



OFFICE OF INSPECTOR GENERAL

U.S. Department of Energy

WHISTLEBLOWER RETALIATION INVESTIGATION

DOE-OIG-WB-17-01

January 2017

**RETALIATION COMPLAINT PURSUANT
TO TITLE 41 UNITED STATES CODE
SECTION 4712**

This report, including any attachments and information contained therein, is issued pursuant to Title 41 U.S.C. § 4712. The original and any copies of the report must be appropriately controlled and maintained. Public disclosure is determined by the Freedom of Information Act (Title 5 U.S.C. § 552) and the Privacy Act (Title 5 U.S.C. § 552a).



Department of Energy
Washington, DC 20585

January 24, 2017

MEMORANDUM FOR THE SECRETARY

A handwritten signature in cursive script that reads "April G. Stephenson".

FROM: April G. Stephenson
Acting Inspector General

SUBJECT: INFORMATION: Retaliation Complaint pursuant to Title 41
United States Code Section 4712

EXECUTIVE SUMMARY

This report involves a complaint filed by Sandra H. Black (Ms. Black) under Title 41 United States Code, Section 4712, Pilot Program for the Enhancement of Contractor Protection from Reprisal for Disclosure of Certain Information (Section 4712 or the Pilot Program).¹ Ms. Black asserted that her reporting of possible waste, fraud, abuse, or mismanagement, and possible violations of law, rule, or regulation related to a Federal contract between the Department of Energy (DOE) and her employer, Savannah River Nuclear Solutions, LLC (SRNS), was a contributing factor in the termination of her employment. Ms. Black was the manager of the SRNS Employee Concerns Program until her termination on January 7, 2015.

In order for the complainant to prevail under the Pilot Program, she must establish by a preponderance of evidence that she made a protected disclosure that she reasonably believes is evidence of gross mismanagement, a gross waste of funds, an abuse of authority, a substantial and specific danger, or a violation of law, rule or regulation. The complainant must also demonstrate that the employer was aware of the protected disclosure and that the disclosure was a contributing factor in the personnel action which was taken. The employee may demonstrate that the disclosure was a contributing factor in the personnel action through circumstantial evidence, such as the proximity in time between the protected disclosure and the personnel action. Assuming that the complainant meets this burden, the burden of proof shifts to the employer which must demonstrate, by clear and convincing evidence, that it would have taken the same personnel action absent the protected disclosure.

We find that Ms. Black has established by a preponderance of the evidence that she made a protected disclosure to representatives of the Government Accountability Office (GAO) on October 27, 2014, and that SRNS management was aware of this disclosure when it terminated her employment on January 7, 2015. Further, we find that, because of the close proximity in time between her disclosure and the termination of her employment, through documentary

¹ On December 14, 2016, the Pilot Program was made permanent by the enactment of Public Law 114-261, "Enhancement of Whistleblower Protection for Contractor and Grantee Employees." For convenience, this report refers to the statute as the Pilot Program."

evidence of her satisfactory performance, and through testimonial evidence, Ms. Black has met her burden of proving that her protected disclosure was a contributing factor in her termination.

We find that SRNS failed to meet its burden of establishing, by clear and convincing evidence, that it would have terminated Ms. Black's employment even if she had not made a protected disclosure. Although it is uncontested that SRNS was aware of and, in fact, directed Ms. Black's meeting with GAO, SRNS does not concede that Ms. Black's discussion with GAO was a disclosure within the meaning of the Pilot Program. We note that, while invited to provide whatever evidence it chose, SRNS provided no written documentary evidence to support its oral statements. The evidence it provided in its defense was the oral testimony of a number of current and former SRNS officials. In our interviews, a number of SRNS managers criticized aspects of Ms. Black's job performance during the period 2013-2014. However, we reiterate that SRNS produced no written record that Ms. Black ever received any oral or written discipline, negative feedback on her performance, or conduct until her employment was terminated on January 7, 2015. It is telling that, in fact, Ms. Black received an award recognizing her for performance that was significant and beyond her normal performance level in September 2014, less than two months before she met with GAO, and four months before she was terminated.

With no records documenting that Ms. Black's performance was in any way unacceptable, and no record of any instances of unacceptable conduct, we find that SRNS failed to meet its burden of proving that Ms. Black's termination was for the "unsatisfactory job performance" cited in the termination notice. Consequently, SRNS management failed to meet its burden of proving by clear and convincing evidence that it would have terminated Ms. Black absent her protected disclosure.

Procedural Requirements of the Pilot Program

The provisions of the Pilot Program indicate that, within 30 days after receiving this report, the Secretary shall determine whether there is sufficient basis to conclude that the contractor subjected the complainant to a prohibited reprisal and shall either issue an order denying relief or shall take one or more of the following actions: (1) order the contractor to take affirmative action to abate the reprisal; (2) order the contractor or grantee to reinstate the person to the position that the person held before the reprisal, together with compensatory damages (including back pay), employment benefits, and other terms and conditions of employment that would apply to the person in that position if the reprisal had not been taken; or (3) order the contractor pay the complainant for all costs and expenses, including attorneys' fees, that were reasonably incurred by the complainant in connection with bringing the complaint, as determined by the Secretary.

RETALIATION COMPLAINT OF SANDRA H. BLACK v. SAVANNAH RIVER NUCLEAR SOLUTIONS, LLC

I. SUMMARY OF COMPLAINT

This report involves a complaint filed by Sandra H. Black (Ms. Black) under Title 41 United States Code, Section 4712, “Pilot Program for the Enhancement of Contractor Protection from Reprisal for Disclosure of Certain Information” (Section 4712 or the Pilot Program). Ms. Black asserted that her reporting of possible waste, fraud, abuse, or mismanagement, and possible violations of law, rule, or regulation related to a Federal contract between the Department of Energy (DOE) and Savannah River Nuclear Solutions, LLC (SRNS), was a contributing factor in the termination of her employment. Ms. Black was the manager of the SRNS Employee Concerns Program until her termination on January 7, 2015.

