United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

IN REPLY REFER TO:

April 24, 2015

VIA E-MAIL and U.S. MAIL

Martha L. King, Esq.
Fredericks Peebles & Morgan LLP
1900 Plaza Drive
Louisville, Colorado 80027

Richard J. Zack, Esq.
Pepper Hamilton LLP
3000 Two Logan Square
Eighteenth & Arch Streets
Philadelphia, Pennsylvania 19103-2799

Re: Final Disposition in the Matter of U.S. Department of the Interior, Office of the Inspector General Report of Investigation U.S. Bureau of Reclamation ARRA Funds–Case No. 0I-CO-13-0243-I (St. Marks)

Dear Ms. King and Mr. Zack:

This opinion is the U.S. Department of the Interior's (Department) final disposition in the matter of Kenneth Blatt-St. Marks (St. Marks). This matter arises from St. Marks' allegation that the Chippewa Cree Tribe (CCT or Tribe) subjected him to a prohibited reprisal as a result of making a protected disclosure under the whistleblower provisions of the American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 1553, 123 Stat. 115, 297-302 (2009) (ARRA). Upon consideration of the initial record as well as the further submissions of the parties and for the reasons set forth in the body of this opinion, we confirm our initial determination issued on December 19, 2014, that CCT engaged in a prohibited reprisal against St. Marks when he was removed from the position of Chairman of the CCT Business Committee in March 2013.

Having found St. Marks entitled to relief, we now order the following relief pursuant to the terms of ARRA as further explained below:[1]

[1] Upon finding a prohibited reprisal by the employer, ARRA requires that the agency head take one or more of the following actions: (a) "[o]rder the employer to take affirmative action to abate the reprisal," (b) "[o]rder the employer to reinstate the person to the position that the person held before the reprisal, together with the compensation (including back pay), compensatory damages, employment benefits, and other terms and conditions of employment that would apply . . . if the reprisal had not been taken," or (c) "[o]rder the employer to pay the complainant an amount equal to the aggregate amount of all costs and expenses (including attorneys fees and expert

- Back pay award of $277,333.30
- Front pay award of $202,666.54
- Travel costs of $2,955.60
- Legal fees and costs of $165,474.91

This constitutes a total monetary award of $648,430.35.

In addition, the Department orders that CCT should abate any further prohibited reprisals against St. Marks arising out of or relating to any protected disclosures he has made to the Department or any investigative authorities concerning ARRA funds provided to CCT.

I. Procedural History

ARRA funding recipients are prohibited from taking reprisals against their own employees for making protected disclosures with respect to "covered" (*i.e.*, ARRA) funds or ARRA-funded activities. *See* ARRA § 1553(a). When an individual submits a complaint alleging that he or she was subjected to a prohibited reprisal, the appropriate Office of Inspector General (IG) of the government agency having jurisdiction with respect to the covered funds must investigate it. ARRA § 1553(b)(1). After receiving the IG's findings, the agency head must determine whether a sufficient basis exists to find a prohibited reprisal by the "non-Federal employer" related to a protected disclosure. *Id.* § 1553(c)(2).

We considered information contained in the May 27, 2014, U.S. Department of the Interior, Office of Inspector General Report of Investigation No. OI-CO-13-0243-I (ROI) to determine that CCT engaged in a prohibited reprisal against St. Marks and that St. Marks was entitled to whistleblower protection. *See* December 19, 2014 Determination of Reprisal at 8-9 (hereinafter "Reprisal Determination"). Because St. Marks did not specify the relief that he was seeking and we otherwise did not have sufficient information upon which to determine proper relief, we directed in the Reprisal Determination that St. Marks submit a request for relief in light of the Department's findings. Reprisal Determination at 11. We also provided CCT an opportunity to respond to St. Marks' request for relief.[2]

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witnesses' fees) that were reasonably incurred by the complainant" in bringing the complaint of reprisal. ARRA § 1553(c)(2)(A)-(C).

[2] On January 9, 2015, CCT requested that the Department provide all additional documents referenced in the ROI that were not provided with the Reprisal Determination. Except for six documents that CCT agreed that it already has in its possession, on January 22-23, 2015, we provided to both parties all additional documents referenced in the ROI. In light of this release, we advised St. Marks that he could supplement his January 12 submission not later than January 30, 2015. We also advised CCT that any submission that it wished to provide was due on February 13, 2015.

