

It is undisputed that a protected disclosure includes information that an employee reasonably believes evidences an abuse of authority relating to a Federal contract. The Act defines "abuse of authority" as "an arbitrary or capricious exercise of authority that is inconsistent with the mission of the executive agency concerned or the successful performance of a contract" of such agency. See 41 U.S.C. § 4712(g)(1). See also "Arbitrary," Black's Law Dictionary (10th ed. 2014) (depending on individual discretion; of, relating to, or involving a determination made without consideration of or regard for facts, circumstances, fixed rules, or procedures); "Capricious," Black's Law Dictionary (10th ed. 2014) (characterized by or guided by unpredictable or impulsive behavior; likely to change one's mind suddenly or to behave in unexpected ways). "The proper test for determining whether an employee had a reasonable belief that [her] disclosures were protected is whether a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee could reasonably conclude that the actions evidenced" an abuse of authority. *Linder v. Dep't of Justice*, 2014 MSPB 84.

Ms. Black contends that her disclosures that SRNS management was acting contrary to the principles underlying the DOE ECP Order (the ECP Order) were disclosures of an abuse of authority. She specifically cites to the following DOE ECP principles: the ECP's independent role in investigating concerns, its commitment to maintaining confidentiality to the extent possible, and

its process for closing concerns. As explained below, there is a sufficient basis upon which to conclude that Ms. Black held a reasonable belief that she disclosed actions of SRNS management that were inconsistent with the ECP Order with respect to the independent role of the ECP in investigating concerns and the goal of protecting confidentiality to the greatest extent possible, and they evidenced an abuse of authority under the Act. R. at 125 (DOE Order 442.1A).

Section 1 of the ECP Order, entitled "Objective," states that the purpose of the Order is to establish a Program that:

[E]nsures employee concerns related to such issues as the environment, safety, health, and management of DOE and the National Nuclear Security Administration (NNSA) programs and facilities are addressed through –

- a. prompt identification, reporting, and resolution of concerns regarding DOE facilities or operations in a manner that provides the highest degree of safe operations;
- b. free and open expression of employee concerns that results in an *independent*, objective evaluation; and
- c. supplementation of existing processes with an *independent* avenue for reporting concerns.

Id. (emphasis added). With respect to confidentiality, Section 4 of the ECP Order, entitled "Requirements," provides as follows:

If the concerned employee requests confidentiality, his or her identity must not be disclosed during the investigation or other process used to evaluate the concern. However, ECP personnel should advise employees of the limitations of its ability to protect confidentiality under certain circumstances. For example, the concern may involve action taken against the employee for which relief is sought, or the employee may be closely associated with the concerns.

Id. at 127 (DOE Order §4(b)(5)). The DOE Guide (the Guide), accompanying the ECP Order, discusses confidentiality in more detail. First, Section 2 of the Guide, entitled "Definitions," defines a "confidential concern" as a "concern submitted by an employee who wishes to have his or her identity protected from all persons except the ECP staff and those with a need to know." *Id.* at 138 (DOE Guide 442.1-1, sec. 2). Second, Section 7 of the Guide, entitled "Confidentiality," provides that "[c]onfidentiality is a cornerstone of an effective ECP and the investigation of concerns" and that ECPs "must provide confidentiality to the greatest extent possible." *Id.* at 145 (DOE Guide, sec. 7). The Guide states, however, that confidentiality cannot be protected "if maintaining that confidentiality puts at risk the health and safety of the workers or the public." *Id.* at 145. In addition, the Guide notes that some factors may impede the ability to grant or maintain confidentiality and lists four examples: (1) if confidentiality impedes a full investigation, (2) if the employee may already be associated with the issues, (3) the extent to which the concerns are being resolved through litigation, and (4) the obligations under the Privacy or Freedom of Information Acts. *Id.* The Guide continues, however, that "even when the ability to grant confidentiality is limited, the ECP" and related personnel "may only reveal the identity of the concerned employee on a need-to-know basis." *Id.* at 146.