II. JURISDICTION

The Pilot Program provides whistleblower retaliation protection for an employee of a DOE contractor who discloses information related to a Federal contract or grant. Section 4712 states, in pertinent part:

(a) Prohibition of Reprisals.

(1) In general.-An employee of a contractor, subcontractor, or grantee may not be discharged, demoted, or otherwise discriminated against as a reprisal for disclosing to a person or body described in paragraph (2) information that the employee reasonably believes is evidence of gross mismanagement of a Federal contract or grant, a gross waste of Federal funds, an abuse of authority relating to a Federal contract or grant, a substantial and specific danger to public health or safety, or a violation of law, rule, or regulation related to a Federal contract (including the competition for or negotiation of a contract) or grant.

(2) Persons and bodies covered.-The persons and bodies described in this paragraph are the persons and bodies as follows:

- (A) A Member of Congress or a representative of a committee of Congress.
- (B) An Inspector General.
- (C) The Government Accountability Office.
- (D) A Federal employee responsible for contract or grant oversight or management at the relevant agency.
- (E) An authorized official of the Department of Justice or other law enforcement agency.
- (F) A court or grand jury.
- (G) A management official or other employee of the contractor, subcontractor, or grantee who has the responsibility to investigate, discover, or address misconduct.

(3) Rules of construction.-For the purposes of paragraph (1)-

- (A) an employee who initiates or provides evidence of contractor, subcontractor, or grantee misconduct in any judicial or administrative proceeding relating to waste, fraud, or abuse on a Federal contract or grant shall be deemed to have made a disclosure covered by such paragraph; and

(B) a reprisal described in paragraph (1) is prohibited even if it is undertaken at the request of an executive branch official, unless the request takes the form of a non-discretionary directive and is within the authority of the executive branch official making the request.

(b) Investigation of Complaints.-

(1) Submission of complaint. - A person who believes that the person has been subjected to a reprisal prohibited by subsection (a) may submit a complaint to the Inspector General of the executive agency involved. Unless the Inspector General determines that the complaint is frivolous, fails to allege a violation of the prohibition in subsection (a), or has previously been addressed in another Federal or State judicial or administrative proceeding initiated by the complainant, the Inspector General shall investigate the complaint and, upon completion of such investigation, submit a report of the findings of the investigation to the person, the contractor or grantee concerned, and the head of the agency.

(2) Inspector General action.-

(A) Determination or submission of report on findings.-Except as provided under subparagraph (B), the Inspector General shall make a determination that a complaint is frivolous, fails to allege a violation of the prohibition in subsection (a), or has previously been addressed in another Federal or State judicial or administrative proceeding initiated by the complainant or submit a report under paragraph (1) within 180 days after receiving the complaint.

(B) Extension of time. - If the Inspector General is unable to complete an investigation in time to submit a report within the 180-day period specified in subparagraph (A) and the person submitting the complaint agrees to an extension of time, the Inspector General shall submit a report under paragraph (1) within such additional period of time, up to 180 days, as shall be agreed upon between the Inspector General and the person submitting the complaint.

The Pilot Program also directs that the burdens of proof specified in Title 5, U.S.C. Section 1221 shall be followed in any investigation conducted by the OIG. That section states that, in any case involving an alleged improper personnel practice, corrective action shall be considered appropriate if the employee has demonstrated that a disclosure or protected activity was a contributing factor in the personnel action that was taken. The employee may demonstrate that the disclosure or protected activity was a contributing factor in the personnel action through circumstantial evidence, such as evidence that the official taking the personnel action knew of the disclosure or protected activity; and the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure or protected activity was a contributing factor in the personnel action. The section also states that corrective action may not be ordered if, after a finding that a protected disclosure was a contributing factor, the employer demonstrates by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure.

The Pilot Program requires that, within 30 days after receiving this report, the Secretary shall determine whether there is sufficient basis to conclude that the contractor subjected the complainant to a prohibited reprisal and shall either issue an order denying relief or shall take one or more of the following actions: (1) order the contractor to take affirmative action to abate the reprisal; (2) order the contractor or grantee to reinstate the person to the position that the

person held before the reprisal, together with compensatory damages (including back pay), employment benefits, and other terms and conditions of employment that would apply to the person in that position if the reprisal had not been taken; or (3) order the contractor pay the complainant for all costs and expenses, including attorneys' fees, that were reasonably incurred by the complainant in connection with bringing the complaint, as determined by the Secretary.

The contract between the Department of Energy and Savannah River Nuclear Solutions contains a clause incorporating the provisions of the Pilot Program.

III. BACKGROUND INFORMATION

The Savannah River National Laboratory (SRNL) and the Savannah River Site (SRS) are owned by the Department of Energy (DOE). Since August 2008, the management and operating (M&O) contract for SRS and SRNL has been held by Savannah River Nuclear Solutions (SRNS), a joint venture of Fluor Corporation, Newport News Nuclear, and Honeywell International, Inc.

The following is a timeline of relevant events that is uncontested by the parties.

In April 1980, Ms. Black was hired as a secretary by DuPont, then the M&O contractor operating SRS on behalf of the Department. Soon thereafter, she was promoted to the position of laboratory technician, a position she held until 1985. Between 1985 and 1994 she was employed, by successive SRS contractors, as a laboratory supervisor, a senior engineer, an industrial safety engineer, and manager of industrial safety engineers.

In October 1994, Ms. Black became the senior investigator of the Employee Concerns Program (ECP) for Westinghouse Savannah River Company, which was then the M&O contractor operating SRS. The ECP investigated and resolved employee concerns filed by contractor employees. In November 2009, Ms. Black was promoted by SRNS, then the M&O Contractor, to Manager of the ECP. She continued in that role until the termination of her employment in January 2015.

