

MEMORANDUM

SUBJECT: Whistleblower Protection Review
Report No. 2000-S-2

FROM: Michael Simmons
Deputy Assistant Inspector General
for Internal Audits (2421)

TO: Romulo Diaz
Assistant Administrator
for Administration and Resources Management (3101)

The Office of Inspector General (OIG) completed a survey of Whistleblower Protection at the Environmental Protection Agency (EPA). This memorandum describes our work concerning three issues. For the first issue, EPA has drafted a document, which we find acceptable, to inform EPA employees of their rights and remedies under the Whistleblower Protection Act and six environmental statutes. We also reviewed the appropriateness of actions taken by EPA against its supervisors who were found guilty of retaliating against whistleblowers. Finally, we determined whether EPA should implement regulations which would allow the Agency to punish private employers who have retaliated against whistleblowers. For the last two issues, we did not identify information which would warrant devoting additional audit resources to these matters. Accordingly, we have completed our work on these issues. We are not making any formal recommendations, and no response to this memorandum is necessary.

PURPOSE

We initiated this review based on a letter sent to EPA's Administrator by the National Whistleblower Center alleging that the Agency has failed to protect whistleblowers and to inform its employees of their rights. There has also been recent Congressional interest regarding whistleblower activities at EPA and other agencies. The purpose of our survey was to determine whether EPA is satisfying the intent and requirements of the Whistleblower Protection Act, as well as whistleblower provisions in environmental statutes. Specifically the objectives of the survey were to answer the following questions: 1) Is EPA adequately ensuring that all employees

are informed of their rights and remedies under whistleblower protection laws? 2) Is the Agency taking appropriate action to protect whistleblowers from retaliation? The attachment contains the Background, Scope and Methodology, and Prior Audit Coverage section.

RESULTS OF SURVEY

EPA Ensuring Employee Awareness

The March 23, 1999, letter from the National Whistleblower Center (NWC) to EPA's Administrator stated that EPA has failed to inform its employees of their legal rights under the environmental whistleblower laws. As a result, NWC contends that most EPA employees are unaware of the statutory remedies available under the six environmental statutes, and therefore are not protected. The NWC states that EPA needs to provide a posting notice of the whistleblower laws and training to EPA employees.

The Whistleblower Protection Act does not require that agencies prepare a whistleblower policy or establish training, but does require that agencies ensure that employees are informed of their rights and remedies. In our initial meeting with EPA officials, they agreed to update their 1995 memorandum informing EPA employees of their rights and remedies under the Whistleblower Protection Act. This updated memorandum, now in draft, will also be posted on the Agency's Intranet system once finalized. The awareness document provides information regarding employee rights and remedies available under the six environmental statutes, as well as the Whistleblower Protection Act. It also provides references to applicable laws and sources for additional information both within and outside of EPA. Additionally, the memorandum reaffirms the Agency's commitment to the protection of employee rights under the whistleblower protection laws. In addition, the Agency is also developing whistleblower training to be incorporated into the Agency's annual ethics training. We believe that the finalized document and proposed training will satisfy the Agency's requirement for informing employees of their rights and remedies under whistleblower protection laws and provisions.

Whistleblower Protection from Retaliation

NWC's March letter stated that EPA has been found guilty of improperly retaliating against employee whistleblowers "in a number of past cases." The NWC requests that EPA undertake an internal review of these cases and discipline past wrongdoers.

Information provided by the Office of General Counsel for Headquarters and three regional offices indicated that there were 23 whistleblower cases involving 17 EPA employees during the last five years. Of these 23 cases, four were decided in favor of EPA (17%), ten were settled out of court (43%), and three were decided in favor of the employee (13%). Six of the cases had not yet been decided (26%). For the three cases decided in favor of the employee, neither the Department of Labor (DOL) nor the Merit Systems Protection Board (MSPB) ordered disciplinary action against an EPA supervisor or manager. We were told by EPA officials that for

the ten cases settled, the Agency never admits fault or recommends disciplinary action. Given these conditions, we have no basis for evaluating the appropriateness of EPA's discipline of "wrongdoers" since punishment had never been ordered by case decision or consented to in an agreement. No further audit attention on this issue is warranted at this time.

