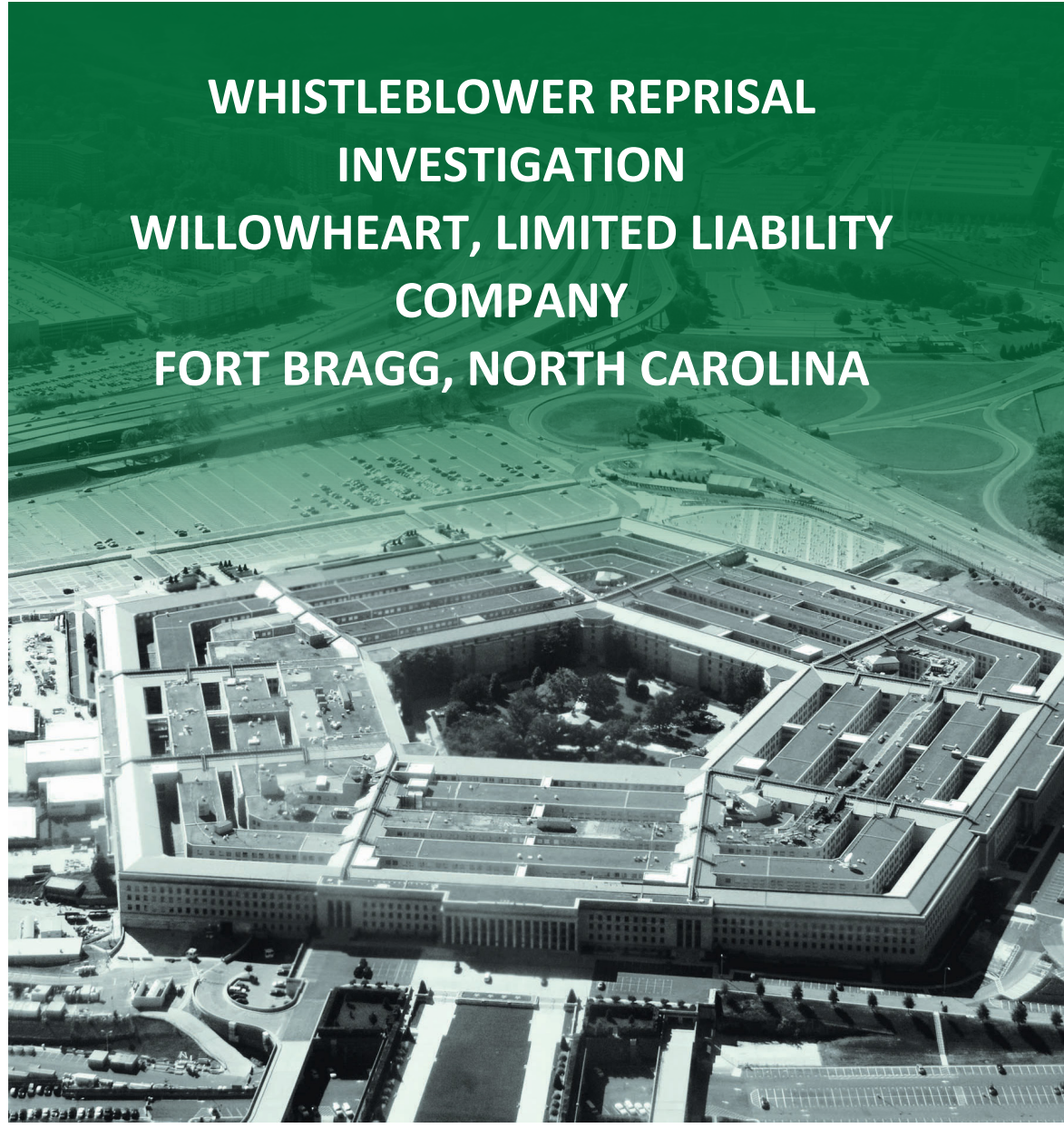


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# INSPECTOR GENERAL

*U.S. Department of Defense*

July 22, 2019



## WHISTLEBLOWER REPRISAL INVESTIGATION WILLOWHEART, LIMITED LIABILITY COMPANY FORT BRAGG, NORTH CAROLINA

INTEGRITY ★ EFFICIENCY ★ ACCOUNTABILITY ★ EXCELLENCE

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**WHISTLEBLOWER REPRISAL INVESTIGATION**

**[REDACTED]**  
WILLOWHEART, LIMITED LIABILITY COMPANY  
FORT BRAGG, NORTH CAROLINA

**I. EXECUTIVE SUMMARY**

The DoD Office of Inspector General (DoD OIG) conducted this investigation in response to an allegation that on December 22, 2017, Willowheart Limited Liability Company (Willowheart) placed [REDACTED] (the Complainant), Contract Security Guard (CSG), Willowheart, on a temporary administrative leave of absence without pay, in reprisal for reporting violations of North Carolina state law, and for reporting abuse of authority to Inspectors General (IGs) and a contracting officer representative (COR).

We determined that the Complainant made three protected disclosures prior to Willowheart placing him on leave without pay, including two disclosures to IGs and one to a COR. We determined that Willowheart had knowledge of the Complainant's protected disclosures and subsequently took one action against the Complainant by placing him on a temporary administrative leave of absence without pay.

We substantiated the allegation that Willowheart placed the Complainant on a temporary administrative leave of absence without pay in reprisal for the Complainant's protected disclosures.

We provided Willowheart the opportunity to comment on the preliminary report of investigation through a tentative conclusion letter we sent to it on April 2, 2019. We received Willowheart's response on April 29, 2019. Willowheart disagreed with our conclusions and requested that we revise our report and conclusion to be consistent with its response. After carefully considering the response, we amended various sections of the report but did not alter our original conclusion.<sup>1</sup>

We recommend that the Secretary of the Army direct Army officials to:

- consider appropriate action against Willowheart for reprising against the Complainant; and
- order Willowheart to award the Complainant compensatory damages (including back pay), employment benefits, and other terms and conditions of employment that the Complainant would have received had he not been reprised against, from the time the Complainant was placed on unpaid administrative leave until he resigned.

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<sup>1</sup> While we have included what we believe is a reasonable synopsis of Willowheart's responses, we recognize that any attempt to summarize risks oversimplification and omission. We incorporated its comments where appropriate throughout this report and provided a copy of its full responses to the Secretary of the Army, together with this report.

## II. BACKGROUND

Willowheart, headquartered in Ellijay, Georgia, is a Small Business Administration minority, woman-owned, 8(a) certified company responsible for providing labor, equipment, transportation, licensures or certifications, material, and services necessary to perform a full array of security-related CSG services in support of the Security Operations Training Facility (SOTF), Fort Bragg, North Carolina. Willowheart became the prime contractor to the U.S Army Special Operations Command (USASOC) under U.S. Government Contract H92236-13-5000 in January 2013, following Alpha Protective Services (APS) filing for bankruptcy.

The Complainant began working as a [REDACTED] for APS [REDACTED]. According to the Complainant, APS promoted him to [REDACTED], and he served in that capacity until APS filed for bankruptcy in December 2012. At that time, Willowheart assumed responsibility for the contract, and the Complainant continued to serve as a [REDACTED] [REDACTED] under Willowheart until [REDACTED]. Following Willowheart's internal restructuring and the Complainant's non-selection to [REDACTED] in [REDACTED], the Complainant reverted from a [REDACTED] to a [REDACTED], serving in that capacity until he resigned from Willowheart on [REDACTED]. The Complainant's supervisory chain varied, depending on the shift leadership.

[REDACTED], Willowheart President, located at the company headquarters in Ellijay, Georgia, began working as a consultant to Willowheart in October 2015. According to [REDACTED], he assumed the position as President of Willowheart in March 2016, reporting directly to [REDACTED], Willowheart Chief Executive Officer.

## III. SCOPE

This investigation covered the period from November 27, 2017, through April 25, 2018. We interviewed the Complainant, [REDACTED] (the responsible management official), and nine other witnesses with firsthand knowledge of the matters. We also reviewed documentary evidence provided by the Complainant, Willowheart, and USASOC, including evidence related to the Complainant's protected disclosures and placement on a temporary administrative leave of absence without pay.

## IV. STATUTORY AUTHORITY

The DoD OIG conducts whistleblower reprisal Investigations involving employees of Defense contractors under Title 10, United States Code, Section 2409 (10 U.S.C. 2409), "Contractor employees: protection from reprisal for disclosure of certain information," as implemented by Defense Federal Acquisition Regulation Supplement, Subpart 203.9, "Whistleblower Protections for Contractor Employees."

At the time of the Complainant's reprisal allegation, the January 2013 Willowheart contract included 18 modifications to exercise the option years and no new task orders. None of the modifications included a contract clause that applied the July 1, 2013, amendments to 10 U.S.C. 2409. As a result, the prior version of the statute applies. That prior version states, in part:

An employee of a contractor may not be discharged, demoted, or otherwise discriminated against as a reprisal for disclosing to ... a Member of Congress, a representative of a committee of Congress, an Inspector General, the

Government Accountability Office, a Department of Defense employee responsible for contract oversight or management, or an authorized official of an agency or the Department of Justice information that the employee reasonably believes is evidence of gross mismanagement of a Department of Defense contract or grant, a gross waste of Department of Defense funds, a substantial and specific danger to public health or safety, or a violation of law related to a Department of Defense contract (including the competition for or negotiation of a contract) or grant.<sup>2</sup>

In its response to our tentative conclusion letter, Willowheart wrote that it is exempt from 10 U.S.C. 2409, specifically under section (e), Exceptions for Intelligence Community. Willowheart contended that it is a contractor of an element of the intelligence community because it was required to have access to Sensitive Compartmented Information (SCI) intelligence and other classified information and was required to take steps to protect access to that information under the National Industrial Security Program Operating Manual (NISPOM). Specifically, Willowheart claimed it provided essential work for the intelligence community by providing CSGs to SOTF at Fort Bragg.