Beginning in 2009, Ms. Black, in her capacity as the SRNS ECP Manager, reported directly to a SRNS Vice President. In 2013, she began reporting to Ellen Elizabeth “Beth” Bilson, the SRNS Vice President for Corporate Services who, in turn, reported to the SRNS President. Ms. Bilson was also responsible for Engineering, Quality Assurance, Internal Audit, Governmental Affairs, and Public Relations. That reporting chain continued until December 2014, when Ms. Black began reporting directly to Carol Johnson, who had become the SRNS President in May 2014.

During Ms. Black’s career with SRNS, she received, at the very least, ratings of “meets and frequently exceeds standards” performance appraisals from her managers. The final documented appraisal of her performance by Ms. Bilson, dated January 23, 2014, had an overall rating of “Meets and Frequently Exceeds” the stated goals. The narrative portion of the appraisal included the following statements:

“[Ms. Black] met a vast number of challenges within the performance period facing reorganizations, critically low staffing levels, training staff, furloughs, and

a multitude of very difficult ECP cases. Her performance this year as she overcame these challenges allowed for the success of the company in ways that would not be possible without her.”

...

“Evaluation of the [ECP] have demonstrated a robust, compliant program which is effective in receiving and evaluating concerns. The ECP programs work with many employees to find the right methods to address their issue.”

...

“[Ms. Black] leads a robust compliant program and is known by the client as a trusted agent working at the top of the DOE ECP programs. In addition, she has identified specific actions to improve the program and the performance of the company in the area.”

...

“Customer interactions demonstrate a trust and confidence in [Ms. Black] and confidence in the ECP program.”

...

“[Ms. Black’s] integrity is demonstrated in her work every day and is without question”

...

“[Ms. Black] communicates well to all levels of the organization about issues that are difficult to discuss and for which solutions are not readily apparent. Her negotiation and mediation skills are critical on a regular basis to allow success of the program.”

...

“[Ms. Black] is often faced with a decision on how to proceed to deal with ECP issues. These decisions affect the individuals who are frequently in crisis, the organizations that they deal with, and the company. She has demonstrated an effective ability to make these decisions to the satisfaction of all players.”

Based on that performance appraisal, Ms. Black was awarded a merit salary increase on March 26, 2014.

In May 2014, Ms. Johnson, a retired Fluor executive, was hired as the President of SRNS.

In early September 2014, the DOE Federal Employee Concerns Manager received notice from the Government Accountability Office (GAO) that it was planning to conduct a site visit to the Savannah River Site regarding Whistleblower Protection issues throughout the DOE complex. As part of that review, the GAO analysts requested an interview with SRNS’ ECP management. This information was conveyed to Ms. Bilson, who, in turn, reported it to Ms. Johnson and senior management. Ms. Bilson appointed Ms. Black as one of the SRNS points of contact for the GAO review.

On September 8, 2014, Ms. Black received a Key Contributor Award of \$2,500 from Ms. Bilson. The letter informing Ms. Black of the award stated that it was to “recognize individuals who made contributions to the Site that were significant and beyond their normal performance level.” The letter also stated:

“[Ms. Black] has managed the Employee Concerns Program and provided leadership to her team in handling some difficult issues that have surfaced in FY14. She and her team are frequently able to mitigate issues early on and bring them to a close without further impacts to the company and our employees in the areas of environment, safety, health, safeguards and security, quality assurance, waste, fraud, abuse, management practices, reprisal, and others. They continue to encourage open communication between employees and management to resolve conflicts through collaboration and mediation.”

On October 18, 2014, Ms. Black and her assistant participated in a teleconference with GAO to address preliminary administrative matters relating to the review.

On October 23, 2014, GAO representatives sent an email to the DOE ECP Manager requesting information regarding “productive” and “counterproductive” intervention by the SRNS Office of General Counsel (OGC) into the SRNS ECP process.

On October 27, 2014, Ms. Black and her assistant met with GAO and provided information about the operations of the SRNS ECP, including information about events that she asserts were instances of inappropriate interventions in the ECP process by SNRS’ OGC and other senior managers. Immediately following this meeting, Ms. Black informed Ms. Bilson of the information that she provided to GAO.

On November 17, 2014, Ms. Bilson told Ms. Black that she was being involuntarily transferred from her position as ECP Manager, and was being moved to a newly-created Safety Conscious Work Environment position, reporting to the Senior Vice President for Environmental Stewardship, Safety and Health (ESS&H) with no decrease in pay. Following her meeting with Ms. Bilson, Ms. Black sent an email to Ms. Johnson requesting a meeting to discuss the transfer.

On November 18, 2014, Ms. Black met with Ms. Johnson to discuss what Ms. Johnson described as a directed transfer. Following that meeting, on November 19, 2014, Ms. Johnson sent an email to Ms. Black indicating that she was “considering some options” based on the previous day’s discussion and would contact Ms. Black after Thanksgiving.

During the first week of December 2014, Ms. Johnson informed Ms. Black that the proposed transfer would not take effect and that Ms. Black would continue in her role as ECP Manager, reporting directly to Ms. Johnson. During the same week, Ms. Black met for the first time with Ms. Johnson as her direct supervisor to discuss the status of the ECP caseload.

On December 8, 2014, at the direction of Ms. Johnson, the SRNS Human Resources Office completed the paperwork effectuating the termination of Ms. Black’s employment. Ms. Johnson directed that the termination was not to be acted on until after Christmas.

On December 15, 2014, Ms. Black met again with Ms. Johnson to discuss the status of the ECP caseload.

In early January 2015, Ms. Black received an email from the administrative assistant to Ms. Johnson requesting that she attend a meeting with Ms. Johnson on January 7, 2015.

