

Handling Disagreement with Superiors' Decisions and Whistleblowing

The mandate of the Office of Inspector General (OIG) is to root out fraud, waste, and abuse, as well as promote the economy and efficiency of the Agency. Because it reports to both the NASA Administrator and to Congress, the OIG is uniquely positioned to give objective and independent commentary on NASA operations.

The OIG also can and does look at matters that it thinks most important to protect taxpayer investments in NASA. Those matters may include examining whether management fairly addresses concerns raised by employees on myriad topics. In the wake of the Shuttle Columbia accident, the OIG has a profound interest in ensuring that NASA is vigilant in establishing and sustaining an environment that encourages the free flow of information. Such vigilance pertains especially to safety and ensuring that those who raise issues are protected from reprisal.

Disagreements With Decisions of Superiors

The Columbia Accident Investigation Board cited as one cause of the Space Shuttle Columbia accident “organizational barriers that prevented effective communication of critical safety information and stifled professional differences of opinion . . .” NASA has been working on improving its communication through organizational and process change and through effective leadership.

Organizations are designed to ensure information relevant to making a decision is communicated to the appropriate level of management. Decisions must be made and carried out or nothing gets accomplished. In order that there be orderly implementation of decision-making in an organization, subordinates generally must accept decisions of superiors.

Instances will arise when an employee believes a superior or other decision-maker is headed down a wrong path and that a higher level of review is necessary because of the importance of the decision. How such a matter is handled is tremendously sensitive, because an employee's suggestion to raise a matter to a higher level could be seen as repudiating a superior's decision. This should not be a deterrent to those who have important views to express. How leaders react to and handle contrary views is critical to the integrity of Agency decision-making.

I communicate to my staff that should an employee and a supervisor disagree on an important issue, and the employee believes the issue merits a higher level review, the employee should suggest to the supervisor that they discuss the issue with the person next highest in the chain of supervision (or with whomever it is that needs to know the information). This to me is a very appropriate suggestion to make to a superior, and I have communicated to my staff that if a supervisor is unwilling to accommodate the request, the employee should feel free to move up the chain of supervision without the supervisor's consent.

As a practical matter, because of the ease of e-mail, employees are free to communicate with whomever they believe is the appropriate level. However, a cost in terms of efficiency of organizational operations could result if leaders and managers are barraged with communications more appropriately handled at lower levels or if normal processes break down. In my experience, given the ease of electronic communications, looping ever-higher levels of management into the resolution of issues is not as burdensome to the efficient operations of an organization as the failure to bring transparency to important decisions.

In my view, an important decision that does not have substantial transparency to it warrants greater attention and scrutiny. Ensuring that risks the Agency accepts are transparent and that the extent of risks has been fully considered is critical. To the extent normal Agency processes do not fulfill these ends, individual employees should be particularly sensitive to ensuring appropriate parties are informed.

At NASA, employees can take issues they have on safety or engineering reliability to one or more of the following: the Independent Technical Authority being established at NASA, the local or Agency Office of Safety and Mission Assurance, the NASA Safety Reporting System, local or Agency Ombudspersons, or the OIG. The NASA Engineering and Safety Center may also be able to assist in certain instances. Without addressing the effectiveness of any of these alternatives, the fact is that multiple alternatives are open to an employee.

Employees are required to report certain matters such as fraud, waste, abuse and corruption to the appropriate authorities. If an employee believes that a supervisor (or any other person) is engaged in such types of activities, the employee has a duty to bring the matter to the attention of others. The OIG is the best avenue for reporting. The OIG will vigorously protect employees from reprisal for making a complaint or disclosing information to the OIG.

Whistleblowing

Reprisal for whistleblowing is inimical to the free flow of information and must be protected against. Protections for whistleblowing are contained in a complex body of statutes, regulations, and court decisions with varying technical requirements. (See attached guidelines.) For example, the Whistleblower Protection Act applies to disclosures that a Government employee makes about violations of laws, gross mismanagement, gross waste of funds, abuse of authority, or a substantial and specific danger to public safety. But that law applies only to “protected disclosures” made by civil service employees and does not include communications to one’s supervisor concerning normal day-to-day duties. The protection of Federal employee whistleblowers falls within the province of the Office of Special Counsel (OSC), an independent agency. For further whistleblower information, Federal employees should access OSC’s website at www.osc.gov. To report whistleblower issues, call the OSC

Whistleblower Disclosure Hotline at 800-572-2249. Certain disclosures by prime contractor employees are also protected (see item 4 in attachment).

The OIG does not adjudicate or enforce whistleblower rights, but does instead determine whether Agency operations are economical, efficient, effective, and in compliance with laws and regulations. In that regard, the OIG will pursue whistleblower matters that it determines warrant consideration. The OIG can be an advocate to the NASA Administrator and can report to the Congress on Agency activity.