Willowheart based its claim that it is exempt from 10 U.S.C. 2409 under section (e) of the current version of the statute, which includes an exception for elements of the intelligence community. However, under the prior version of 10 U.S.C. 2409 applicable to the Complainant's reprisal allegation, the statute did not include an amendment exempting elements of the intelligence community from the provisions set forth in the statute. As a result, Willowheart is subject to 10 U.S.C. 2409.

Further, even if the amended version of the statute was in effect at the time of the Complainant's reprisal complaint, Willowheart was still not part of an Intelligence Community Element and was not covered by the exception to 10 U.S.C. 2409.

10 U.S.C. 2409(e) cites to 50 U.S.C. 3003, "Definitions," to provide the definition for an element of the intelligence community.<sup>3</sup> Under 50 U.S.C. 3003, "Definitions," an Intelligence Community Element (ICE) is defined as certain Agencies whose mission is to conduct foreign intelligence and counterintelligence, including: the Defense Intelligence Agency, intelligence elements of the Army, Navy, Air Force, Marine Corps, Coast Guard, other offices within the DoD for the collection of specialized national intelligence through reconnaissance programs, and such other elements of any department or agency as may be designated by the President, or designated jointly by the Director of National Intelligence and the head of the department or agency concerned, as an element of the intelligence community.

According to [REDACTED], the SOTF is not part of a U.S. Army (USA) ICE. Additionally, [REDACTED] provided SOTF's unclassified mission statement which states,

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<sup>2</sup> With its 2013 amendment, 10 U.S.C. 2409 expanded the persons and bodies to whom protected disclosures could be made, to include certain contractor management officials and employees, officials of law enforcement agencies, and courts or grand juries. The amendment also expanded the type of protected disclosures an employee could make from "violations of law" to "violations of laws, rules, or regulations."

<sup>3</sup> The amended version of 10 U.S.C. 2409 (e)(1) states, "This section shall not apply to any element of the intelligence community, as defined in section 3(4) of the National Security Act of 1947 (50 U.S.C. 3003(4))."

SOTF is a USASOC facility which houses and provides logistics and administrative support to the Army elements involved with the development, testing and evaluations of Army security and special operations doctrine. SOTF provides training for select U.S. and foreign military personnel in operational and personal security techniques as directed by the Department of the Army in support of DoD directives and mission requirements.

██████████ also explained that the SOTF Director, a USA lieutenant colonel, is in charge of operations for the facility. Subordinate to the Director are an assortment of civilian and military administrative support personnel (such as facility engineers, a contract guard force, and financial support specialists). The facility provides finance and medical support, coordinates common training requirements, and arranges for the training of allied or foreign personnel.

Accordingly, even if the most recent version of 10 U.S.C. 2409 applied to Willowheart, Willowheart is not part of an ICE whose mission includes conducting foreign intelligence and counterintelligence, and the exception to 10 U.S.C. 2409 does not cover Willowheart.

Willowheart also provided a supplemental response to our tentative conclusion letter stating that the DoD OIG no longer has jurisdiction over the complaint and should dismiss this case because more than 360 days had elapsed since the Complainant filed his reprisal complaint on February 8, 2018. Willowheart further contended that the DoD OIG should dismiss this case because the Complainant had filed a lawsuit regarding his claim of reprisal on December 20, 2018, in the Superior Court of the State of North Carolina, County of Cumberland. The case was later removed to the U.S. District Court for the Eastern District of North Carolina, Western Division, on January 22, 2019.

We acknowledge that under 10 U.S.C. 2409(c)(2),

If the head of an executive agency issues an order denying relief under paragraph (1) or has not issued an order within 210 days after the submission of a complaint under subsection (b), or in the case of an extension of time under paragraph (b)(2)(B), not later than 30 days after the expiration of the extension of time, and there is no showing that such delay is due to the bad faith of the complainant, the complainant shall be deemed to have exhausted all administrative remedies with respect to the complaint, and the complainant may bring a de novo action at law or equity against the contractor to seek compensatory damages ....

However, neither the version of 10 U.S.C. 2409 applicable to this case or the current version of 10 U.S.C. 2409 states that the DoD OIG must close a case when a complainant has filed a de novo action that is pending in a U.S. District Court. Further, as of the date of this report, this matter has not yet been addressed by the U.S. District Court for the Eastern District of North Carolina, Western Division. Additionally, 10 U.S.C. 2409(b)(1) requires the OIG to determine whether the complaint is frivolous, and if it is not frivolous then the OIG "shall investigate the complaint and, upon completion of such investigation, submit a report of the findings of the investigation to the person, the contractor concerned, and the head of the agency."

As articulated below, the Complainant's allegations are not frivolous and therefore an OIG investigation was warranted, regardless of the action pending in Federal court.



**V. FINDINGS OF FACT***Disclosure to the USASOC IG*

On November 27, 2017, the Complainant contacted the USASOC IG, Fort Bragg, North Carolina, to inquire about what he needed to do to file a complaint against Willowheart. The Complainant also reported to the USASOC IG that Willowheart had hired an employee as an armed security guard who was under the age of 21, which he believed was a violation of North Carolina State law and the contract. According to the Complainant, the USASOC IG advised him that he should contact the (USASOC SOTF) COR before initiating a complaint against the company.

Chapter 74C of the North Carolina General Statute does not specify an age requirement to be a CSG in the state of North Carolina. However, a provision in Section 74C-13 of the state law dictates that the North Carolina Private Protection Services Board (Board) may not issue a firearm registration permit to an applicant until the applicant's employer submits evidence satisfactory to the Board that the applicant meets all the qualifications established by this section and by the rules promulgated to implement this section. Title 14B, North Carolina Administrative Code, Chapter 16, Rule 0801 (14B NCAC 16 .0801) states:

- (a) Each armed security guard employer or his or her designee shall submit and sign an application form for the registration of each armed security guard applicant to the Board. This form shall be accompanied by ... (6) a certification by the applicant that he or she is at least 21 years of age.

U.S. Government Contract H92236-13-5000 and the Willowheart Standard Operating Procedures (SOP) Manual state that (Willowheart) CSGs "must be 21 years of age and fluent in English in both oral and writing skills." Paragraph 1.1.3.1, "Compliance with Laws," of the contract states, "The contractor shall warrant that performance of all services under this contract are furnished by the contractor and/or its subcontractors in compliance with all applicable Federal, State and local laws, Executive Orders, rules and regulations."

Under the Assimilative Crimes Act, 18 U.S.C. 13(a), the applicable North Carolina law may potentially be incorporated into the laws governing Fort Bragg since the North Carolina law has a criminal enforcement provision.

During a follow-up call with the USASOC IG on December 1, 2017, the Complainant said that he was uncomfortable contacting the COR because either the company standard operating procedures (SOP) or the collective bargaining agreement (CBA) prohibited Willowheart employees from discussing business with the "client (USASOC SOTF)." The USASOC IG offered the Complainant the use of its office to call the COR, but the Complainant declined. The USASOC IG then informed the Complainant that its office only handled military complaints, and it directed him to contact the U.S. Army Contracting Command IG if he wished to pursue filing an IG complaint.

*Disclosure to the COR*

On December 7, 2017, the Complainant reported to the COR that Willowheart had hired an employee who was under the age of 21 as an armed guard, which violated the contract and North Carolina state law. The Complainant also told the COR that [REDACTED] changed company physical

fitness requirements for its armed guards in an attempt to remove senior-aged security guards without first going through the Industrial, Technical and Professional Employees Union (ITPEU), in violation of the contract.<sup>4</sup> The Complainant also reported to the COR that Willowheart was not filling positions when CSGs left their posts to conduct training at the weapons firing range, and that CSGs were not paid for 2 weeks following the previous company filing for bankruptcy, resulting in guard force posts often being staffed short of contract specifications.

The COR informed the Complainant that another CSG had already reported the underage hiring back in September 2017, and that he and the Contracting Officer (KO) had addressed the matter with Willowheart. The COR also informed the Complainant that while the hiring of the 20-year-old employee was a violation of the contract, North Carolina state law did not apply in this case because Fort Bragg was on Federal property.

In addition to the above disclosures, the Complainant told us that he also reported to the COR that Willowheart had discriminated against a new employee who was a military retiree by requiring him to pay for his own medical physical. The COR told us that he did not recall whether the Complainant raised this issue with him.

The Complainant also told the COR that he was considering filing a complaint with the U.S. Army Contracting Command IG, to which the COR replied he was “more than welcome to do so,” but that he (the COR) did not think it was going to change anything.

According to [REDACTED], Willowheart had recently changed the vendors that conducted its company physicals and explained that the new vendor, unlike the previous company, adhered to the existing regulations by conducting a more thorough evaluation. The COR informed the Complainant that his concerns were “not a Government issue,” and he needed to address his concerns with the Union, explaining that as long as Willowheart did not lower the requirements specified in the contract, the company could “do whatever they want above the requirement.”