On January 7, 2015, Ms. Black was informed by the SRNS Senior Vice President for Workforce Services and Talent Management that her employment was being terminated. The notice of termination stated that the action was being taken for “unsatisfactory job performance.” Ms. Black was also informed that she had lost the trust and confidence of SRNS management in her ability to manage the ECP.

IV. RETALIATION COMPLAINT

A. Ms. Black’s Assertion that She Made a Protected Disclosure

Ms. Black asserts that, during her meeting with GAO on October 27, 2014, she disclosed information alleging abuse of authority by SRNS management. She also asserts that she provided substantial documentary evidence on specific employee concerns supporting these assertions.

Ms. Black stated that, during the year leading up to the termination of her employment, she had a number of professional disagreements with other members of SRNS senior management. She also asserted that these disagreements arose out of a concerted effort by individual managers to interfere in the ECP. Specifically, Ms. Black asserted that individual managers had either attempted to take individual employee concerns outside the jurisdiction of the ECP, compromised the confidentiality of SRNS employees who had filed concerns, or inappropriately pressured Ms. Black to “close out” employee concerns before corrective actions had been completed. Ms. Black asserted that the DOE order regulating the SRNS ECP required that employee concerns remain open until all corrective actions were completed, and that the attempts of SRNS management to close the cases prematurely were violations of the order.

As noted in the chronology above, on October 27, 2014, Ms. Black and her assistant were interviewed by two representatives of GAO. Ms. Black told us that, in preparation for the interview, she gathered documentation covering four years of SRNS ECP cases, as GAO had requested. She further noted that she informed GAO that, in a number of cases, the SRNS management, including the SRNS Deputy General Counsel, had attempted to direct her to take what she believed were inappropriate actions related to the employee concerns and that she had refused to do so.

Ms. Black stated that she provided information and documentation to GAO on four specific employee concerns as examples of interference by SRNS management in ECP matters in the six months before she was terminated. Each of the examples cited either occurred or were ongoing during the period between May and October 2014.

Ms. Black cited one instance in which she said that the SRNS Deputy General Counsel attempted to direct both her and her assistant to alter the findings of an investigation of an employee concern filed by an SRNS employee who had alleged he had been retaliated against by SRNS management for disclosing allegations of incompetence by a subcontractor responsible for servicing gloveboxes at the Savannah River Site. Ms. Black indicated that the ECP substantiated the allegations raised by the employee. Ms. Black asserted that she contacted Ms. Bilson and the SRNS Senior Vice President/SRNL Deputy Director in an attempt to prevent what she believed to be a retaliatory transfer of the employee who had filed the concern. She stated that, in

response, she received a letter from the Senior Vice President/SRNL Deputy Director stating that the SRNS Office of General Counsel (OGC) had determined that the employee concern had not been substantiated. The fact that the OGC had intervened in a matter that was within Ms. Black's jurisdiction caused her concern.

Ms. Black asserted that the Deputy General Counsel subsequently contacted her and insisted that she order her assistant to change the investigative findings. Ms. Black said that, when she refused to do so, the Deputy General Counsel contacted Ms. Black's assistant and directed her to change the findings. Ms. Black indicated that her assistant also refused to change the findings. Ms. Black said that she then contacted her supervisor, Ms. Bilson, and informed her that she was going to report the repeated attempts by the Deputy General Counsel to influence the findings to the Department of Energy's (DOE) ECP Office as a violation in DOE's Noncompliance Tracking System, a database for the contractor to voluntarily report instances of its noncompliance with nuclear safety, worker safety, and health regulatory requirements. Ms. Black stated that Ms. Bilson was supportive of making that report and expressed her willingness to add her name to it. Ms. Black also asserted, however, that SRNS management was unwilling to investigate what she considered to be improper actions by the Deputy General Counsel.

Ms. Black cited a second employee concern that involved nuclear safety employees who alleged that they would not report health and safety issues because of fear that they would be retaliated against. She asserted that the ECP substantiated the complaint but that two SRNS vice presidents refused to take any corrective action, a position that was supported by the SRNS Deputy General Counsel. Ms. Black also asserted that one of the vice presidents wrote a rebuttal to the ECP report in which he identified the employees who said they feared retaliation by management for raising health and safety issues. Ms. Black asserted that soon after the arrival of the new SRN President, Ms. Johnson, in May 2014, she attended a meeting at which Ms. Johnson inquired about the delay in closing out this concern. Ms. Black asserted that she informed Ms. Johnson that the delay was caused by the inaction on the part of SRNS management.

Ms. Black cited a third instance in which she believed SRNS management attempted to interfere in the processing of an employee concern. Ms. Black said a concern had been filed alleging that SRNS' Chemical Reuse program resulted in the improper storage of excess chemicals, in violation of Federal environmental regulations. Ms. Black asserted that she reported the results of the ECP's investigation of this concern to Ms. Bilson, who also had line responsibility for the chemical program, as well as to Ms. Johnson, the Executive Vice President and Chief Operating Officer, and the Senior Vice President for Support Services. Ms. Black asserted that, during the meeting at which she briefed management about the results of this Concern, the Executive Vice President expressed more interest in knowing who had filed the concern rather than in how it might be resolved, and actually referred to the individual who filed the concern as a "rat."

Ms. Black told GAO about a fourth instance in which she provided information to SRNS management regarding an employee concern. In this case, an employee concern had been filed alleging that a class of SRNS employees was not being paid for their lunch period. She also indicated that the individuals who had filed the concern with her office had requested confidentiality. She asserted that the ECP substantiated the allegation and determined that the failure to pay employees for their lunch period was a violation of the Fair Labor Standards Act.

The ECP then referred the matter to the SRNS Human Resources office for resolution. Ms. Black asserted that, in response, the SRNS Deputy General Counsel attempted to pressure her into closing the concern and referring the matter to the SRNS OGC to resolve. Ms. Black indicated that she told the Deputy General Counsel that the ECP was required to retain jurisdiction over employee concerns until they were completely resolved because it was obligated by its own procedures to provide a written response to the individuals who had filed the concern. Ms. Black also noted that she provided information regarding this matter to Department of Energy's SRS ECP office.