SRNS has described its program in similar terms. SRNS President, Carol Johnson, acknowledged the importance of an independent ECP, stating, in notes to herself regarding meetings with Ms. Black, that in her "view[,] it [was] important for [Black] to maintain her independence in the investigations[.]" R. at 154. Similarly, the SRNS manual governing the SRNS ECP places significant emphasis on confidentiality. *See id.* at 152 (SRNS Workforce Services, Employee Concerns Program Administrative Process, SRNS-ECP, Procedure ECP1.01, Revision 15, effective May 12, 2010, at 62). Page 62 of that manual, which is included in the record, is labeled "Attachment 18 Typical Acknowledgement of Confidentiality" and consists of a document entitled, "Acknowledgment of Confidentiality for SRNS Employee Concerns Activities." *Id.* at 152. This acknowledgement is identified as being "TO" the "Manager, SRNS Employee Concerns Program," and the text of the acknowledgement provides in full:

I, _____, hereby acknowledge that I fully understand that all of my activities associated with the SRNS Employee Concerns Program (ECP) are to be handled in a PRIVILEGED AND CONFIDENTIAL manner. In this respect, I agree that I will not disclose any information relative to the identity of individuals who contact the ECP with specific issues to anyone outside of the investigation except when the failure to do so could/would result in personnel injury or death, or damage to/loss of government property or equipment. I also understand and agree that this applies to any and all information associated with both specific and general program activities.

I understand that ANY violation of this agreement will be referred to my organization management for appropriate action.

Id. The foregoing portions of the record reflect an ECP that independently investigates concerns and values confidentiality.

Given the foregoing, it was reasonable for Ms. Black to believe that SRNS actions - seeking to have the ECP change an unfavorable investigatory finding or to compromise confidentiality when unnecessary - did not comply with the ECP Order. It was reasonable for Ms. Black to believe that SRNS actions were taken with disregard for the requirements and objectives of the ECP Order and were therefore "arbitrary." *See* Black's Law Dictionary (10th ed. 2014) (involving a determination made without consideration of or regard for ... fixed rules, or procedures). Finally, it was reasonable for Ms. Black to believe that the arbitrary actions at issue were inconsistent with DOE's mission, which includes operating its sites in an environment open to the raising of concerns, and with the governing contract, which requires compliance with DOE orders. *See* 41 U.S.C. § 4712(g)(1). Accordingly, it was reasonable for Ms. Black to believe that she was disclosing an "abuse of authority." *Id.*

SRNS argues that, even if Ms. Black disclosed an abuse of authority, Ms. Black's disclosures were part of her official duties and that such disclosures are not protected under the Act. R. at 72. The record does not support a finding that reporting SRNS senior management abuse of authority to GAO was part of Ms. Black's normal duties. Ms. Black's normal duties, as described in the ECP Manager job description, were to "[d]evelop and manage" the SRNS ECP program. R. at 229. While Ms. Black's normal duties may comprise "serv[ing] as the company point of contact" in investigations like those conducted by GAO, this role does not encompass whistleblowing-type

activities, such as identifying and reporting improprieties or deficiencies of senior management to GAO. *Id.*

2. Whether the Protected Disclosure was a Contributing Factor in Ms. Black's Termination

Now that we have determined that Ms. Black made protected disclosures, Ms. Black must demonstrate that one of the protected disclosures was a contributing factor in her termination. 5 U.S.C. § 1221(e)(1). SRNS denies that any protected disclosure was a contributing factor to the SRNS decision to terminate Ms. Black. SRNS Response (February 10, 2017) at 3-4.

Federal courts have defined a "contributing factor" under whistleblower protection statutes as:

any factor which alone, or in connection with other factors, tends to effect, in any way, the outcome of the decision. Any weight given to the protected disclosure, either alone or in combination with other factors, can satisfy the contributing factor test.

Hill v. Mr. Money Financing Co., 491 F. Supp. 2d 725, 731 (N.D. Ohio 2007); *Primes v. Parish National Bank*, 1995 WL 241853 (E.D. La. 1995), citing 5 U.S.C. § 1221(e); *Marano v. Dep't of Justice*, 2 F.3d 1137, 1140-41 (Fed. Cir. 1993). Moreover, an employee can demonstrate that the protected disclosure was a contributing factor through circumstantial evidence, including that the contractor knew of the disclosure and that the adverse action occurred in temporal proximity to the disclosure. 5 U.S.C. § 1221(e). The employee can establish that the contractor knew of the disclosure by establishing that the official taking the action had actual or constructive knowledge of the protected disclosure. *Bradley v. Dep't of Homeland Sec.*, 123 M.S.P.R. 547, ¶¶ 13, 15. The employee can "establish constructive knowledge of a protected disclosure by demonstrating that an individual with actual knowledge of the disclosure influenced the official accused of taking the retaliatory action." *Id.* ¶ 15.