[REDACTED] told us that he was aware that Willowheart had a policy prohibiting its employees from discussing company business with the client but that he had an “open-door” policy, and he recalled telling Willowheart at one point, “I don’t care about that policy. Anybody can come talk to me anytime they want.”

At the time the Complainant met with the COR, the underage CSG had already turned 21. The Complainant stated that the intent of his disclosure to the COR was to make him aware that Willowheart had disregarded the COR’s order and placed the security guard on the gates while she was still under the age of 21.

[REDACTED] began her employment with Willowheart as a CSG in [REDACTED] and turned 21 on [REDACTED] prior to the Complainant’s disclosure to the USASOC IG and USASOC SOTF COR.

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<sup>4</sup> The Age Discrimination in Employment Act of 1967 (29 U.S.C. 621 *et seq.*) provides that certain applicants and employees 40 years of age and older are protected from discrimination on the basis of age in hiring, promotion, discharge, and compensation or terms, conditions, or privileges of employment.

Regarding the Complainant's disclosure that Willowheart discriminated against a newly-hired military retiree, the Complainant alleged that Willowheart required the employee to pay for his initial medical physical up front because the employee had received a 90 percent Veterans Affairs (VA) rating on retirement from military service. According to the Complainant, this was the only employee that Willowheart had required to pay for his own initial medical physical up front. The Complainant told us that he believed this was a violation of the Americans with Disabilities Act but stated he was not 100 percent certain if he conveyed that to the COR.

In its response to our tentative conclusion, Willowheart wrote that the Complainant's claim that Willowheart discriminated against a veteran because he had a 90 percent VA rating on retirement was meritless and bordered on frivolousness, stating that all of its employees servicing the contract at Fort Bragg are military veterans. Willowheart further wrote that it was unaware of any facts that would substantiate this claim, asserting that our preliminary report of investigation referenced no substantiating facts.

The retiree the Complainant alleged Willowheart had discriminated against told us that in late [REDACTED] he traveled to the Willowheart office in Fayetteville, North Carolina, to drop off his résumé for a position as a CSG. During an informal conversation with [REDACTED], [REDACTED] asked him what VA disability rating he had received on retirement, to which he replied, "90 percent." The retiree said that during an interview with [REDACTED] a few days later, [REDACTED] asked him if he was receiving disability, but he did not recall [REDACTED] specifically asking him if he received a 90 percent disability rating.

Following Willowheart's offer of employment, the retiree went to the U.S. Health Works clinic in Fayetteville to take his initial medical and fitness physical. The retiree said that while in-processing at the front desk, a U.S. Health Works employee informed him that the clinic had received a phone call from someone at Willowheart directing them to have the retiree pay up front for his physical, adding that the company would reimburse him if he passed the physical. The retiree said that this "kind of threw [him] off," but that he paid the \$400 bill with his debit card.

Following his physical, the retiree asked four or five of his colleagues attending the Willowheart CSG training if they had to pay for their physicals up front, to which, according to the retiree, all replied that they were not required to pay up front for their own physicals. The retiree said that he later spoke to [REDACTED], Facilities Security Officer and Business Operations Specialist, Willowheart, about the matter and that [REDACTED] told him,

Oh yeah, you know, it was because you're disabled and we [Willowheart] weren't necessarily sure that you were going to be able to pass the physical so, you know, we didn't want to take a loss, but since you passed, we'll go ahead and send a check to you for the reimbursement.

According to the retiree, [REDACTED] "didn't say 90 percent, he just said because you have a disability." The retiree told us that he never spoke to [REDACTED] about the matter, but that Willowheart later sent him a check to cover the full cost of the physical.

The retiree also confirmed to us that he informed the Complainant about everything that had transpired regarding the events described above, and he told the Complainant he thought Willowheart had discriminated against him because of his VA disability rating, adding that he was the only applicant



who had to pay up front for his physical. The retiree said he was not “familiar” with any specific law that was violated, but he said that he, the Complainant, and other Willowheart CSGs that he spoke with all agreed that there “is an Act where you cannot discriminate against someone for having a VA disability.”

Regarding the Complainant’s allegations that Willowheart failed to properly staff posts during unscheduled or unforeseen absences and that Willowheart failed to go through the Union prior to changing company physical fitness requirements, the Complainant told us he believed they were violations of the contract and the CBA. The Complainant further stated that he informed Officer [REDACTED] Willowheart CSG, about what he had reported to the COR.

[REDACTED], Willowheart, told us that he spoke to the COR daily and that the COR informed him that the Complainant had recently reported a number of ongoing issues occurring within the command, including that the Complainant was considering filing an IG complaint. [REDACTED] informed [REDACTED] on or about December 19, 2017, that the Complainant had reported “five issues of concern” to the COR.

When asked about the Complainant’s communication to the COR, [REDACTED] told us, “My personal reaction, I was very disappointed. I thought [the Complainant] had more integrity and more to him, than [to] just bypass everybody and just go straight to our client and start talking.” [REDACTED] told us that he did not have a problem with the Complainant speaking with the COR, as the COR had an open-door policy and it was very typical for Willowheart security guards to speak with him about various matters. [REDACTED] said that his concerns were the topics raised by the Complainant, including an allegation that his program manager was not staffing posts, resulting in a possible breach of security.

[REDACTED] and [REDACTED] told us that they were not aware that the Complainant had specifically contacted the USASOC IG, but they were aware that the Complainant had met with “an IG” prior to his disclosure to the COR. [REDACTED] told us that he did not know the difference between the USASOC IG and the U.S. Army Contracting Command IG. [REDACTED] stated that he did not know that there was more than one IG.

[REDACTED] told us that the Complainant conveyed to him that the Complainant went directly to the IG’s office first, then was directed by the IG’s office to “go back to the COR to hear what the COR had to say.”

#### *Disclosure to the ACC IG*

On December 12, 2017, the Complainant filed an IG Action Request (IGAR) with the U.S. Army (USA), Army Contracting Command IG (ACC IG), Redstone Arsenal, Alabama, and reported the following alleged violations.

- Management hired an employee as an armed guard who was under the age of 21, a violation of the contract and North Carolina state law.
- Management illegally fired an employee while the employee was on Family Medical Leave recovering from hip surgery.
- Management discriminated against one employee by requiring him to pay up front for his own physical based on his VA rating.
- Management did not reimburse other employees for costs associated with followup appointments.

- Management failed to replace guards who called in sick with a part-time guard, leaving parts of the compound without an armed security guard.
- Physical fitness requirements were different for certain employees.
- The president of Willowheart implemented company policy and physical requirements without going through the Union.
- The owner of Alpha Protective Services (APS) transferred ownership of APS to his mother, then renamed the company Willowheart after APS filed Chapter 7 bankruptcy in December 2012.
- Guards manning the compound gates went 3 weeks without pay following the 2012 bankruptcy.<sup>5</sup>

In addition to the issues the Complainant raised in his disclosure to the COR, the Complainant reported to the ACC IG that Willowheart “illegally” fired an employee while the employee was on Family Medical Leave recovering from hip surgery, which he believed was a violation of North Carolina state labor laws. The Complainant alleged that in addition to requiring an employee with a 90 percent VA rating to pay for his initial medical physical up front, Willowheart did not reimburse employees that had to have followup medical appointments because they had failed one or more portions of their physicals. Regarding the statement in the Complainant’s IGAR that the owner of APS transferred ownership of the company to his mother then renamed the company Willowheart after APS filed bankruptcy, the Complainant told us he included that in his report to the IG because he wanted to “demonstrate a history of abuse of authority and mismanagement” by the company.

On December 13, 2017, the Complainant informed [REDACTED] that he had filed an IG complaint. [REDACTED] said he asked the Complainant if he had let the chain of command know, to which the Complainant replied that he had not. [REDACTED] stated that he warned the Complainant to be careful, as management expected employees to keep them apprised of everything they were doing, and then he wished the Complainant “good luck.”

#### *Willowheart’s Reaction on Learning of Disclosures to IG and COR*

On December 14, 2017, [REDACTED] called [REDACTED] and informed him that the Complainant had reported to an IG that Willowheart had hired a CSG who was underage, pulled guards off their posts to conduct training, left positions unfilled when employees called in sick, and was going to implement new physical training standards in August (2018).

[REDACTED] called [REDACTED] and informed him of what [REDACTED] had reported. [REDACTED] told us that [REDACTED] “chastised” him for “being wrong [for] sitting on information that a disgruntled employee [was] taking malicious actions.”

[REDACTED] directed [REDACTED] and [REDACTED] to have [REDACTED] come in and provide a written statement detailing what the Complainant had reported, and based on the content of [REDACTED]’s Record of Communication, [REDACTED] would determine if he needed to place the Complainant on an administrative leave of absence and initiate an inquiry into the matter.

<sup>5</sup> [REDACTED], the Complainant reported that the CSGs were not paid for 2 weeks following the previous company filing for bankruptcy.

██████████ explained to us that ██████████'s report was not clear to him and that his intent for the followup was for ██████████ to define specifically what the Complainant's concerns were so that ██████████ could address the matter. ██████████ told us that he had "no concern, whatsoever," nor did he care that the Complainant had contacted the IG because it did not affect his operation. ██████████ said that his biggest concern was addressing the issues the Complainant had communicated to the COR.