Many times whistleblower matters we consider are difficult to untangle because they involve personality conflicts and/or professional disagreements on complex technical issues. Whistleblowers, including confidential and anonymous sources, may bring to light fraud, waste, and abuse, as well as violations of law, safety issues, or suggestions to improve the Agency. In some cases, whistleblower disclosures can be validated and criminal or civil remedies pursued and recommendations made to enhance Agency operations. However, sometimes after conducting an investigation or audit, our Office is unable to validate a whistleblower's statements. Notwithstanding the challenges associated with these matters, the OIG believes it plays an important check and balance to Agency action.

The Inspector General Act protects disclosures made in good faith to the OIG if they relate to violations of law, mismanagement, abuse of authority, or a substantial and specific danger to the public health and safety. The OIG will vigorously protect employees from reprisal for making a complaint or disclosing information to the OIG.

Robert W. Cobb
Inspector General

Whistleblower Guidelines

The following guidelines assist the OIG and the whistleblower.

1. The Inspector General Act of 1978, as amended, 5 USC Appendix, § 7.
The IG Act of 1978 protects civil service employees who disclose instances of violations of law, rules, or regulations, or mismanagement, gross waste of funds, abuse of authority or a substantial and specific danger to the public health and safety. The disclosure must be made to the OIG. Knowingly false reports to the IG, or reports made without regard to their truth or falsity, are not protected.
2. Whistleblower Protection Act of 1989, 5 USC § 1211 et seq.
The Whistleblower Protection Act of 1989 is another provision that protects civil service employees for disclosures relating to violations of law, rules, or regulations; gross mismanagement; gross waste of funds; abuse of authority, or a substantial and specific danger to the public health and safety. Applicants for Federal employment and former Federal employees are protected under this statute. The Office of Special Counsel (OSC) administers the law. The OIG may investigate such matters and refer them to the OSC, or may work these cases jointly with the OSC. The OSC has authority to litigate before the Merit Systems Protection Board to seek a stay of the alleged retaliatory personnel action while its investigation is pending. When the OSC fails to act, the aggrieved employee or applicant may petition for protection directly to the Merit Systems Protection Board.
3. False Claims Act, 31 USC § 3730(h).
The False Claims Act protects private sector employees who assist in False Claims Act litigation in the Federal courts. Reprisals for assisting in OIG investigations of false claims are also protected. The employee must bring suit in Federal District court to seek a remedy. In addition to other employment remedies, the employee may also seek two times back pay owed as well as attorneys' fees.
4. Federal Acquisition Streamlining Act (FASA), § 6005, amending 10 USC § 2409.
FASA protects private sector employees of NASA prime contractors if the disclosure is made to the Department of Justice, Congress, or to the OIG and if the disclosure concerns a substantial violation of law pertaining to a contract, including its competition or negotiation. The statute does not, however, protect employees of NASA subcontractors. The disclosure must also relate to a substantial violation of law pertaining to a NASA prime contract or its formation. Employees who believe they are aggrieved may file a signed, written complaint with the OIG. Unless the complaint is frivolous, under the law the OIG must investigate and submit a report to the employee, the employer, and the NASA Administrator. The employer and employee can comment on the report, and the Administrator can request further fact finding. If the Administrator finds reprisal

for protected disclosures has occurred, the Administrator can abate the reprisal by ordering reinstatement, back pay, and attorneys' fees. NASA can enforce the Administrator's order in Federal district court. A party aggrieved by the Administrator's order can seek review in Federal circuit court.

5. Sarbanes-Oxley Act of 2002, P.L. 107-204, § 806 (codified at 18 USC § 1514A). The Sarbanes-Oxley Act provides protection to employees of publicly traded corporations for disclosures and testimony and investigative assistance related to fraud against shareholders, mail fraud, wire fraud, and violations of the U.S. Securities and Exchange Commission rules. The U.S. Department of Labor enforces the law, although the OIG can refer cases to them. The significance of this Sarbanes-Oxley Act is that disclosure to the immediate supervisor is protected. In contrast, other statutes and case law, such as those that interpret the Whistleblower Protection Act, have held that disclosures to immediate supervisors, particularly when they are the alleged wrongdoers, are not whistleblowing disclosures.
6. Sarbanes-Oxley Criminal Provision, 18 USC § 1107. Retaliation Against Informants.
It is a criminal offense to threaten any employee's livelihood in retaliation for providing truthful information to law enforcement in an investigation of a Federal criminal offense. The provision protects private and public sector employees from retaliation. The protected disclosures must actually be truthful, not just have reason to believe they may be truthful. The retaliation must be knowing and intentional. If convicted of this felony, the sentence can include a fine and 10 years of imprisonment.
7. Research Misconduct Regulation Implementing Office of Science and Technology Policy policy. (NASA regulation 14 CFR 1275.104(e), 69 Federal Register 42102 et seq., effective July 14, 2004).
To the extent permissible by law, the identities of whistleblowers who wish to remain anonymous will be kept confidential by the OIG.