It is undisputed that Ms. Johnson made the decision to terminate Ms. Black. Ms. Johnson maintains that she made the decision to terminate Ms. Black prior to learning about her GAO disclosures. *Id.* at 73; see also SRNS Response (February 10, 2017) at 3-4. Ms. Johnson stated that she decided to terminate Ms. Black on December 1, 2014, following a meeting on that date with Ms. Black. Ms. Johnson stated that she did not learn of Ms. Black's GAO disclosures until mid-December 2014.

The record contains circumstantial evidence suggesting that Ms. Johnson, despite her claim to the contrary, had actual knowledge of Ms. Black's GAO disclosures prior to Ms. Johnson's decision to terminate her. During the last week of October 2014, Ms. Black spoke to the GAO; on November 17, 2014, Ms. Bilson met with Ms. Black to discuss transferring her to a newly-created position at SRNS; on the same date, Ms. Black emailed Ms. Johnson, stating that the proposed transfer was retaliation, and Ms. Black met with Ms. Johnson on November 19, 2014 and December 1, 2014. Moreover, as discussed below, the record indicates that Ms. Bilson knew of Ms. Black's GAO disclosures. It would be unusual for her not to inform Ms. Johnson of those disclosures, since the disclosures reflected poorly on SRNS senior management. Finally, given Ms. Johnson's description of the November 19, 2014, meeting, it is unlikely that Ms. Black did not mention her disclosures: Ms. Johnson described the meeting as lasting "two to three hours" and one in which

Ms. Black “did most of the talking” and “regurgitated” past incidents that were not related to the present. R. at 801.

Regardless of whether Ms. Johnson had actual knowledge of the GAO disclosures, however, the record indicates that she had constructive knowledge. The record indicates that Ms. Bilson had actual knowledge of those disclosures. Prior to the GAO interviews, DOE informed Ms. Bilson and other SRNS senior leadership that the GAO interviews would include a discussion of the involvement of the SRNS OGC in the ECP process. *Id.* at 520, 530. Ms. Black told Ms. Bilson that she would discuss her objections to that involvement with GAO. *Id.* at 792. Ms. Black and the SRNS Deputy General Counsel had back-to-back GAO interviews, with his occurring second. *Id.* at 531. Taken together, these facts permit a reasonable inference that Ms. Bilson and SRNS senior management had knowledge that Ms. Black intended to share and, in fact, did share her concerns with GAO.

The record also indicates that Ms. Bilson made remarks to Ms. Johnson that influenced her decision. In her OIG interview, Ms. Bilson stated that Ms. Black “blew up” and stated “hell no” during their November 17, 2014, meeting discussing a transfer. *Id.* at 795. According to Ms. Bilson’s remarks in her OIG interview, Ms. Johnson was disappointed that she had to “weigh in” on the transfer and that the meeting had “concluded so badly,” *id.*, thereby indicating that Ms. Bilson provided a description of the meeting that cast Ms. Black in negative terms and influenced Ms. Johnson. Accordingly, the record indicates that Ms. Johnson had constructive knowledge of Ms. Black’s GAO disclosures.

The record also reflects temporal proximity of Ms. Black’s protected disclosures and her termination. As noted above, the GAO interview took place during the last week in October 2014, and on December 1, 2014, Ms. Johnson made the decision to terminate Ms. Black.

As discussed above, the record indicates that Ms. Johnson had constructive, if not actual, knowledge of Ms. Black’s protected disclosures prior to the decision to terminate her and that those disclosures were in temporal proximity to the termination. Accordingly, Ms. Black has met her burden of demonstrating, by a preponderance of the evidence, that the protected disclosures were a contributing factor in her termination.

C. Whether SRNS Has Presented Clear and Convincing Evidence That it Would Have Terminated Ms. Black in the Absence of the Protected Disclosure

Once an employee demonstrates that he or she made a protected disclosure and that the protected disclosure was a contributing factor to an adverse personnel action, the employer has the burden of demonstrating, by clear and convincing evidence, that it would have taken the same action in the absence of the protected disclosure. 5 U.S.C. § 1221(e). As explained below, SRNS has not met its burden.