On the morning of December 21, 2017, ██████████ met with ██████████ and ██████████ to discuss what the Complainant had reported to ██████████ on December 14, 2017. ██████████ said that during the meeting ██████████ asked him "point blank" who had submitted the complaint. ██████████ told us that he was reluctant to reveal who had filed the IG complaint but did so after ██████████ told him that they needed to know.

██████████ told us that ██████████ did not direct him to find out who had filed the complaint, and he denied that he asked ██████████ "point blank" who had done so, stating that the only direction he gave ██████████ was to write down the truth and clarify what the "warning" was. ██████████ told us he believed he was already aware that the Complainant was the individual in question and was "pretty sure" that ██████████ informed him during their December 14, 2017, conversation that the Complainant had filed the IG complaint.

Following his meeting with ██████████ and ██████████, ██████████ documented in a Record of Communication titled, "Notification of IG Investigation," that he informed ██████████ on December 14, 2017, that a Willowheart "security officer" (the Complainant) had initiated either a DoD or Department of the Army Inspector General investigation of the company. ██████████'s Record of Communication also reflected that the Complainant told him a lieutenant colonel from the ACC IG office had called to inform the Complainant that the IG office had opened an investigation and that they would contact the Complainant soon.

██████████ and ██████████ documented in their respective December 21, 2017, Records of Communication that ██████████ also told them the Complainant allegedly reported to the IG that Willowheart was trying to get rid of its older CSGs. Specifically, ██████████ wrote, "A conviction that the President of the Company is attempting to remove from employment Contract Security Guards of relatively senior age and experience."

██████████ and ██████████ forwarded ██████████'s December 21, 2017, Record of Communication to ██████████, and ██████████ later directed them to go back to ██████████ and have him fill out a followup Record of Communication that included more details.

██████████ told us that he directed ██████████ and ██████████ to get with ██████████ to have him complete a followup Record of Communication that included a "more detailed accounting as to what was being communicated by ██████████." ██████████ explained that ██████████'s initial report included many "one-liners" and did not reflect the problems conveyed to him regarding what ██████████ reported to ██████████. ██████████ added that ██████████'s concerns about what the Complainant had reported to ██████████ were unclear, and he wanted ██████████ to define specifically what his concerns were.

In [REDACTED]'s December 21, 2017, Record of Communication that he forwarded to [REDACTED], [REDACTED] flagged [REDACTED]'s verbal report to him and [REDACTED] as a possible indicator of insider threat activity. [REDACTED] wrote that if [REDACTED]'s report was verified through an official inquiry, it "would confirm that a disgruntled employee [had] developed an unwillingness to communicate with the company, and would be indicative of a pattern of behavior to attempt to subvert Willowheart as a company." [REDACTED] wrote, "While it is [the Complainant's] right to file a complaint with the IG, this report causes alarm since [the Complainant] had previously been identified as a disgruntled employee, in the wake of the loss of his position as Shift Supervisor." [REDACTED] further wrote that not only had the Complainant failed to exercise existing company channels to address his concerns, he had circumvented his chain of command and made a verbal report directly to the client (COR). Finally, [REDACTED] wrote:

When combined with all information, an assessment of [the Complainant] would reflect questionable trustworthiness and reliability, and an unwillingness to follow rules and regulations; the sum which may disrupt operations, increase vulnerability to the client, and indicate that he may not properly safeguard protected information.

On December 22, 2017, [REDACTED] completed a followup Record of Communication and identified the Complainant as the individual who filed the IG Complaint. Additionally, [REDACTED] documented that the Complainant reported to the IG that Willowheart hired a person under the age of 21, in violation of North Carolina state law, and pulled security guards off their assigned posts to conduct required training. [REDACTED] further wrote that the Complainant reported that Willowheart had left positions unfilled when a person called in sick, and changed physical and physical agility standards. In his closing paragraph, [REDACTED] stated, "I felt that I was doing the right thing in passing the warning to management. Now that I have done that, I feel that I am now being used to help terminate an individual for doing something that he thought was the right thing to do."

*Willowheart's Inquiry into the Complainant as a Potential Employee Security Risk*

On December 22, 2017, [REDACTED] initiated an inquiry via video conference into "alleged actions of [the Complainant] that are sufficient to bring into question [the Complainant's] reliability to perform the duties of a Security Officer on SOTF." Attendees of the company inquiry included [REDACTED], located in Ellijay, Georgia; and [REDACTED]; [REDACTED]; [REDACTED], Willowheart CSG and ITPEU Shop Steward; and the Complainant, all located in a conference room at the Willowheart company office in Fayetteville, North Carolina.

According to [REDACTED], the purpose of initiating the company inquiry was "a two-part component." [REDACTED] said the most important component was that of an overall security investigation to determine whether there was cause for concern regarding the contract. [REDACTED] stated that the Complainant had reported five significant topics of concern to the COR that were either contractual administrative violations or security violations, including that Willowheart was not staffing posts properly. [REDACTED] also said that there were "some defaming" allegations levied against the project manager, including that [REDACTED] was not staffing posts properly, and possible hostile work environment issues that he ([REDACTED]) needed to gain further clarity on.

[REDACTED] told us that the second component of the company inquiry was to assess the Complainant's overall performance as a security officer. [REDACTED] told us that it was critical to

understand the Complainant's attitude because Willowheart had to evaluate whether he was "disgruntled, disaffected, or malicious," which were three terms ██████████ said Willowheart had to assess as part of the Individual Reliability Program (IRP).<sup>6</sup> ██████████ added that in the 3 to 4 days preceding the company inquiry, they determined that the Complainant displayed signs of "severe disgruntlement," which they believed made him a potential candidate for an insider threat. ██████████ further stated that he needed to understand the Complainant's intent and what the Complainant wanted to achieve by making a report to the IG after the COR had already clarified that the issues the Complainant had raised were resolved.

The Complainant described the company inquiry as an interrogation. He asserted that ██████████ intimidated and bullied him for 3 hours, stating that while there was no yelling, "It was a very firm, serious and intimidating inquiry." The Complainant told us that at the beginning of the inquiry proceedings, he made a statement that he did not want to participate in answering the questions listed before him, to which ██████████ replied, "Okay, well, if you don't want to talk you can turn in your badge. You're suspended." The Complainant said that he did not feel that he had a choice in the matter and agreed to proceed in answering the questions listed in ██████████'s 9-page questionnaire.

According to the Complainant, ██████████ asked him several questions about his communications with the COR and the IG. The Complainant told us he felt that his conversations with the COR and the IG were his business alone, and not ██████████'s. In response to these questions, the Complainant said he did not give ██████████ straightforward answers, instead answering in a simple yes or no, or sometimes not answering the questions at all. According to the Complainant, ██████████ repeated his questions several times until the Complainant answered the way wanted, or ██████████ gave up and moved on to another question.

As documented in the informal transcript of the inquiry proceeding generated by ██████████, ██████████ asked the Complainant multiple times about his understanding of the company's SOP and Code of Ethical Business Conduct and why the Complainant had intentionally circumvented the company chain of command to make reports to the COR and IG. The Complainant replied each time that he believed his IG complaint was a separate matter and was above the company's chain of command.

██████████ disputed the Complainant's claim that the company inquiry was an interrogation and that he had bullied the Complainant throughout the proceedings, adding that the inquiry was a fact-finding mission to ascertain the truth. ██████████ stated that the Complainant had the right to walk out of the room at any time if he believed the inquiry was an interrogation. ██████████ told us that from the onset of the inquiry, the Complainant displayed a "recalcitrant" attitude and had remarked that the reason that Willowheart initiated the inquiry against him was because he had filed an IG complaint. ██████████ said he informed the Complainant that the inquiry had nothing to do with the "IG investigation" but had "everything to do with the report that [the Complainant] made to the COR."

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<sup>6</sup> Army Regulation (AR) 190-56, "The Army Civilian Police and Security Guard Program," Chapter 3, Individual Reliability Program, states, "The IRP provides a means of assessing the reliability and suitability of individuals being considered for employment, and for continuous assessment of personnel assigned to civilian police and security guard positions .... Supervisors at all levels have an inherent responsibility to inform the commander of all cases of erratic performance and poor judgment by personnel, on or off duty, that could affect on-the-job reliability. All personnel are responsible for reporting to their immediate supervisor any behavior that might affect their coworkers' reliability."

██████████ asked the Complainant if he was willing to share what he had reported to the IG and the name of the lieutenant colonel from the IG office whom he had called. ██████████ said he had to be concerned about any possible security infractions the Complainant may have reported and wanted to know what the Complainant's concerns were so he could address and fix the issues. Regarding the Complainant's reluctance to answer questions on ██████████'s questionnaire, ██████████ said the Complainant had an "absolute mandate" to participate in the "security investigation," or face immediate relief of duty pending further investigation.

On December 22, 2017, ██████████ concluded in his report of inquiry proceedings that the Complainant's "misconduct" of intentionally breaching the Willowheart Code of Conduct and SOP made him an unreliable person and security risk under AR 190-56, and a potential insider threat under DoD 5220.22-M, "National Industrial Security Program Operating Manual (NISPOM)." ██████████ wrote that the Complainant's "disregard of the SOTF's COR clarification and instruction by filing a complaint with the IG's Office can only be assessed as willful insubordination and a demonstrated act of ill will." ██████████ also wrote that the Complainant's intentional circumvention of known and accepted company protocols, Union grievance procedures, and the COR clarifications fully discredited the Complainant's trustworthiness.