On January 12, 2015, St. Marks, through his attorneys, submitted a 19-page document consisting of three sections. The submission was accompanied by 33 exhibits. With that submission, St. Marks requested: (1) certain restraints be placed upon the Business Committee's actions; (2) reinstatement as Chairman; and (3) various types of compensation (*i.e.*, "front" pay, back pay, construction contract-related amounts and damages, and costs and expenses, including attorneys fees, related to St. Marks' whistleblower complaint).

In a January 23, 2015 submission, St. Marks, by counsel, forwarded a January 20, 2015 order of the Chippewa Cree Tribal Court containing a number of procedural rulings in the 2013 matter of Arrow Enterprises versus Chippewa Cree Construction Company (C-4), et al., and C-4's counter-claim against Arrow Enterprises and St. Marks.

On January 30, 2015, St. Marks, by counsel, provided a third submission, which was accompanied by sixteen exhibits. Therein, he detailed further procedural developments—some nearly real-time—that, in his view, cast into question the efficacy of the Chippewa Cree Tribal Court as a forum for vindicating his rights. He reiterated his request that the Department order an abatement of reprisal against St. Marks, but that this now should extend to the tribal court system.

On February 13, 2015, CCT provided a 43-page submission accompanied by thirty-seven (37) exhibits ("CCT Submission"). The CCT Submission challenges the Reprisal Determination, asserting that St. Marks in fact "was removed pursuant to the Tribe's Constitution based on his extensive history of wrongdoing and fraudulent conduct." *Id.* at 2. Specifically, CCT's allegations include that St. Marks (1) defrauded CCT and the Federal Government through his company, Arrow Enterprises, by inflating equipment rental rates charged to the U.S. Department of Agriculture, engaging in bribery, and otherwise inflating costs on the Sewer Lagoon project; (2) harassed CCT employees Fawn Tadios, Georgie Russell, and other Rocky Boy Health Clinic staff prior to his March 2013 removal as Chairman; (3) abused, wasted and misused tribal funds by the unauthorized giving of money to friends and supporters and making an unauthorized automobile purchase following his November 2012 election as Chairman; (4) failed to perform certain contractual obligations subcontracted to Arrow Enterprises by the CCT-owned C-4; (5) made unlawful attempts to hire and fire tribal judges, some allegedly occurring after November 2014; and (6) took improper actions with respect to the tribal checking account. CCT also argues that (1) the Reprisal Determination and any relief ordered by the Department would be an unlawful intrusion on tribal sovereignty; (2) the ARRA whistleblower provisions do not apply to this matter; (3) the Department erred in how it applied the ARRA whistleblower provision; and (4) the relief requested by St. Marks is mooted or otherwise prohibited.

The parties have also provided us with a number of other documents regarding the myriad of disputes, elections, and tribal court matters related primarily to actions that occurred subsequent to the March 2013 removal.[3]

Finally, on April 24, 2015, St. Marks provided an additional submission presenting "costs and attorneys fees from December 2014 to March 2015."

II. Analysis

Notwithstanding the significant additional documentation developed and events that have occurred since St. Marks first was formally removed from his position in March 2013 by the CCT Business Committee, we have no reason to alter our conclusion that St. Marks' making of a protected disclosure was a "contributing factor" in his March 2013 removal and that he is entitled to relief under ARRA's whistleblower provision.[4] ARRA § 1553(c)(1)(A).

The focus of our inquiry is St. Marks' March 2013 removal and the record existing prior to and at the time of that removal. The ARRA statute requires us to consider the "inspector general report [provided] under subsection (b), [and] determine whether there is sufficient basis to conclude that the non-Federal employer has subjected the complainant to a reprisal prohibited by subsection (a)." *See* ARRA § 1553(c)(2); *see also Jackson v. Mabus*, 2014 U.S. Dist. LEXIS