As noted above, at the outset of the OIG investigation, the OIG requested that SRNS submit a comprehensive set of documents concerning Ms. Black’s employment and termination. R. at 48-49. The OIG request included records of SRNS rules and policies for discipline and performance, records of Ms. Black’s performance and any disciplinary actions, and records of the decision to terminate Ms. Black. *Id.* In response, SRNS submitted its human resources manual, which sets out processes for addressing performance and discipline issues. *Id.* at 394-436. SRNS concedes that it

did not utilize these processes with Ms. Black, arguing instead that the processes do not apply to employees at Ms. Black's level. *Id.* at 70. SRNS also submitted copies of some of Ms. Black's performance appraisals. *Id.* at 247-327, 237-246. SRNS now argues before OHA that Ms. Black's 2012 performance appraisal indicates that Ms. Black did not have good working relationships with others. SRNS Response (February 10, 2017) at 8, *citing* Ex. A to Barry Declaration. Finally, SRNS submitted to the OIG a November 19, 2014, email from Ms. Johnson to Ms. Black, stating that Ms. Johnson was "considering some options" based on their meeting, as well as Ms. Johnson's notes to herself, dated December 21, 2014, for the proposition that Ms. Johnson attempted to mentor and coach Ms. Black, but her attempt was unsuccessful. R. at 154, 440. In addition to the foregoing, the OIG record contains the summaries of its interviews with Carol Barry (Ms. Barry), the Senior Vice President for Workforce Service and Talent Management, and Ms. Johnson, discussing their views of Ms. Black's performance. *Id.* at 782-787, 798-803. Finally, in its response to the OIG report, SRNS submitted signed statements by both individuals. SRNS Response (February 10, 2017) (Attachments).

When we consider whether SRNS has presented clear and convincing evidence that it would have terminated Ms. Black in the absence of her protected disclosures, we consider various factors. Under the Geyer Test, they include: (1) the strength of the reasoning for the personnel action excluding the protected disclosure, (2) the strength of any motive to retaliate for making the protected disclosure, and (3) any evidence of similar action against similarly situated employees in situations where protected disclosures were not involved. *Kalil v. Dep't of Agriculture*, 479 F.3d 821 (Fed. Cir. 2007).

With respect to its reasoning for terminating Ms. Black, SRNS argues that Ms. Black was terminated because she "opposed [Ms.] Johnson's vision" for the ECP. R. at 68. SRNS alleges that Ms. Black was unable to work cooperatively with management, was unable to facilitate solutions, had a pessimistic outlook, and was unwilling to improve. *Id.* at 64, 67. As noted above, SRNS relies, as evidentiary support for this argument, on a statement in Ms. Black's 2012 performance review; Ms. Johnson's December 21, 2014, notes to herself; the OIG summaries of its interviews with Ms. Barry and Ms. Johnson; and signed statements of those individuals that SRNS provided to OHA. As explained below, we are unpersuaded by SRNS' arguments and find that it has failed to present clear and convincing evidence that it terminated Ms. Black for performance or disciplinary reasons.

First, SRNS admittedly did not follow the processes in its human resources manual, which states that it applies to "all full-service M&O employees." *Id.* at 635. The record contains no formal contemporaneous documentation of notice to Ms. Black of performance or conduct deficiencies. Moreover, Ms. Johnson's December 21, 2014 notes, the OIG summary of its interview with her, and her signed statement, reflect her own thought processes, documented after Ms. Black's termination, rather than notice to Ms. Black of poor performance or conduct deficiencies prior to her termination. SRNS Response (February 10, 2017) (Johnson Declaration); R. at 154, 798-803. Although those submissions reflect the SRNS desire that relations between the ECP and SRNS management improve, the submissions do not reflect any communication to Ms. Black that SRNS had concluded that she was at fault. *Id.* Indeed, the record indicates that Ms. Black viewed her new reporting relationship as a positive development, not part of an informal performance improvement plan; Ms. Bilson stated that Ms. Black considered the change in reporting to be a "kudo" and "almost as good as promotion." R. at 795.

Moreover, although SRNS contends that its practice is not to use the processes in its human resources manual for employees at Ms. Black's level, it has not submitted clear and convincing evidence on that point. *Id.* at 70. Instead, its examples were at the "Vice President" level, a level SRNS admits is above that of Ms. Black. *Id.* at 67.³ Second, the statement in Ms. Black's 2012 performance appraisal that she "will continue to grow as a manager...as she reestablishes and builds a network of trust across the SRNS organization" is, on its face, not notice of deficient performance, but a stated goal for the next year. Indeed, Ms. Black's performance appraisal for the next year did not contain that statement, instead stating that she "communicate[d] well to all levels of the organization" and "frequently exceeds expectations" with respect to teamwork. SRNS Response (February 10, 2017) (Exhibit A to Barry Declaration); R. at 242, 243.