██████████ further wrote that the Complainant's intentional display of poor judgement, irrational behavior, and lack of trustworthiness "placed him in a status of being an unreliable person and security risk under AR 190-56." ██████████ wrote that the Complainant's display of "significant disgruntlement" after not being selected as a ██████████, his self-serving actions that escalated without reasonable justification, and the circumvention of company and Union protocol was initially assessed as a "demonstrated personal vendetta" meant to cause the company harm.

Additionally, ██████████ wrote, "These escalating, irrational, and unsupported actions pertaining to unsupported complaints are in alignment with the potential for [Complainant] to become either a witting or unwitting Internal Threat as defined by the Defense Security Services." ██████████ continued by writing that the Complainant's "psychological state and true intent of [the Complainant] must be assessed prior to [him] being entrusted back into a secure facility and armed." Finally, ██████████ wrote that the Complainant's "demonstrated misconduct" of making false and unsupported accusations and complaints against the company and the company president, his "inciting and promoting a hostile and harassing work environment," and his "not following the SOP for using the chain of command, open door policy, union grievance proceeding, or autonomous [sic] Q&A box to seek clarification of concerns," supported the Complainant's immediate suspension without pay pending further investigation.

When asked to expand on what he had written in his inquiry report, ██████████ told us that as he understood it, the Complainant went directly to the IG's office first, which then instructed him to contact the COR to hear what he had to say about the matter. After the COR, "the senior-most person operationally outside the company" and overseer of the contract, told him that there were no issues and instructed the Complainant to talk to the Union if he had further questions, the Complainant still went out and filed an IG complaint, which ██████████ said was an act of ill will and insubordination.

██████████ told us that the Complainant's malice toward the company was also demonstrated by issues he raised, which ranged in time of occurrence from several months prior (to his disclosures) to 5 years prior. ██████████ said that it appeared to him that the five issues the Complainant raised were "just pulled together to elicit some sort of negative response." Regarding the



statement that the Complainant's IG complaint demonstrated irrational behavior and a lack of judgement and trustworthiness, ██████ stated that there "was no rationale except for a malicious rationale" when the Complainant filed an IG report after the COR told him, "All is good." ██████ further stated that he believed the Complainant's intention was "to utilize the IG as a weapon, if you will."

#### *Administrative Leave of Absence Without Pay*

At the conclusion of the company inquiry, and following completion of a Report of Inquiry Proceedings, which included an informal transcript, ██████ told the Complainant that effective immediately, he was placing the Complainant on a temporary administrative leave of absence without pay. According to the Complainant, the reasons ██████ gave for placing him on a temporary administrative leave of absence without pay were that ██████ considered him a security risk, a possible insider threat, and a threat to national security. Additionally, the Complainant said that ██████ accused him of harassing a fellow CSG (by reporting she was hired underage) and violating the conditions of his employment agreement, the code of conduct, and company SOP by not using the chain of command. Later that day, ██████ gave the Complainant a formal letter notifying him that effective immediately, Willowheart was suspending him without pay pending further investigation.

██████ told us that he alone made the decision to place the Complainant on a temporary administrative leave of absence without pay, adding that he made the decision based on his 35 years of service in mid-level and executive level governmental and company positions in the Government security arena. ██████ said he placed the Complainant on suspension without pay because during the inquiry the Complainant had conveyed that he did not have to follow company rules and regulations as defined by the Willowheart Code of Conduct and SOP.<sup>7</sup> ██████ said the Complainant displayed a "disgruntled and disaffected" behavior throughout the inquiry, adding that there was no way he (██████) could place someone so "disenfranchised" back on the contract considering the classification levels associated with the mission.

██████ also stated that the contract stipulates that when there is reason to believe that an employee does not "measure up" to the IRP, the company must take immediate action and dismiss the employee from the contract. ██████ also told us that based on all of the Complainant's actions in total, to include his disclosures, he (██████) believed the Complainant was "looking to cause harm, and that his actions were out of malice, rather than his actions being of a concerned individual that wanted to see some remedy to some specific and documented problem." ██████

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<sup>7</sup> The Willowheart Code of Ethical Business Conduct states that the first step for reporting an employee's concern should be to the employee's supervisor. If the employee does not think that his or her complaint received the proper attention or the supervisor cannot answer the employee's question, the employee should then go to the next higher level of management. In cases where it may not be appropriate for the employee to discuss his or her concern with their supervisor or the next higher level of management, the employee should contact Personnel.

The Willowheart SOP section titled "Confidentiality" states, "... you are not allowed to discuss any Company related issues with a client representative or visitor. Also, employees may not contact the Client for any reason at any time. If found doing so, you may be disciplined up to and including termination." In the section titled, "Chain of Command," the chain of command is given as follows: CSG/CSG, Sergeant, Lieutenant, Captain, Assistant Project manager, Project Manager or Human Resources.

said that such a person did not have the judgement, reliability, or dependability required to keep them on contract.

In a September 4, 2018, letter to the Director of Whistleblower Reprisal Investigations, [REDACTED] wrote:

Based upon [the Complainant's] demonstrated disgruntled and disaffected attitude, it was determined that it would be a potential security risk as well as a risk to good orderly conduct of contract operations to return him to service. It was certainly clear that [the Complainant] appeared to be ineligible for continued qualification under the Individual Reliability Program. It was due to [the Complainant's] demonstrated disqualifying character traits & attitude alone that caused the company to place [the Complainant] on Administrative Leave of Absence Without Pay until further investigation could be conducted by the company and an IRP qualification decision could be made in accordance with AR 190-56 Chapter 3.

When asked if the Complainant's communications to the COR or the IG influenced his decision to suspend the Complainant, [REDACTED] told us:

Well, let's be clear, because I've been saying it has been. But the reason it has been is, as I have explained is, one, not taking the counsel of the COR, and then bypassing the COR ... I did take into consideration that COR. As far as the IG, not because the IG received a report, it was the manner and the intention that was displayed and communicated that was considered in the decision-making process.

It's a very hard case, when you're trying to separate national security matters. When someone uses the whistleblower protection, it is – we understand that – the validity and the importance of that program, but we also have to make sure that that program is not being used or weaponized, and that national security must be fully executed, if you will, properly.

Regarding Willowheart's claim that the Complainant was disgruntled, [REDACTED] told us that the Complainant became disgruntled after losing his [REDACTED] position. [REDACTED] stated that the Complainant "definitely distanced himself from me," never acknowledging when [REDACTED] was in the room. [REDACTED] told us that the Complainant "expressed a significant amount of disgruntlement when he was not selected as [REDACTED] in June 2017," adding that the Complainant became more "repressed and introverted." [REDACTED] said he was taken aback by the Complainant's attitude during a company ceremony to recognize and reward the Complainant's service as a [REDACTED], telling [REDACTED], "Boy, I will tell you. If looks could kill, I'd probably be dead right now." When we asked if Willowheart management ever counseled the Complainant or documented his behavior, [REDACTED] told us that the Complainant was never counseled, adding "he never did anything negative towards me." [REDACTED] told us that he did not think there was a need to counsel the Complainant when they first saw signs of his disgruntlement over not being selected as [REDACTED], stating,

You know, employees get angry. I teach my management it's okay for them to be angry. Just monitor them, and as long as their disgruntlement doesn't

escalate into something that you believe needs to be addressed, this just takes time, and people will get over their challenges. But you have to watch them.

In his September 2, 2018, response to our investigation notification, ██████ provided a list of 29 Willowheart employees placed on a temporary administrative leave of absence without pay from January 2017 through September 2, 2018.<sup>8</sup> Exhibit E of ██████'s response reflected two categories for an employee's placement on a temporary administrative leave of absence without pay: administrative and medical evaluations. The administrative category consisted of personnel who were ineligible for employment due to personal conduct, drug testing or screening failure, and inability to pass the Physical Ability Test. The medical evaluation category consisted of those personnel who did not meet the medical screening criteria defined by AR 190-56, Appendix C, and the U.S. Army Medical Command's cardiovascular standards. Of the 29 employees ██████ placed on a temporary administrative leave of absence without pay, eight, including the Complainant, were for administrative matters and 21 were for medical reasons. The Complainant was the only employee placed on a temporary administrative leave of absence without pay, for "adverse personal conduct."

██████ told us that any time the company has had a breach or suspected breach of the IRP, Willowheart immediately placed the employee on a temporary administrative leave of absence without pay. ██████ explained that regardless of the breach, whether it is for not meeting medical, fitness, or character standards, there is an immediate requirement to release the employee from service as a CSG until the issue is resolved. When we asked ██████ his reasons for suspending the Complainant without pay instead of with pay, ██████ told us that it was common practice, adding that Willowheart suspends everybody without pay when they do not meet IRP requirements because they no longer qualify to be on contract. When we asked ██████ if he had ever placed an employee who had filed a complaint on a temporary administrative leave of absence without pay, he told us that at least half of the 29 employees he had suspended had filed some type of complaint, either with the COR, the Union, or with the Department of Labor. ██████ added that in each of those cases, he became aware that the employee had filed some type of complaint prior to him placing the employee on a temporary administrative leave of absence without pay.