[3] The Department has also received a number of other related communications from the parties in the course of our consideration of this matter, including: (1) February 4, 2015 letter from St. Marks' attorneys informing us that he was supplementing his earlier submissions and attaching "Special Election for Chairman and Business Committee Certification of Results" sheet showing St. Marks' re-election; (2) February 5, 2015 Resolution No. 07-15 of the CCT Business Committee purportedly limiting the Chairman's authority to act in a wide variety of matters only with Business Committee authorization; (3) February 27, 2015 letter from St. Marks' attorneys attaching (a) a February 15, 2015 CCT Business Committee letter to St. Marks setting out fifteen purported charges supporting his removal and setting a March 2, 2015 Business Committee meeting and (b) St. Marks' February 27 letter to the Business Committee declining on procedural grounds to call the Business Committee meeting; (4) March 4, 2015 letter from St. Marks' attorneys updating us on *Jonathan Windy Boy v. Chippewa Cree Election Board*, 2014-CV-CV-2014 pending in the CCT Tribal court and providing ten attachments of various orders and other procedural steps in the case; (5) March 3, 2015 letter from CCT's counsel providing copies of (a) the CCT Business Committee's Opinion of March 2, 2015 regarding fifteen charges brought against St. Marks and (b) a TRO issued by the CCT Tribal Court on March 2, 2015, in *Ricky Morsette v. Ken St. Marks*, 2015-CV-RO-2211, prohibiting St. Marks from acting as Chairman; (6) March 4, 2015 letter from St. Marks' attorneys advising that St. Marks received a March 3, 2015 letter from CCT conveying a TRO issued in the new case of *Ricky Morsette v. Ken St. Marks*, 2015-CV-RO-2211; and (7) a copy of a March 4, 2015 letter from CCT to USBR advising of CCT Business Committee Resolution No. 15-15 and the Business Committee's Opinion unanimously removing St. Marks from the position of Chairman for neglect of duty and gross misconduct.

[4] Although St. Marks was elected as CCT Chairman twice more in special elections held by CCT (elected the second time on July 30, 2013, and the third time on February 5, 2015) and subsequently removed by members of the CCT Business Committee following both of those elections, the ROI upon which we rely in making the Reprisal Determination and ordering relief in this decision pursuant to ARRA concerns only those facts around St. Marks' removal from the CCT Business Committee in March 2013.

95894 at **16-19 (D.D.C. 2014) (deciding authority was entitled to rely upon prior advisory opinion in reaching whistleblower determination; the "arbitrary and capricious" and "substantial evidence" tests are satisfied as deciding authority "need[s] only examine the evidence and explain its finding"). The deciding official "must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168, 83 S. Ct. 239, 9 L. Ed. 2d 207 (1962)).

Accordingly, CCT's attempts to include *post hoc* evidence of St. Marks' alleged misconduct are unavailing and are given no dispositive weight. As further explained below, we also reject CCT's claims that ARRA's whistleblower provisions do not apply here or that CCT was denied due process in the Department's review of this matter.

A. Nothing Bars the Application of ARRA's Whistleblower Provisions in this Matter

Although CCT argues that the Reprisal Determination infringes on tribal sovereignty and that ARRA's whistleblower provision has no application here, those arguments fail given the plain language of the agreements under which CCT received more than $27 million in ARRA funds from the United States. As presented in the Reprisal Determination, at 3-5, and recounted in our Findings of Fact 1-4 and n. 6 therein, CCT *expressly* subjected itself to ARRA's provisions generally and to its whistleblower provisions specifically when it entered into Modifications No. 6 and 8 to Annual Funding Agreement No. 06NA602127. Under those modifications executed in September of 2009 and September of 2010, CCT received, respectively, $19,860,000 and $7,666,000 in ARRA funding (totaling $27.5 million) to be applied to work on the Rocky Boy's/North Central Montana Regional Water System. *See* ROI Attachments 5 at 1 and 6 at 2.

It is difficult to imagine a more extensive and explicit incorporation of ARRA's whistleblower provisions than found in those modifications. Modification No. 6 and No. 8 contain the following provision:

> 10. Prohibition of reprisals against contractor whistleblowers
>
> No employee of the Contractor or any subcontractor shall be discharged, demoted, or otherwise discriminated against as a reprisal for disclosing, including a disclosure made in the ordinary course of the employee's duties, to the Recovery Accountability and Transparency Board, the Inspector General, the Comptroller General, a member of Congress, a state or Federal regulatory or law enforcement agency, a person with supervisory authority over the employee (or such other person working for the employer who has

> the authority to investigate, discover, or terminate misconduct), a court or grand jury, a Federal agency head, or their representatives, information that the employee reasonably believes is evidence of (1) gross mismanagement of this addendum/contract; (2) a gross waste of funds awarded pursuant to this addendum/contract; (3) a substantial and specific danger to public health or safety related to the implementation or use of funds awarded pursuant to this addendum/contract; (4) an abuse of authority related to the implementation or use of funds awarded pursuant to this addendum/contract; or (5) a violation of law, rule, or regulation related to this addendum/contract (including the competition for or negotiation of the addendum/contract). This prohibition is enforceable pursuant to processes set up by ARRA. Other provisions of section 1553 also apply.[5]

Modification No. 6 at 9; Modification No. 8 at 9-10.