In addition, the SRNS contention that it had no motive to retaliate is not persuasive. SRNS contends that Ms. Black's disclosures did not cause any harm, arguing that GAO audits of this nature are not unusual or threatening. R. at 72. At the time of Ms. Black's termination, SRNS had no way of knowing whether Ms. Black's disclosures to GAO would be harmful.⁴ Further, as noted above, the record indicates that SRNS knew of the four employee concerns cited by the OIG, the SRNS management and Deputy General Counsel's actions with respect to those concerns, Ms. Black's objections to those actions, and the GAO's intent to examine the role of the SRNS OGC in the SRNS ECP in its audit. Because Ms. Black alleged improprieties by SRNS senior management, and SRNS had no way of knowing what the resulting GAO report would find, the record does not support the SRNS contention that it had no motive to retaliate.

Finally, SRNS has failed to provide evidence that Ms. Black's termination was similar to that of similarly situated employees. As discussed above, SRNS concedes that it did not follow the processes outlined in its human resources manual when it terminated Ms. Black, and its references to its terminations of three SRNS Vice Presidents are not references to similarly situated employees, *i.e.* employees at Ms. Black's level.⁵ SRNS has provided no examples of its management of performance or discipline issues with respect to managers at Ms. Black's level.

As the foregoing indicates, SRNS has not brought sufficient evidence to demonstrate that: (1) it had a strong business reason for terminating Ms. Black; (2) it did not have a motive for retaliating against her; or (3) it treated her consistently with similarly situated employees. Accordingly, SRNS has failed to provide clear and convincing evidence that it would have terminated Ms. Black in the absence of her protected disclosures.

D. Whether the Department Should Order Relief to Ms. Black

As noted above, under the Act, an agency is required to render a decision on whether relief is appropriate and, if so, the form it should take. The Act identifies the following three categories of relief: (1) ordering the contractor to take affirmative action to abate the reprisal, (2) ordering the contractor to reinstate the complainant to the position held prior to the reprisal with compensatory damages, to include back pay, employment benefits, and other terms and conditions of employment that would apply had the reprisal not been effectuated, and/or (3) ordering the

³ Indeed, Ms. Bilson, a Vice President, stated that Ms. Black was a lower level manager than the other managers that reported to her.

⁴ The GAO Report was not published until June 2016, over one year after Ms. Black was terminated.

⁵ According to SRNS, the record indicates that Ms. Johnson informed Ms. Black that the interim nature of her position did not give her the status of a Vice President. R. at 67.

contractor to pay the complainant an amount equal to the total of all costs and expenses, to include attorneys' fees, that were reasonably incurred by the complainant in pursuing the complaint. 41 U.S.C. § 4712(c).

Ms. Black has submitted a statement of her requested relief. Black Requested Remedies (February 3, 2017). Ms. Black requests affirmative action, compensatory damages, and costs and expenses. *Id.* at 2-3. SRNS objects to the grant of any relief, but provides alternative calculations for some relief. SRNS Response to Remedies (February 10, 2017). We have determined that relief is appropriate, but not to the extent requested by Ms. Black. As explained below, the relief granted consists of reinstatement, back pay and lost benefits, compensatory damages, and costs and expenses in bringing the Complaint.

1. Affirmative Action to Abate the Reprisal

The Act provides for the grant of "affirmative action to abate the reprisal." 41 U.S.C. § 4712(c)(1)(A). The Act does expressly identify specific types of "affirmative action" contemplated by this section.

Ms. Black contends that SRNS is in violation of the whistleblower protection requirement contained in its contract with DOE by engaging in retaliation against her. Black Requested Remedies (February 3, 2017) at 5. She asserts that this violation is grounds for terminating the contract and/or withholding or lowering fee awards, and she requests that we do so. *Id.* In the alternative, Ms. Black asks that we modify the contract "to require that SRNS develop a corrective action program." *Id.* Further, Ms. Black requests that we identify and penalize each of the SRNS employees who engaged in retaliation against her. *Id.* She suggests that the penalization come in the form of a written reprimand, denial of bonuses or raises, poor performance evaluations, or termination. *Id.* Ms. Black also requests that we order SRNS to post and distribute copies of the OIG report and this order to the SRNS workforce. *Id.* at 6. Finally, Ms. Black requests that we prohibit private settlements, including gag orders and "no admission wrongdoing" clauses in this or any other case. *Id.* SRNS objects to the foregoing requests for relief on various grounds, as discussed below. SRNS Response to Remedies (February 10, 2017) at 2-3.