At the conclusion of the company inquiry, ██████ initiated a formal investigation to determine the occurrence of any further violations of AR 190-56, AR 380-67, "Personnel Security Program," and DoD 5220.22-M.

According to ██████, ██████ and other members of SOTF informed ██████ that they did not agree with Willowheart's assessment that the Complainant was untrustworthy and a security risk, and that they had no issues with allowing the Complainant to come back to work. ██████ did not view the Complainant as a security risk or insider threat because the Complainant thought that he was doing the right thing by reporting something that he thought SOTF did not know.

██████ denied that ██████ told him "that they were happy to have [the Complainant] back on." ██████ said that during a January 13, 2018, meeting with the COR, the KO, and ██████, they asked if Willowheart would consider bringing the

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<sup>8</sup> According to ██████, Willowheart did not have an electronic database for its employee records prior to 2017; therefore, he could not recall the number of employees placed on a temporary administrative leave of absence without pay prior to January 2017.

Complainant "back into employment." [REDACTED] replied, "Absolutely," but that he had to conduct an investigation into the matter before he could make a determination.

#### *DoD Hotline Complaint*

On February 8, 2018, the Complainant filed a complaint with the DoD Hotline and reported that [REDACTED] had bullied and interrogated him (during the company inquiry), suspended him without pay, and falsely accused him of being a security risk and insider threat, in reprisal for his protected disclosures to the COR and an IG.

#### *Willowheart Employee Action Report (Investigation Report)*

On February 22, 2018, [REDACTED] released the findings of his investigation in a report titled, "Employee Action Report (EAR)." As part of [REDACTED]'s investigation, Willowheart administered a standardized questionnaire titled, "Company Investigation, Potential Employee Security Risk" to 10 of its CSG employees, five of whom held the rank of sergeant. The questionnaire consisted of 10 questions, four of which inquired into the Complainant's attitude and whether he had expressed any dissatisfaction following his non-selection to [REDACTED], dissatisfaction with how the contract was being administered, or whether the Complainant expressed dissatisfaction with any level of supervision or management, up to and including the President of Willowheart. The questionnaire also included a question regarding whether the interviewee was aware of the Complainant reporting any concerns to "a Supervisor Lieutenant, the Captain, the company, the SOTF COR, or any other organization."

Review of the questionnaires shows that none of the CSGs interviewed noticed any change in the Complainant's attitude from the time he served as a [REDACTED] to the time when the questionnaires were received, or witnessed the Complainant expressing dissatisfaction with any level of management, up to the president of Willowheart. Only one of the nine CSGs interviewed noted the Complainant's dissatisfaction with how the company was administering the contract and two CSGs noted the Complainant's disappointment or dissatisfaction after not being selected for [REDACTED]. Two CSGs indicated that they were aware that the Complainant had reported concerns to the SOTF COR and an IG.

In the EAR, [REDACTED] concluded that the Complainant had acted out of malice with an intent to cause harm to Willowheart and Willowheart management. [REDACTED] wrote that the Complainant's "actions gave the company cause to question whether he is a security risk by his display of willful, surreptitious, and malevolent actions in the manner by which he pursued reporting his concerns." [REDACTED] wrote that the Complainant "acted in a manner contrary to the best interest of Willowheart or the client ... by his willful and surreptitious manner in reporting what he believed to be violations of contract or his own perceptions when reporting to the client and then going beyond the client to reporting to an outside agency." The report further reflected that the Complainant's questionable judgement, lack of candor, dishonesty, and unwillingness to comply with the rules and regulations showed cause for the company to question and "significantly doubt" the Complainant's reliability, trustworthiness, and judgement to execute his assigned responsibilities, thereby making him a security risk.

The investigative report concluded that the Complainant "willfully disobeyed, violated and circumvented with malicious intent the required company employee SOPs, Code of Conduct, and employment agreements." [REDACTED] determined that the Complainant did not commit any

security violations and deemed that the Complainant was not, at the present, considered an “insider threat.” However, [REDACTED] noted in the report that the Complainant might be at risk to become an insider threat, and therefore recommended that the Government conduct a psychological evaluation and/or polygraph to determine the intent of the Complainant’s actions. [REDACTED] further documented that the Complainant had “brought focus and potentially made disparaging remarks to the hire of [the underage CSG] as not meeting the age requirements stated by the contract.” However, during [REDACTED]’s inquiry into the matter, the underage CSG informed [REDACTED] that she did not wish to file a workplace harassment complaint, as the Complainant’s comments did not affect how the members of the guard force treated her. Accordingly, Willowheart decided not to pursue possible “Workplace Harassment and Hostile Work Environment violations” against the Complainant. [REDACTED]

[REDACTED]

On February 27, 2018, [REDACTED] forwarded the EAR to the COR and to the Defense Security Service. In an accompanying memorandum, Willowheart submitted a formal request that the SOTF-designated Individual Reliability Program Certifying Official (IRP CO) conduct an “IRP Disqualifying Assessment” of the “Potentially Disqualifying Information” detailed in the Willowheart EAR.

On March 19, 2018, while on unpaid administrative leave from Willowheart, the Complainant began working as a DoD civilian security guard for the U.S. Army Forces Command (FORSCOM). On April 1, 2018, the Complainant submitted a letter of resignation to Willowheart, effective immediately.

On April 25, 2018, [REDACTED], USA, SOTF Security Manager and IRP CO, determined that the Potentially Disqualifying Information Willowheart presented in the EAR did not constitute disqualifying information under AR 190-56 and AR 380-67. Accordingly, [REDACTED] recommended to the SOTF Commander that he take no further action into the matter.

## **VI. ANALYSIS**

### **A. Did the Complainant make a protected disclosure? Yes**

We determined that prior to Willowheart placing the Complainant on a temporary administrative leave of absence without pay, the Complainant made three disclosures under 10 U.S.C. 2409, all of which were protected.

#### *November 27, 2017, Disclosure to the USASOC IG – Yes*

On November 27, 2017, the Complainant reported to the USASOC IG that Willowheart had hired an employee as an armed security guard who was under the age of 21, which he believed was a violation of the contract and North Carolina state law.

In its response to our tentative conclusion, Willowheart wrote that based on the Complainant’s many years of experience as a CSG and supervisor at Willowheart, he knew that North Carolina law did not apply to Willowheart’s operations at Fort Bragg. Willowheart contends that during his tenure, the Complainant received extensive and repeated training concerning his legal authority to carry a firearm. Through that training, Willowheart claimed that the Complainant received instruction that his authority to act as a CSG came from Federal law and directives, not from North Carolina law. Willowheart further wrote that the Complainant had never applied for a permit to work as an armed security guard with the

Private Protection Services Board (Board), had never carried an identification card issued by the Board, and never received any training sanctioned by the Board, as required by Chapter 74C of the North Carolina General Statute.

The evidence showed that Willowheart did in fact hire an armed security guard in [REDACTED], who turned 21 years old [REDACTED]. As articulated above, North Carolina state law and implementing regulations restrict firearm registration for armed security guards to individuals 21 years of age or older. The contract and the Willowheart SOP also specify that Willowheart CSGs must be 21 years of age or older. Further, since the applicable North Carolina State law has a criminal enforcement provision, the North Carolina State law could potentially be incorporated into the laws governing Fort Bragg under the Assimilative Crimes Act, 18 U.S.C. 13(a). Since the Complainant was correct that the officer was hired as an armed security guard under the age of 21, and since hiring an armed security guard under the age of 21 is inconsistent with North Carolina State law, the contract, and the Willowheart SOP, we determined that the Complainant had a reasonable belief that his communication to an IG was a report of a violation of law related to a DoD contract. Therefore, this disclosure is protected under 10 U.S.C. 2409.

*December 7, 2017, Disclosure to the SOTF COR – Yes*

On December 7, 2017, the Complainant reported to the COR that Willowheart had hired an employee who was under the age of 21 as an armed security guard and that it had discriminated against a military retiree applicant by requiring him to pay for his own initial medical physical up front because he had received a 90 percent VA rating on retirement from military service.

As described above, we determined that the Complainant's report of the hiring of the underage armed security guard was a report of a violation of law related to the contract. Additionally, based on the retiree's testimony and the Complainant's understanding that a veteran with a 90 percent VA disability rating was the only individual required to pay for his physical up front, we determined that the Complainant presented a reasonable belief of a violation of law related to a DoD contract, as the contract included a clause for Federal Acquisition Regulation 52.222-35, "Equal Opportunity for Veterans (Sep 2010) (38 U.S.C. 4212)."

Reporting a violation of law to a DoD employee responsible for contract oversight or management is protected under 10 U.S.C. 2409.

The Complainant also reported to the COR that Willowheart did not have the required number of armed guards to cover any unscheduled or unforeseen workforce absences, resulting in guard force posts often being staffed short of contract specifications. The Complainant further reported that [REDACTED] changed the company physical fitness requirements for its armed guards without first going through the Union. We determined that these reports were allegations of contract violations and the Union agreement respectively, and were not allegations of gross mismanagement of a DoD contract or grant, a gross waste of DoD funds, a substantial and specific danger to public health or safety, or a violation of law related to a DoD contract (including the competition for or negotiation of a contract) or grant, under 10 U.S.C. 2409.



*December 12, 2017, Complaint to the U.S. Army Contracting Command IG – Yes*

On December 12, 2017, the Complainant filed an IG Action Request with the ACC IG, and reported that Willowheart had hired an employee as an armed guard who was under the age of 21 and discriminated against an employee by requiring him to pay up front for his own physical based on his VA rating.