B. Ms. Black's Allegation that She was Reprimed Against for Whistleblowing

Ms. Black asserted that, in response to her asserted disclosure to GAO of what she alleges are abuses of authority by SRNS management regarding the ECP, SRNS took retaliatory actions against her that led to the termination of her employment on January 7, 2015.

On November 17, 2014, Ms. Bilson orally informed Ms. Black that she was being involuntarily transferred from her position as ECP Manager, and that she was being transferred to a newly-created position dealing with Safety Conscious Work Environment issues. Ms. Black asserted that Ms. Bilson informed her that this was a professional, non-managerial position that was equivalent to her current job. Ms. Black said that Ms. Bilson also indicated that this proposed move was a lateral transfer with no decrease in pay. She said that Ms. Bilson stated that, in the new position, she would be reporting to the SRNS Senior Vice President for ESS&H.

Ms. Black told us that she asked Ms. Bilson if there was a written job description for the new position, whether a review of the grade level and a pay range had been conducted, and whether the position had been advertised. She said that the answer to each of these questions was "no." Ms. Black asserted that she also asked Ms. Bilson why she was being removed from her position as the ECP Manager and that Ms. Bilson's only explanation was that she had been in her position "too long." Ms. Black said that she told Ms. Bilson that she believed that the proposed transfer constituted retaliation for the manner in which she had managed several recent employee concerns, and because of her participation in the GAO review. Ms. Black asserted that she also asked Ms. Bilson whether Ms. Black's assistant² would become the new ECP Manager. Ms. Black said that Ms. Bilson told her that SRNS management intended to advertise the position, but that her assistant could apply for it. She asserted that Ms. Bilson indicated that Ms. Johnson had already approved her removal as ECP Manager. Ms. Black asserted that she requested to discuss the proposed transfer with Ms. Johnson.

Ms. Black said that, immediately after her discussion with Ms. Bilson, she sent an email to Ms. Johnson stating:

“[Ms. Bilson] informed me this morning that she was removing me from my ECP Manager's position. [She] stated that I would be relocated to a professional assignment (removed from management) and this would be a lateral move.

² Ms. Black's assistant had previously been identified as her successor in the SRNS succession plan. The assistant was also interviewed by the GAO representatives, along with Ms. Black.

Being removed from my current L-2 Manager's job assignment to a professional position with less responsibility, no budget, and no staff, is a punitive measure and retaliation for my recent job activities.

I would like to discuss with you at your earliest convenience.”

In response to this email, Ms. Johnson agreed to a meeting. On November 18, 2014, Ms. Black met with Ms. Johnson and asked why she was being removed from her position as ECP Manager. Ms. Black said that Ms. Johnson indicated that she had been in her job “too long.” Ms. Black asserted that she questioned why the proposed Safety Conscious Work Environment position to which she was being reassigned had no job description and no budget and had not been advertised. She also said that she reminded Ms. Johnson of difficulties she had encountered in several recent ECP cases including the employee concerns raised about a chilled work environment and the chemical reuse programs. Ms. Black said that she also told Ms. Johnson that she had provided information regarding those cases to GAO in her recent interview with that office. Ms. Black said that she informed Ms. Johnson that she believed the company was proposing the transfer in retaliation for her actions regarding these employee concerns and her communications with GAO regarding the SRNS ECP.

Ms. Black said that Ms. Johnson specifically stated that the proposed transfer to the new position was not the result of Ms. Black's poor job performance. She further noted that Ms. Johnson ended the meeting by stating that “ultimately” Ms. Black would have to accept whatever position to which she was assigned.

On November 19, 2014, Ms. Johnson sent an email to Ms. Black that stated:

“I am considering some options based on our discussion yesterday. I am taking some vacation beginning tomorrow and through the week of Thanksgiving but will give you a call.”

Ms. Black asserted that during the first week of December, 2014, Ms. Bilson told her that she would continue in her position as the ECP Manager, but that she would now report directly to Ms. Johnson. Ms. Black told us that was pleased with this arrangement because the ECP would become an independent entity, and she, as the ECP Director, would report directly to Ms. Johnson.

Ms. Black asserted that she had her first meeting with Ms. Johnson as her direct supervisor on December 1, 2014, and that she had a second meeting on December 15, 2014. We note that on December 16th, the day after Ms. Black's second meeting with Ms. Johnson, SRNS management issued an email indicating Ms. Black would report directly to Ms. Johnson.

Ms. Black stated that, in early January 2015, she received an email from the administrative assistant to Ms. Johnson requesting a meeting with Ms. Johnson on January 7, 2015. She said that, when she arrived for the meeting, she was met by the SRNS Senior Vice President for Workforce Services and Talent Management and a representative of the SRNS Human Resources office. She told us that they informed her that her employment was being terminated immediately for “unsatisfactory job performance.” Ms. Black also asserted that the Senior Vice President verbally informed her that SRNS management had “lost confidence in her.”

V. COMPLAINANT'S BURDEN OF PROOF

In order to make a *prima facie* case, a complainant must establish, by a preponderance of the evidence that she made a protected disclosure, that management was aware of the disclosure, and that the personnel action was taken as a result of the protected disclosure. The complainant must prove each of these elements by at least circumstantial evidence. An analysis of each of these evidentiary burdens follows.

The first burden that Ms. Black has to meet is to establish, by a preponderance of the evidence, that she made a protected disclosure. Ms. Black asserted that she disclosed information that she reasonably believed constituted an abuse of authority related to the SRNS contract with DOE when she met with GAO on October 27, 2014.