Many of Ms. Black's requests concern DOE and SRNS rights under the contract, which are outside the scope of this proceeding. Accordingly, we decline to consider further Ms. Black's request that DOE terminate the contract, reduce the incentive fee, direct contractor actions with respect to contractor personnel, or issue orders related to settlements.

We do observe that Ms. Black's disclosures relate to the ECP Order, particularly whether an ECP manager can be required to change an investigatory finding or divulge the confidentiality of a concerned individuals without good cause. We also observe that Ms. Black's termination may have had a negative impact on employees' perceptions of their ability to freely raise concerns. Although SRNS states that Ms. Black's termination was followed by an increase in the number of concerns being filed with the SRNS ECP, the GAO Report cites information indicating that Ms. Black's termination did have an adverse impact on employees' perceptions of their ability to raise concerns. GAO Report at 47. The GAO Report indicates that, after Ms. Black's termination, the DOE SRS ECP Manager noted an increase in the number of SRNS employees filing concerns with the DOE SRS ECP and prepared a report that cited the following statements from SRNS employees:

We were told that if you talk to DOE, you will not be considered part of the team.

They fired the [contractor] ECP Manager: what do you think they will do to me?

They are eventually going to terminate anyone who files a concern with DOE. If they knew that I was talking to DOE, I would get fired.

I would like to remain anonymous please due to the possibility of reprisal by senior management.

Employees are very afraid to raise safety issues at the meetings, because they will be terminated or embarrassed.

General Counsel dictates what the contractor ECP does. Nothing will be done without their approval.

Id. Although the GAO Report did not specifically refer to Ms. Black and SRNS, the Report refers to the termination of a contractor ECP manager, allegedly for speaking with GAO. *Id.*

Based on the foregoing, we have determined that it is appropriate to provide a copy of this Order to the Office of Environmental Management and the Headquarters Director of the Employee Concerns Program for their consideration of whether any specific actions concerning the SRNS ECP or the climate at SRS are appropriate.

2. Reinstatement and Compensatory Damages

Under the Act, an agency can order reinstatement and compensatory damages (including back pay, employment benefits, and other terms and conditions of employment that would apply if the action had not been taken). 41 U.S.C. § 4712(c). Ms. Black does not seek reinstatement, instead arguing that she is entitled to "front pay." Black Requested Remedies (February 3, 2017) at 11-12. Additionally, Ms. Black seeks back pay, lost benefits, damages related to her retirement, medical costs attributable to the stress related to her termination, and damages for mental or emotional stress and harm to her personal and professional reputation. *Id.* at 7-10. In response, SRNS denies that the Act provides for some of the requested relief, and it challenges Ms. Black's calculations. SRNS Response to Remedies (February 10, 2017).

As explained below, we have determined that SRNS shall reinstate Ms. Black and provide back pay, employment benefits, and other terms and conditions of employment. Additionally, we order compensatory damages for emotional distress.

a. Reinstatement

Ms. Black argues that reinstatement is an inappropriate remedy in this case. Black Requested Remedies (February 3, 2017) at 11-12. She states that she would be working for an individual who does not support the ECP, that SRNS statements to justify her termination were "malicious and false" and preclude trust, and that reinstatement would be harmful to her mental and emotional health. *Id.* at 11. Instead, as noted above, she seeks "front pay."