Although the COR told the Complainant during their December 7, 2017, meeting that North Carolina state law did not apply on Fort Bragg, we concluded that the Complainant continued to have a reasonable belief that the information he disclosed to the IG was a violation of state law, as under the Assimilative Crimes Act, the applicable North Carolina law may be incorporated into the laws governing Fort Bragg since the North Carolina law has a criminal enforcement provision. As detailed above, we also concluded that the Complainant presented a reasonable belief that Willowheart discriminated against a veteran employee with a 90 percent disability rating. Accordingly, the Complainant's report to an IG of violations of law related to the contract, is protected under 10 U.S.C. 2409.

We reviewed the Complainant's remaining allegations to the IG and determined they were not reports of gross mismanagement of a DoD contract or grant, a gross waste of DoD funds, a substantial and specific danger to public health or safety, or a violation of law related to a DoD contract (including the competition for or negotiation of a contract) or grant, including that:

- Willowheart illegally fired an employee while the employee was on leave under Family Medical Leave, recovering from hip surgery;
- Willowheart management failed to replace guards who called in sick with part-time guards, leaving parts of the compound without armed security guards;
- Willowheart did not reimburse employees for costs associated with followup medical appointments;
- physical fitness requirements were different for certain employees;
- the president of Willowheart implemented company policy and physical requirements without going through the Union;
- Willowheart did not pay guards manning the compound gates for 3 weeks; and
- the owner of APS transferred ownership of APS to his mother, then renamed the company Willowheart, after APS filed Chapter 7 bankruptcy in December 2012.

In its response to our tentative conclusion, Willowheart wrote that the DoD OIG acknowledged in its preliminary report of investigation that seven of the Complainant's nine allegations against the company "did not relate to protected activity because they did not relate to gross mismanagement of the Contract or to a violation of law related to the Contract." Accordingly, Willowheart contended that the Complainant's inability to corroborate or substantiate any of the seven allegations that the DoD OIG had preliminarily dismissed demonstrated that the Complainant's "disclosures in their entirety were not made in good faith or reasonable."

We disagree with Willowheart's suggestion that our conclusion that seven of the disclosures did not satisfy the specific statutory requirements for protection has any bearing on whether the remaining two disclosures were protected. Additionally, the evidence supports that Willowheart perceived the Complainant as a whistleblower. After Willowheart became aware that the Complainant had contacted the COR and the IG, they took active measures to find out what the Complainant had reported, to

include initiating a command inquiry to address the “five significant topics of concern” that the Complainant had reported to the COR. Further, there was insufficient evidence to support that the Complainant made his disclosures in bad faith or that the disclosures we deemed protected were unreasonable.

As described above, a preponderance of the evidence established that the Complainant made three protected disclosures, prior to being placed on administrative leave, that he reasonably believed evidenced violations of law related to a DoD contract.

**B. Was the Complainant discharged, demoted, or otherwise discriminated against? Yes**

We determined that Willowheart took one qualifying action against the Complainant when it placed him on a temporary administrative leave of absence without pay on December 22, 2017, pending an investigation.

In its response to our tentative conclusion, Willowheart wrote that as part of its contract with DoD, Willowheart was required under AR 190-56 and the NISPOM to ensure that its CSGs continued to remain eligible under the IRP. Factors to consider for eligibility under the IRP include actions involving questionable judgment, lack of candor, and unwillingness to comply with rules and regulations. Willowheart further wrote that pursuant to the contract, Willowheart was required to report eligibility concerns and to suspend the employee pending investigation. Accordingly, Willowheart contended that because Willowheart’s conduct was required under its contract, AR 190-56, and the NISPOM, the company’s actions regarding the Complainant were pursuant to nondiscretionary directives in its contract with the DoD.

However, Willowheart’s beliefs that the Complainant was ineligible under the IRP, and that the action it took against the Complainant was a nondiscretionary act, were based solely on its belief that the Complainant was an insider threat because he bypassed the company and made protected disclosures to the COR and IGs. This was supported by the fact that on April 25, 2018, the SOTF Security Manager and IRP CO determined that the potentially disqualifying information Willowheart presented in the EAR did not constitute disqualifying information under AR 190-56 and AR 380-67.

Accordingly, we determined that placing an employee on a temporary administrative leave of absence without pay is a qualifying action under 10 U.S.C. 2409 that could dissuade a reasonable person from making protected disclosures.

**C. Did the contractor have knowledge, actual or constructive, of the Complainant’s protected disclosure(s)? Yes**

*November 27, 2017, Disclosure to the USASOC IG – Yes*

██████████ acknowledged to us that during the December 22, 2017, company inquiry, the Complainant conveyed directly to him that he had gone to an IG’s office prior to meeting with the COR (on December 7, 2017). ██████████ also stated that he understood the IG’s office then directed the Complainant to “go back to the COR to hear what the COR had to say.” Although ██████████ was aware that the Complainant had gone to an IG prior to making his disclosure to the COR, ██████████ was unaware of which IG the Complainant had contacted. Nevertheless, while ██████████ did not know that the Complainant had specifically contacted the USASOC IG, we concluded that the

Complainant's disclosure to "an IG," an entity to whom a protected disclosure may be made under 10 U.S.C. 2409, was known by [REDACTED].

*December 7, 2017, Disclosure to the SOTF COR – Yes*

[REDACTED] acknowledged to us that on or about December 19, 2017, [REDACTED] informed him that the Complainant had reported "five issues of concern" to the COR. The Complainant also later confirmed to [REDACTED] during the inquiry proceedings on December 22, 2017, that he had reported the ongoing issues to the COR.

*December 12, 2017, Complaint to the U.S. Army Contracting Command IG – Yes*

On or about December 18, 2017, [REDACTED] notified [REDACTED] that the Complainant had filed an IG complaint. Additionally, [REDACTED] December 21, 2017, Record of Communication, provided to [REDACTED], included an entry that a lieutenant colonel from the U.S. Army Contracting Command IG had contacted the Complainant to inform him that an investigation had been initiated. Further, evidence showed that [REDACTED] was aware of the IG complaint during the company inquiry proceeding when he asked the Complainant if he was willing to share the name of the lieutenant colonel (from the IG office) so he could call him.

In its response to our tentative conclusion, Willowheart wrote,

[The Complainant] cannot prove his prima facie case because he did not engage in protected activity, because Willowheart did not know or have reasonable notice that he was allegedly engaged in protected activity, and because [the Complainant's] alleged protected activity was not a contributing factor in the decision to place him on administrative leave. Additionally, Willowheart would have taken the same action even absent [the Complainant's] alleged protected activity.

As described above, the preponderance of evidence established that Willowheart had knowledge of the Complainant's three protected disclosures prior to placing him on administrative leave.

**D. Would the same action(s) have been taken against the Complainant absent the protected disclosure(s)? No**

We determined that Willowheart would not have placed the Complainant on a temporary administrative leave of absence without pay, absent his protected disclosures. Discussion of the factors weighed together follows the factor-by-factor analysis below.

*Willowheart's Stated Reasons for Placing the Complainant on a Temporary Administrative Leave of Absence Without Pay*

The Complainant told us that at the conclusion of the December 22, 2017, company inquiry, [REDACTED] informed him that he was placing him on administrative leave without pay because Willowheart considered him a security risk, a possible insider threat, and a threat to national security. Additionally, the Complainant said [REDACTED] accused him of harassing another CSG and violating

the conditions of his employment agreement, the code of conduct, and company SOP by not using the chain of command.

Willowheart wrote in its December 22, 2017, notification letter to the Complainant that it was placing the Complainant on a temporary administrative leave of absence without pay pending further investigation.

Willowheart wrote in its company inquiry that the Complainant's "demonstrated misconduct" of making false and unsupported accusations and complaints against the company and company president, his "inciting and promoting a hostile and harassing work environment," and his "not following the SOP for using the chain of command, open door policy, Union grievance proceeding, or autonomous [sic] Q&A box to seek clarification of concerns," supported the Complainant's immediate suspension without pay pending further investigation.

In a letter to the DoD OIG Whistleblower Reprisal Investigations Director, [REDACTED] stated that he had placed the Complainant on a temporary administrative leave of absence without pay, pending further investigation, because of the Complainant's demonstrated disqualifying character traits and attitude.

[REDACTED] told us that he placed the Complainant on a temporary administrative leave of absence without pay because during the inquiry, the Complainant conveyed that he did not have to follow company rules and regulations defined by the Willowheart Code of Conduct and SOP. [REDACTED] stated that the Complainant also displayed "disgruntled and disaffected" behavior throughout the inquiry, adding that there was no way he ([REDACTED]) could place someone so "disenfranchised" back on the contract considering the classification levels associated with the mission. [REDACTED] also explained that the contract stipulated that when there was reason to believe that an employee did not "measure up" to the IRP, the company must take immediate action and dismiss the employee from the contract.

Additionally, [REDACTED] told us that based on all of the Complainant's actions in total, including his communications, [REDACTED] believed the Complainant was "looking to cause harm, and that his actions were out of malice, rather than his actions being of a concerned individual that wanted to see some remedy to some specific and documented problem." [REDACTED] added that in his opinion, such a person did not have the judgement, reliability, or dependability required to keep them on contract.