Ms. Black asserted that, during her interview with GAO, she communicated specific information that SRNS management had attempted to direct the findings and results of specific employee concerns that had been filed with her office. She asserted that she also disclosed to GAO that individual SRNS managers had attempted to intervene in the processing of some employee concerns and had pressured her to close specific concerns before final corrective actions had been completed. She also asserted that she provided information that SRNS managers frequently attempted to contravene the confidentiality policy that she believed was essential to the ECP process, and required by SRNS policy and DOE rules.

We interviewed one of the GAO analysts who participated in the October 27, 2014, interview of Ms. Black and her assistant. The analyst confirmed that Ms. Black raised allegations of misconduct by SRNS management, particularly by individuals within its OGC. The analyst recalled that Ms. Black cited two specific cases in which she asserted that the SRNS OGC attempted to intervene in employee concerns, challenged the facts of the cases, conducted parallel reviews, and attempted to direct Ms. Black and her subordinates not to substantiate the concerns being investigated. The analyst stated that Ms. Black specifically asserted a belief that she was being both “bullied” and “pressured” by SRNS managers in an attempt to reach the outcomes desired by management. The analyst also stated that Ms. Black asserted that members of SRNS management attempted to intervene inappropriately into the ECP’s investigative process. The analyst stated that Ms. Black specifically asserted that these actions by SRNS management were both “unethical” and violations of the company’s ECP procedures. The GAO analyst indicated that she was surprised by how forthcoming and passionate Ms. Black was at the meeting.

There is ample evidence to conclude that Ms. Black communicated to GAO her belief that individual SRNS senior managers were attempting to intervene inappropriately in the ECP process. We conclude that the information Ms. Black conveyed to GAO constituted a disclosure of abuse of authority under of the Pilot Program.

The second burden that Ms. Black has to meet is to establish, by a preponderance of the evidence, that SRNS management was aware that she had made a protected disclosure to the GAO.

SRNS management does not dispute that it knew that Ms. Black met with GAO and Ms. Bilson confirmed that she named Ms. Black as SRNS' point of contact with GAO for the ECP. Ms. Black stated that, prior to her meeting with the GAO representatives, she specifically asked Ms. Bilson whether she should provide information to the GAO about the difficulties she encountered with the SRNS OGC in resolving employee concerns. Ms. Bilson confirmed that she spoke with Ms. Black prior to the meeting and that she told Ms. Black that she should feel free to communicate anything that she wanted to the GAO representatives, including what could be characterized as negative information about SRNS.

In our interview with her, then-SRNS President, Carol Johnson asserted that she did not recall being informed of the GAO review prior to the analysts conducting the on-site visit. She conceded, however, that her subordinate managers, including Ms. Bilson, were aware of it. Ms. Johnson also indicated that she was not aware of who had been interviewed by GAO or on what dates the interviews may have occurred. She stated that she was not even aware that Ms. Black had been interviewed by GAO until her November 18, 2014, meeting with Ms. Black to discuss her proposed transfer to the Safety Conscious Work Environment position. Ms. Johnson also indicated that Ms. Black discussed her interview with the GAO during their meetings in November and December 2014.

Based on the available evidence, we conclude that Ms. Black has established, by a preponderance of the evidence, that SRNS management, including Ms. Bilson and Ms. Johnson, had knowledge of her disclosure of negative information about SRNS to GAO.

The third burden that Ms. Black has to meet is to establish that her protected disclosure was a contributing factor in the decision by SRNS management to terminate her employment. Although our review did not uncover any direct evidence that Ms. Black's disclosure was a contributing factor in the decision to terminate her, there is substantial circumstantial evidence that her disclosure was a contributing factor in the decision to take that action. The very close temporal proximity between Ms. Black's meeting with the GAO representatives on October 27, 2014, and the completion, on December 8, 2014, of the paperwork to terminate Ms. Black's employment is sufficient circumstantial evidence that her disclosure was a contributing factor in that action.

Based on the circumstantial evidence presented, we conclude that Ms. Black has established, by a preponderance of the evidence, that her protected disclosure to GAO was a contributing factor in the decision by SRNS management to terminate her employment.

VI. MANAGEMENT'S BURDEN OF PROOF

Once the complainant has met her burden of proof, the burden shifts to the employer to demonstrate, by clear and convincing evidence, that it would have taken the same personnel action absent the protected disclosure.

It is important to note that SRNS management did not provide any written records to support its position that the termination of Ms. Black's employment was not retaliatory. The evidence that it did provide was the statements that current and former SRNS officials made to us in interviews approximately a year and a half after Ms. Black was terminated.

A. SRNS Management's Version of Events Immediately Prior to Ms. Black's Termination

As noted in the chronology, until a few weeks before Ms. Black was terminated, her immediate supervisor was Beth Bilson. In our interview with Ms. Bilson, she told us that, for several years prior to the events that led to this complaint, she had considered the possibility of moving Ms. Black to a different position within the SRNS organization. Ms. Bilson asserted that she believed that Ms. Black was becoming "burned out" in her position because of a lack of resources, staff, and budget, and the lack of an identified successor as manager. She indicated that, in her opinion, these resource issues led to the ECP being unable to resolve some concerns in a timely fashion. She stated that, although each of these issues improved between 2013 and October 2014, she still believed that Ms. Black would benefit from working in a different position. Ms. Bilson indicated that the difficulty that she encountered was finding an equivalent managerial position that Ms. Black was qualified to fill.

Ms. Bilson said that, during the fall of 2014, SRNS management began discussions about creating a new position in the area of Safety Conscious Work Environment. She indicated that the proposed position would report to the Senior Vice President for ESS&H. Ms. Bilson said that she had several discussions regarding the proposed position with Ms. Johnson, and others, including Ms. Black, before Ms. Johnson approved the creation of the position. She stated that she believed that Ms. Black would be a good fit for the proposed new position because she was already an expert in the subject matter encompassed by it. She said that she also believed that if Ms. Black accepted the position it would allow her to represent SRNS on a national level.