As a general matter, reinstatement has the benefit of returning an employee to the position the employee would have been in had the retaliation not occurred, and reinstatement is a visible sign to the workforce that retaliation will be redressed. Moreover, we are not persuaded that reinstatement is inappropriate here. As discussed above, we are providing a copy of the Order to the Office of Environmental Management and the Headquarters Director of the Employee Concerns Program for their review and determination whether action is necessary with respect to the SNRS ECP.⁶ Reinstatement has other advantages. It obviates the need for front pay, and it addresses Ms. Black's dissatisfaction with the terms of her retirement annuity.⁷ Given the foregoing, we cannot conclude that being reinstated would have a negative impact on Ms. Black's mental or emotional well-being, and therefore order that she be reinstated in the same or comparable position.

b. Compensatory Damages

i. Back Pay and Lost Benefits

Ms. Black claims back pay and lost benefits. Black Requested Remedies (February 3, 2017) at 7. SRNS argues that total back pay and benefits should be reduced by the annuity and benefits that Ms. Black received, and by an amount she allegedly should have been able to earn as an ECP consultant had she sought work and mitigated her damages. SRNS Response to Remedies (February 10, 2017) at 6, (Expert Report at 13), (Expert Report, Schedule 3).

The Act is silent on how back pay should be calculated. OHA, however, does have precedent on the calculation of back pay in whistleblower proceedings, which are similar in that they involve complaints by DOE contractor employees against DOE contractors, 10 C.F.R. Part 708. *See, e.g., Denise Hunter*, Case Nos. WBH-12-0004, WBX-12-0004 (2013). Accordingly, we utilize this precedent when considering the issues raised with respect to relief.

The record does not reflect any serious dispute concerning Ms. Black's monthly income and pension benefit. As for lost benefits, Ms. Black derives a number by applying a percentage to her income, but does not explain why this is an accurate amount as opposed to a rough calculation. SRNS derives a number based on a yearly actual calculation of lost benefits and, therefore, we will utilize it.

The significant dispute involves the SRNS contention that Ms. Black's back pay should be reduced by an amount for failure to mitigate damages, *i.e.*, for amounts she allegedly should have been able to earn as an ECP consultant following her termination. In our Part 708 cases, which also involve whistleblower complaints against DOE contractors, we have never applied an offset for failure to mitigate damages. Given the hypothetical nature of such an offset, we question its appropriateness. In any event, SRNS has not justified such an offset in this case. SRNS has not adequately justified its position that a certain amount of consulting work was available; moreover, given the public

⁶ Indeed, if SRNS management had used its established human resources processes for addressing its alleged concerns about Ms. Black's management of the ECP, that process might have allowed a satisfactory resolution of those concerns, avoiding the alleged need to terminate her employment.

⁷ Ms. Black maintains that, as a result of the circumstances of her termination, she was financially unable to elect an annuity with a survivor benefit. Black Requested Remedies (February 3, 2017) at 7.

nature of Ms. Black's termination, SRNS has not addressed Ms. Black's ability to obtain such work, either at the SRS or elsewhere.

Finally, neither party provided an interest calculation. Black Requested Remedies (February 3, 2017) (Att. 1 at 9); SRNS Response to Remedies (February 10, 2017) (Expert Report, Schedule 3). Accordingly, we utilize the methodology in our Part 708 cases, which is based on the methodology used to calculate back pay for federal employees. In making the calculation, we used the net back pay and benefits data provided by SRNS, and \$ [REDACTED] as the offset for Ms. Black's pension. See SRNS Response to Remedies (February 10, 2017) (Expert Report, Schedule 3, n.6. & Schedule 4); Black Requested Remedies (February 3, 2017) (Att. 1 at 12, n. 17). Based on the foregoing, we determine that Ms. Black should be awarded back pay and lost benefits through April 1, 2017, in the amount of \$ [REDACTED]. The supporting calculation and explanatory notes are set forth in the Appendix to this Order.

ii. Emotional Distress

In support of her request for \$250,000 in compensatory damages for emotional distress, Ms. Black cites to *Hobby v. Georgia Power Company*, 2001 WL 168898. Nonetheless, Ms. Black provides no analysis explaining how this case is dispositive or how the award of damages is justified. Black Requested Remedies (February 3, 2017) at 10.

In order to recover compensatory damages for mental and emotional distress, Ms. Black must demonstrate that her wrongful termination caused that distress. *Blackburn v. Martin*, 982 F.2d 125, 131 (4th Cir. 1992). The award "may be supported by the circumstances of the case and testimony about physical or mental consequences of retaliatory action." *Lederhaus v. Paschen*, 1992 WL 752761 (DOL Off. Adm. App.). Ms. Black "must prove the existence and magnitude of subjective injuries with competent evidence." *Id.*

As evidence of her emotional distress, Ms. Black provides letters from her counselor and her internist explaining the negative impact that the retaliatory termination has had on her emotional and mental health. Black Requested Remedies (February 3, 2017) (Atts. 5, 7). [REDACTED]