Lack of EPA Regulation Protecting Whistleblowers Outside of EPA

According to NWC, whistleblower protections would be strengthened if EPA had regulations which would allow EPA to punish private employers who have harassed or terminated their employees for providing information to federal or state environmental agencies. The U.S. Nuclear Regulatory Commission (NRC) has implemented such a regulation which allows them to investigate and fine employers. NRC officials explained that while the Department of Labor offers personal remedies (such as reinstatement to former position, back pay, compensatory damages, etc. . . .) to whistleblowers who have been retaliated against, NRC may take additional action to punish the company in the form of an enforcement action, such as a fine.

Although NRC officials believed their Allegation Program has been successful, they have not performed analyses identifying the number of companies that NRC has taken action against or compared the benefits of the program versus the resources invested. Therefore, we were unable to obtain information on the effectiveness of NRC's program. Additionally, EPA's Office of General Counsel officials believe that implementing a similar program at EPA would require legislative changes. Given these conditions, we will not conduct additional work on this issue at this time.

We wish to thank Office of Administration and Resources Management and Office of General Counsel officials who assisted us in this survey. Should your staff have any questions concerning this memorandum, please have them contact Cathleen Meeks, Auditor, Headquarters Audit Division on 202-260-5117, or John T. Walsh, Divisional Inspector General for Audit, on 202-260-4959.

cc: Marla Diamond, OGC
Stephen Kohn, National Whistleblower Center

Attachment

BACKGROUND

The Whistleblower Protection Act (WPA) was established to strengthen and improve the protection rights of Federal employees, prevent reprisals, and help eliminate wrongdoing within the Government. The Act mandates that employees should not suffer adverse consequences as a result of prohibited personnel practices, including protecting whistleblowers from retaliation. Federal employees, including EPA employees, may seek whistleblower protection from the Office of Special Counsel (OSC) and the Merit Systems Protection Board (MSPB) under the Whistleblower Protection Act. The Office of Special Counsel is an independent executive agency whose responsibilities include investigating whistleblower complaints and litigating cases before the Merit Systems Protection Board. The Board has the authority to enforce its decisions and to order corrective and disciplinary actions. Actions ordered can include job restoration, reversal of suspensions, disciplinary action against a supervisor, reimbursements of attorney fees, and medical and other costs and damages.

Whistleblower protection provisions are also part of the six environmental statutes, including the Water Pollution Control Act, the Clean Air Act, the Safe Drinking Water Act, the Solid Waste Disposal Act, the Toxic Substances Control Act, and the Comprehensive Environmental Response, Compensation, and Liability Act. Employees, both private and federal, who believe they have been retaliated against by an employer for whistleblower activities related to the six environmental statutes, may also file a complaint with the Department of Labor (DOL). If DOL determines that retaliation has occurred, DOL may order corrective actions. DOL may instruct the employer to provide appropriate relief, which may include restoration of back pay, employment status and benefits, or compensatory damages.

SCOPE AND METHODOLOGY

We conducted the survey in accordance with the Government Auditing Standards (1994 Revision) issued by the Comptroller General of the United States as they apply to economy, efficiency, and program results audits. To accomplish our survey objectives, we interviewed officials in the Office of Administration and Resources Management and the Office of General Counsel. We reviewed EPA whistleblower case information for the last five years involving EPA employees within Headquarters and Regions 2, 5, and 8. We also spoke with officials within the Department of Labor and the Office of Special Counsel regarding their procedures for handling whistleblower cases and actions relating to past EPA cases. Finally, we spoke to Nuclear Regulatory Commission officials regarding their Allegation Program.

PRIOR AUDIT COVERAGE

We reviewed recent audit reports from the General Accounting Office (GAO) relating to whistleblowing activities at EPA, Allegations by EPA Employees, dated 1/29/99 and Employees Who Made Allegations and Left EPA, dated 3/2/99. GAO investigated the consequences of EPA employees, who alleged mismanagement by EPA and retaliation against whistleblowers in a letter published in the Washington Times. GAO did not make conclusions regarding the appropriateness of EPA's treatment of whistleblowers, however, it summarized the nature of the allegations and the resolution of the cases. We also reviewed GAO reports and testimony from fiscal years 1992-93 which found that federal employees from several agencies had minimal knowledge about their rights under whistleblower protections.