Ms. Bilson confirmed that, Ms. Black was correct when she told us that, at the time the proposed position was offered to her in November 2014, there was no job description for it. Ms. Bilson stated to us that this was the case because she believed that Ms. Black was in the best position to write the job description herself.

In our interview with Carol Johnson, then-President of SRNS, she told us that, beginning in October or November 2014, she began to consider transferring Ms. Black to a different position. She said that this decision was based on her personal observations of Ms. Black's work performance and input she received from other SRNS managers. Ms. Johnson related that Ms. Bilson had expressed her belief that Ms. Black had been in the ECP position "too long." Ms. Johnson also said that Ms. Bilson informed her that she had also expressed this belief to Ms. Black on more than one occasion. Ms. Johnson asserted that this information prompted her to consider moving Ms. Black to a different position.

Ms. Johnson indicated that, during October 2014, the SRNS Senior Vice President for ESS&H, suggested creating a Safety Conscious Work Environment position, and that Ms. Black might be the correct person for the position. Ms. Johnson stated that this was a "concept position," which explained why no job description had been created, and why they did not intend to advertise the position.

Ms. Johnson stated that, because of her then-recent discussions with Ms. Bilson about possibly moving Ms. Black to a different position, she believed that a transfer to the proposed position

was a “win, win” option for both Ms. Black and the company. Ms. Johnson told us that her primary concern in making this decision was the “health” of the company and the ECP. She also stated that she did not “fully trust” the decision-making process of Ms. Black in her management of the ECP. She also said that she believed that Ms. Black showed a lack of respect for several members of SRNS senior management. As an example, Ms. Johnson cited the fact that Ms. Black had required senior managers to sign confidentiality agreements before she was willing to disclose the names of individuals who had filed employee concerns.

Ms. Johnson indicated that, based on all of the factors present, she decided to direct Ms. Bilson to transfer Ms. Black to the new position, with or without Ms. Black’s consent. Ms. Johnson told us that her intention at the time she conveyed this decision to Ms. Bilson was that Ms. Black was to be informed that she was being transferred and that it was not merely an offer for Ms. Black to consider.

Ms. Bilson stated that, in a meeting on November 17, 2014, she told Ms. Black that she was being transferred to the new position. Ms. Bilson stated that, in response, Ms. Black responded negatively and demanded to speak to Ms. Johnson about the issue. Ms. Bilson stated that her conversation with Ms. Black was very brief and that Ms. Black refused to even discuss the new position. Ms. Bilson stated that, following her meeting with Ms. Black, she met with Ms. Johnson and told her that Ms. Black had indicated to her that she considered the proposed transfer to the new position a demotion. Ms. Bilson also stated that, when she provided this information to Ms. Johnson, Ms. Johnson seemed disappointed that she had to become involved in the proposed personnel action.

On November 18, 2014, Ms. Johnson met with Ms. Black to discuss the proposed transfer. Ms. Johnson indicated that this meeting, to discuss the proposed transfer, lasted for between two and three hours. She stated that, during the meeting, she informed Ms. Black that Ms. Black was in a position to “make the job,” by which she meant that Ms. Black could help in formulating the parameters of the proposed new position. Ms. Johnson stated that, during this meeting, Ms. Black was “very belligerent” and took exception to the fact that, unlike her position as ECP Manager, the new position was not managerial, and asserted that the proposed job was, in effect, a “sham position.” Ms. Johnson indicated that, during the meeting, Ms. Black stated that the proposed transfer “was not going to happen.”

Ms. Johnson opined that Ms. Black’s conduct during the meeting was “very unprofessional” and that she used “inappropriate” and even “profane” language. She stated that Ms. Black did most of the talking during the meeting and that she repeatedly referenced previous disagreements that she had had with other members of SRNS management that did not relate to the job transfer issue. Ms. Johnson stated that Ms. Black also indicated that she had communicated information regarding these disagreements to GAO during her interview on October 27, 2014. Ms. Johnson said that Ms. Black told her that her communication of these issues to GAO provided her “protection” from retaliation.

Ms. Johnson said that, at the conclusion of the meeting, she informed Ms. Black that she would have to consider the issue of the proposed transfer further. Ms. Johnson indicated that, following the November 8, 2014 meeting, she decided that Ms. Black would continue in her role as ECP Manager, but, going forward, would report directly to her rather than Ms. Bilson. Ms. Johnson

asserted that her intention in making Ms. Black her direct report was so that she could “mentor” Ms. Black.

Ms. Johnson stated that her first meeting with Ms. Black as her direct subordinate took place during the first week of December 2014. Ms. Johnson said that, during this meeting, Ms. Black again reiterated her various complaints about her interaction with other SRNS managers on ECP matters. Ms. Johnson indicated that, by the end of this meeting, she came to the conclusion that Ms. Black was the wrong person to manage the ECP and needed to be removed from the position. She also indicated that Ms. Black’s refusal to accept the Safety Conscious Work Environment position necessitated the termination of her employment.

Ms. Johnson asserted that her primary reason for coming to that conclusion was that Ms. Black was unwilling to work with SRNS management to facilitate closing employment concerns in a timely manner.

In our interview with her, Ms. Johnson told us that she reviewed and considered Ms. Black’s previous performance appraisals when she made the decision to terminate her employment. She also said, however, that she did not believe that the appraisals contradicted her personal observation of Ms. Black’s activities. Ms. Johnson indicated that she believed that there were negative and unprofessional interactions between Ms. Black and other SRNS managers that had not been documented in previous appraisals of her performance. When we asked Ms. Johnson whether she was aware that Ms. Black had received a Key Contributor award in September 2014, less than two months prior to the attempt to transfer her, Ms. Johnson said she was not aware of the award.