[REDACTED] However, Ms. Black additionally describes how she feels shame, worthlessness, and embarrassment as a result of her retaliatory termination. Black Requested Remedies (February 3, 2017) at 8-9. She describes anxiety related to financial strain as a result of having to take an early retirement. *Id.* at 10. We determine that this financial anxiety resulting from the retaliatory termination justifies an award of \$ [REDACTED] without interest. See *Creekmore v. ABB Power Systems Energy Services, Inc.*, 1996 WL 171403 (DOL Off. Adm. App.) (determining that an award of \$40,000 in compensatory damages for emotional distress was appropriate where the individual had a potential preexisting condition contributing to negative post-termination health problems and where the individual suffered "panic" due to negative financial implications of the wrongful termination). [REDACTED]

3. Costs and Expenses

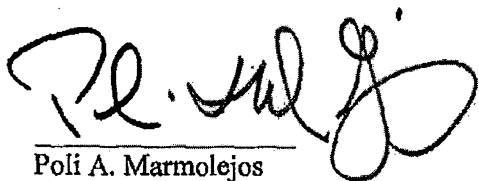
Finally, Ms. Black requests costs and expenses of pursuing the Complaint. Black Requested Remedies (February 3, 2017). Ms. Black requests: (1) \$ [REDACTED] for out-of-pocket expenses, (2) \$ [REDACTED] for her economic consultant's fee, (3) \$ [REDACTED] in mediation costs, and (4) \$ [REDACTED] in legal fees and expenses. *Id.* at 13. These amounts total \$ [REDACTED]. While SRNS generally contends that Ms. Black is not entitled to the relief she seeks, including legal fees and costs, it does not present an argument disputing Ms. Black's list of costs and expenses. Instead, it indicates in a footnote that it cannot determine whether a challenge is appropriate based on the limited documentation presented by Ms. Black. SRNS Response to Remedies (February 10, 2017) at 9, n.6.

Because Ms. Black has prevailed in this case, it is appropriate to award costs and expenses in pursuing the Complaint. *See* 41 U.S.C. § 4712(c)(1)(C). We note that the \$ [REDACTED] amount claimed for out-of-pocket expenses is not accompanied by supporting receipts. Accordingly, while we have determined to award such expenses, that award is subject to Ms. Black providing supporting receipts to SRNS by March 15, 2017. In addition, we note that the amount claimed for legal fees and expenses includes the \$ [REDACTED] in mediation costs. Black Requested Remedies (February 3, 2017) (Att. 11). Accordingly, we will not award the separate, duplicate claim for mediation expenses. Finally, we note a miscalculation in the total of the legal fees and expenses invoice. *Id.* Based upon the listed fees and expenses, the total should be \$ [REDACTED]. Therefore, we have determined to award Ms. Black a total of \$ [REDACTED] which consists of \$ [REDACTED] for out of pocket expenses (subject to the requirement that she provide supporting receipts to SRNS by March 15, 2017), \$ [REDACTED] for the economic consultant, and \$ [REDACTED] for legal fees and expenses.

IT IS THEREFORE ORDERED THAT:

- (1) Savannah River Nuclear Solutions (SRNS) shall provide the relief described in this Order in accordance with Paragraphs 2 and 3 below.
- (2) SRNS shall reinstate Ms. Black to the same or comparable position no later than April 1, 2017.
- (3) SRNS shall remit to Ms. Black, no later than April 1, 2017, a total of \$371,775.98, which represents the sum of the following awards:
 - a. \$ [REDACTED] for back pay and lost benefits, with interest, as calculated in the Appendix to this Order;
 - b. \$ [REDACTED] in out-of-pocket expenses, subject to her providing supporting receipts to SRNS no later than March 15, 2017;
 - c. \$ [REDACTED] for the expense of an economic consultant;
 - d. \$ [REDACTED] in compensatory damages for mental and emotional distress; and
 - e. \$ [REDACTED] for legal fees and expenses.
- (4) This is a final Order of the Department of Energy.

Pursuant to the Act, any person adversely affected or aggrieved by this Order may obtain review of this Order's conformance with the Act in the United States Court of Appeals for the Fourth Circuit. 41 U.S.C. § 4712(c)(5). No Petition seeking such review may be filed more than 60 days after issuance of this Order. *Id.*



Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: FEB 23 2017