#### *Motive to Retaliate*

[REDACTED] had motive to retaliate against the Complainant for his disclosures. Despite [REDACTED]'s denial, the evidence showed that Willowheart actively pursued measures to find out what the Complainant had reported to the ACC IG. After reading [REDACTED]'s December 21, 2017, Record of Communication, in which [REDACTED] identified that a Willowheart CSG had initiated an IG complaint and that the U.S. Army Contracting Command had allegedly opened an investigation, [REDACTED] directed [REDACTED] to have [REDACTED] draft a followup Record of Communication providing more detail. [REDACTED] then prepared a more detailed Record of Communication on December 22, 2017. This Record of Communication and [REDACTED]'s instruction to prepare it are evidence that [REDACTED] indirectly sought details about the reports to the IG since those details would have been a part of the Complainant's discussion with [REDACTED].

Additionally, Willowheart included a question in its investigation questionnaire about whether the interviewee was aware of the Complainant reporting any concerns to a Supervisory Lieutenant, the Captain, the Company, the SOTF COR, or any other organization.

██████████ told us that during a followup meeting with ██████████ and ██████████, ██████████ asked him “point blank” who had filed the IG complaint. ██████████ then wrote a second Record of Communication identifying the Complainant as the individual who had filed the IG complaint. ██████████ also wrote that the Complainant had reported to the IG that Willowheart hired an underage employee, pulled CSGs off their assigned positions to conduct required training, left positions unfilled when a CSG called out sick, and changed the physical and physical agility standards. ██████████ and ██████████ wrote in their Record of Communications that ██████████ informed them that the Complainant also reported that the president of Willowheart (██████████) was attempting to remove its older CSGs from employment.

The Complainant’s allegations that Willowheart hired an underage employee, discriminated against a military veteran, and attempted to discriminate against older CSGs were aimed directly against ██████████ and could have put Willowheart in a negative light with SOTF authorities, potentially jeopardizing its contract with the DoD.

Willowheart management officials displayed animus toward the Complainant’s disclosures to the COR and the IG. ██████████ was disappointed that the Complainant met with the COR, and evidence showed that ██████████ was also alarmed by the complaint to the IG. Furthermore, by enlisting ██████████ and ██████████ to obtain oral and written statements on the Complainant’s reports to the IG and COR, ██████████ actively sought out the details regarding what the Complainant had reported to the COR and IG. Evidence showed that ██████████ appeared upset, and he “chastised” ██████████ for sitting on the information that demonstrated to him that the Complainant had been taking “malicious actions” by complaining to the ACC IG. ██████████ followed these actions by initiating an inquiry against the Complainant.

██████████ explained that the most important component of the inquiry was to determine whether there was a cause for concern regarding the contract, as the Complainant had reported five matters to the COR that were either contractual administrative violations or security violations. ██████████ claimed that although the initiation of the inquiry had nothing to do with the Complainant’s IG complaint, he did tell the Complainant that the inquiry had “everything to do with the report that [the Complainant] made to the COR.” As discussed above, we determined the Complainant’s disclosure to the COR was also protected. He also proceeded to ask the Complainant if he would share what he had reported to the IG during the company inquiry. The inquiry transcript suggested that ██████████ focused on the reasons for the Complainant’s communications with the COR and the IG, rather than asking about the issues that the Complainant had reported, as ██████████ had claimed was the basis for the inquiry.

██████████ stated that during the inquiry, the Complainant displayed a disgruntled and disaffected attitude, including refusing to answer questions and denying that he had to follow Willowheart rules and regulations. However, the evidence does not support that the Complainant expressly stated he did not have to follow company rules, but rather, he asserted his right to contact the IG and the COR over matters of concern, and that his disclosure to the IG was above the company’s chain of command. ██████████’s claim that the Complainant was disenfranchised and looking to cause harm was not credible as there was no documentation of such behavior earlier and no efforts to

resolve such concerns. This was further supported by the fact that on April 25, 2018, the SOTF Security Manager and IRP CO determined that the potentially disqualifying information Willowheart presented in the EAR did not constitute disqualifying information under AR 190-56 and AR 380-67.

The evidence showed that [REDACTED] explicitly characterized the Complainant's disclosures to the IG and COR as misconduct, willful insubordination, and demonstrated ill will. [REDACTED] wrote in the EAR that the Complainant's "actions gave the company cause to question whether he is a security risk by his display of willful, surreptitious, and malevolent actions in the manner by which he pursued reporting his concerns." The EAR also stated that the Complainant "acted in a manner contrary to the best interest of Willowheart or the client ... by his willful and surreptitious manner in reporting what he believed to be violations of contract or his own perceptions when reporting to the client and then going beyond the client to reporting to an outside agency." This suggested animus toward the Complainant's disclosures and indicated that the action against the Complainant was taken not in spite of the disclosure, but rather as a result of the disclosure. Willowheart placed the Complainant on a temporary administrative leave of absence without pay because it concluded that he violated the Willowheart SOP and its Code of Ethical Business Conduct when he bypassed the company chain of command and disclosed violations of law to the SOTF COR and IGs.

#### *Timing of Action Taken or Withheld*

Willowheart became aware of the Complainant's protected disclosures to the ACC IG on December 18, 2017; to the SOTF COR on December 19, 2017; and to the USASOC IG on December 22, 2017. Following the December 22, 2017, company inquiry proceeding, Willowheart placed the Complainant on a temporary administrative leave of absence without pay. The close timing between Willowheart's knowledge of the Complainant's protected disclosures and the action taken against him raises an inference of reprisal.

#### *Disparate Treatment of Complainant*

From January 2017 through September 2, 2018, [REDACTED] placed 29 Willowheart employees on a temporary administrative leave of absence without pay: eight for administrative matters (including the Complainant), and 21 for medical reasons. The Complainant was the only employee placed on a temporary administrative leave of absence without pay, for what Willowheart considered "adverse personal conduct." [REDACTED] told us that of the 29 employees he placed on a temporary administrative leave of absence without pay, at least half of them had filed some type of complaint, either with the COR, the Union, or with the Department of Labor, before they were suspended without pay. Accordingly, we determined that the comparator evidence indicated a consistent pattern of placing employees who had exercised their statutory or contractual rights to file complaints on temporary administrative leave without pay. Indeed, the comparator evidence supports that the Complainant's protected disclosures predictably resulted in the action Willowheart took against him.

#### *Discussion*

Weighed together, the evidence analyzed above established that Willowheart would not have taken the action it did with respect to the Complainant absent his protected disclosures.



The evidence showed that the Complainant made three protected disclosures to Government officials and that Willowheart had knowledge of those protected disclosures prior to taking the action against the Complainant.

The evidence also showed that within days of becoming aware of the Complainant's protected disclosures, Willowheart initiated a company inquiry against the Complainant and placed him on a temporary administrative leave of absence without pay pending further investigation, specifically for reporting alleged violations of law to the IG and COR. The followup investigation focused on what Willowheart considered the Complainant's "misconduct" for violating company policy by going outside the chain of command and communicating with the client (COR) and Inspectors General.

Willowheart's claim that the Complainant demonstrated signs of "severe disgruntlement" lacked supporting evidence. [REDACTED] and [REDACTED] claimed that the Complainant became severely disgruntled when he was not selected as [REDACTED]; however, no Willowheart management officials counseled the Complainant or documented his alleged disgruntled behavior. [REDACTED] did not counsel the Complainant because he never observed the Complainant acting negatively toward him. [REDACTED] did not think there was a need to counsel the Complainant for disgruntlement over not being selected to [REDACTED], adding that it was okay for employees to be angry as long as their disgruntlement did not escalate into something that needed to be addressed. Additionally, none of the 10 CSGs who participated in Willowheart's investigation questionnaire noticed any change in the Complainant's attitude from the time he served as a [REDACTED] to the time of the questionnaire or witnessed the Complainant express dissatisfaction with any level of management, up to the president of Willowheart. Only one of the nine CSGs interviewed noted the Complainant's dissatisfaction with how the company was administering the contract and two CSGs noted the Complainant's disappointment or dissatisfaction after not having been selected for [REDACTED].

Willowheart expressed numerous instances of animus toward the Complainant's protected disclosures and took active steps to identify what the Complainant had reported to the COR and the IG. Willowheart provided no evidence of any other "misconduct" by the Complainant other than what it considered his "willful insubordination" of reporting violations to the IG and COR.

The evidence further showed that Willowheart had motive to remove the Complainant, whom it considered a "security risk" and potential "insider threat" for bypassing his chain of command and reporting his concerns to an outside agency, from the contract. The matters reported by the Complainant highlighted Willowheart's alleged deficiencies to the Government, causing Willowheart "concern regarding the contract."

Weighed together, the preponderance of the evidence established that Willowheart would not have placed the Complainant on a temporary administrative leave of absence without pay absent his protected disclosures.

## **VII. CONCLUSION**

We conclude, based on the preponderance of evidence described above, that Willowheart placed the Complainant on a temporary administrative leave of absence without pay, in reprisal for his protected disclosures.

**VIII. RECOMMENDATIONS**

We recommend that the Secretary of the Army direct Army officials to:

- consider appropriate action against Willowheart for reprising against the Complainant; and
- order Willowheart to award the Complainant compensatory damages (including back pay), employment benefits, and other terms and conditions of employment that the Complainant would have received had he not been reprised against, from the time that the Complainant was placed on unpaid administrative leave until he resigned.

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