Ms. Johnson told us that she sought and received feedback from other individuals regarding Ms. Black’s work performance, including the Executive Vice President and Chief Operations Officer, the Senior Vice President for ESS&H, the Senior Vice President for Workforce Services and Talent Management, the Deputy General Counsel, as well as Ms. Bilson. Ms. Johnson said that the concerns expressed to her by other SRNS managers focused on Ms. Black’s attempt to preserve the confidentiality of the individuals who filed employee concerns and Ms. Black’s difficulty in resolving employee concerns in a timely manner. Ms. Johnson said that she had also observed interactions between Ms. Black and other SRNS managers that were not “collegial.” Ms. Johnson asserted that, based on her personal observations, Ms. Black’s management of the ECP was “called into question.”

Ms. Bilson provided oral commentary on Ms. Black’s work performance during the time that she supervised her. Ms. Bilson stated that Ms. Black was a good performer, and “did the job she was asked to perform.” She also indicated, however, that the ECP’s lack of timeliness in resolving open concerns was a continuing problem. She stated that, initially, she believed the timeliness issue was caused by a lack of staff, but she came to the conclusion that it was caused by the strained working relationship between the complainant and the managers of other groups with whom Ms. Black had to work to resolve the open employee concerns. Ms. Bilson also indicated that she did not believe that her appraisals of Ms. Black’s performance adequately reflected the strained working relationships between Ms. Black and other SRNS managers. Ms. Bilson also indicated that, regardless of her written appraisals of Ms. Black’s performance, Ms. Black was somewhat more difficult to manage than some other employees and that she had to spend what she considered to be a disproportionate amount of her time supervising her.

Ms. Johnson told us that, despite Ms. Black's 35-year career with SRNS and its predecessors, she did not believe that Ms. Black deserved the benefit of any progressive discipline. She stated that the SRNS policy on progressive discipline applied primarily to non-managerial employees and was not appropriate for a managerial employee at Ms. Black's level.³

Ms. Johnson stated that, in making the decision to terminate Ms. Black, she considered the possible chilling effect that terminating the head of the company's ECP might have on the confidence of SRNS' employees in, and willingness to use, the Program. She told us that she concluded that the ECP would be "more effective" without Ms. Black as manager.

Ms. Johnson asserted that, following her meeting with Ms. Black in early December 2014, she met with representatives from the Office of Human Resources and OGC to discuss the termination and severance package. On December 8, 2014, the SRNS Human Resources Office completed the paperwork terminating Ms. Black's employment. Ms. Johnson stated that she made the decision to wait until after Christmas to notify Ms. Black of her termination and make it effective.

B. Office of Inspector General Analysis

SRNS management presented only oral testimonial evidence in support of its defense that it was justified in considering a transfer of Ms. Black to a different position within the SRNS organization. Because the transfer never occurred, however, we do not need to consider whether that proposed action constituted retaliation for Ms. Black's protected disclosure to the GAO.

Although we were informed in our interviews by a number of SRNS managers, including both Ms. Bilson and Ms. Johnson, that they thought that Ms. Black's performance in her role as ECP Manager may not have been as good as her overall ratings would lead one to believe, we note that these opinions, expressed in interviews more than a year after Ms. Black was terminated, were not documented by SRNS management in any contemporary record. We also note that SRNS management could not provide any records that it had ever informed Ms. Black of these alleged performance shortcomings. To the contrary, all of the records indicate that Ms. Black received high performance ratings over a long period of time, and that, in fact, she received a SRNS Key Contributor award for contributions that were "significant and beyond normal performance" in September 2014, shortly before her meeting with GAO and just four months prior to the termination of her employment. We also note that, although Ms. Johnson claimed to have considered Ms. Black's personnel record in making the decision to terminate her employment, she admitted that she did not know about the then-very-recent Key Contributor award, a fact that would have been readily apparent from even a cursory examination of Ms. Black's personnel record.

The SRNS management employees that we interviewed stated that, in their opinion, Ms. Black showed a lack of respect for several members of senior management by requiring that they sign confidentiality agreements before she would identify the individuals who had filed employee

³ Our review of the SRNS Progressive Discipline policy found no indication that limited its applicability to non-managerial employees.

concerns. We received no records, nor did any SRNS official tell us that anyone ever told Ms. Black that she should not require non-disclosure agreements from senior managers because doing so was inappropriate, unauthorized, or insulting.

SRNS management asserted that Ms. Black's refusal to accept the proposed transfer from the ECP to the new Safety Conscious Work Environment position in some way necessitated the termination of her employment. We note, however, that there is no record that Ms. Black was ever informed that her rejection of the newly-created position would lead to her termination.

As previously discussed, SRNS asserts that, in various meetings during November and December 2014, Ms. Black engaged in conduct that was described in our interviews as unprofessional. We note, however, that SRNS management provided no records supporting its assertion that it contemplated disciplining Ms. Black for her alleged misconduct. If Ms. Black's behavior was as egregious as SRNS now alleges, its failure to document that alleged misbehavior, or take immediate disciplinary action in response to it, is puzzling. We also note that SRNS management did not cite Ms. Black's alleged misconduct on the one record that would have supported its case – her notice of termination.

Based on our evaluation of the totality of the evidence, we conclude that SRNS has failed to demonstrate, by clear and convincing evidence, that it would have terminated Ms. Black's employment absent her protected disclosure.

VII. CONCLUSION

Based on the available evidence, we conclude that Ms. Black has established by a preponderance of the evidence that information she conveyed to the GAO regarding the possible abuse of authority by SRNS managers, constituted protected disclosure within the definition of the Pilot Program. We also conclude that SRNS management was aware of these disclosure and that they were contributing factors in the decisions by SRNS management to terminate her employment on January 7, 2015. Finally, we conclude that SRNS management has failed to prove by clear and convincing evidence that it would have taken this action absent Ms. Black's protected disclosure.