The modifications define "Contractor" to include "Chippewa Cree Tribe, Chippewa Cree Construction Corporation, a federally-recognized Indian Tribe or Tribal Organization, as defined at 25 U.S.C. 450b." Modification No. 6 at 7. Further, the modifications that expressly apply ARRA's whistleblower provisions are signed by the CCT Tribal Chairman. *Id.* at 11. Contrary to CCT's assertions, nothing about the application of ARRA in the present circumstance impairs CCT's status as a sovereign tribal nation. In its sovereign capacity, CCT expressly agreed to be subject to ARRA's whistleblower provisions.

CCT's tribal sovereign immunity argument is likewise unpersuasive. The Department fully recognizes the long-standing principle that tribes are immune from lawsuits or court process filed by private parties and states except when it has clearly waived that immunity or Congress has abrogated that immunity. *See generally* Cohen's Handbook of Federal Indian Law § 7.05. Tribes do not, however, enjoy sovereign immunity against the United States. *U.S. v. Yakima Tribal Court*, 806 F.2d 853, 861 (9th Cir. 1986) (Indian nations are not immune from lawsuits filed against them by the United States). Thus, CCT does not have the shield of sovereign immunity against an action taken by the Department here to ensure that CCT abides by the requirements of ARRA to which CCT *expressly* agreed, including any action by the United States to enforce an order of the Department arising out of this matter in a court with jurisdiction.

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[5] In the same spirit as this express reference to ARRA's whistleblower provision in paragraph 10 of both modifications, the modifications signed by CCT note in their opening that "[p]ursuant to Section 1610(b) of ARRA, in each funding agreement that transfers ARRA funds to Tribes pursuant to self-determination contracting authorities, the Secretary 'shall incorporate provisions to ensure that the agreement, conforms with the provisions of [ARRA] regarding the timing for use of funds and transparency, oversight, reporting, and accountability, including review by the Inspectors General, the Accountability and Transparency Board, and Government Accountability Office, consistent with the objectives of this Act.'" *See* Modification No. 6 at 1 and Modification No. 8 at 2 (quoting ARRA § 1610(b)).

Finally, nothing in CCT's analysis changes our conclusion that St. Marks was a CCT "employee" as that term is defined by ARRA. In efforts to uphold Congress' mandate in ARRA to protect whistleblowers and fully address the kinds of illegal activity at which ARRA § 1553 was aimed, we find that a broad reading of "employee" is warranted. In undertaking his duties as Chairman on behalf of CCT, St. Marks was unquestionably "performing services on behalf of an employer," *see* ARRA § 1553(g)(3)(A), and CCT was providing him a paycheck for the services he was providing. *See* Reprisal Determination at 2, n. 2; ROI at 13; Att. 67. Accordingly, we have no reason to alter our finding that St. Marks is an "employee" under ARRA.

B. The Department Has Afforded CCT Sufficient Due Process

CCT contends that the Department is depriving CCT of procedural due process in this matter, arguing that the Department did not afford a hearing to allow CCT to test the evidence, present its case, and cross-examine witnesses (*see* CCT Submission at 36, 38-39, 40) and that the Department failed to consider CCT's voluminous factual record or to meet with tribal members to discuss the facts. *Id.* at 39. CCT cites to *Business Communications, Inc. v. U.S. Department of Education*, 739 F.3d 374 (8th Cir. 2013), where the Eighth Circuit held that the agency's order for reinstatement of an employee with back pay violated the employer's due process rights because the agency did not provide the employer with a hearing and because the pre- and post-deprivation procedures available under ARRA § 1553 did not provide any opportunity for the employer to confront and cross-examine adverse witnesses. *Business Communications*, 739 F.3d at 381. We find that the *Business Communications* decision is not persuasive here and may, indeed, be an erroneous application of law. Further, *Business Communications* is non-binding upon the jurisprudence of the Ninth Circuit, which is the court that would hear any appeal of this order. The *Business Communications* decision may, in effect, invalidate a reasonable implementation of ARRA's whistleblower provision in accordance with Congress' intent as demonstrated by ARRA's terms.

The ARRA whistleblower provision expressly directs the IG to prepare a report and the head of the agency to consider that IG report in order to determine whether there has been a prohibited reprisal. *See* §§ 1553(b)(1), (c)(2). It is the IG in the first instance that determines whether or not a complaint is "frivolous" and, if the complaint is not frivolous, investigates the complaint and then submits its findings. *See* §§ 1553(b)(1) – (2). The agency then must apply the specified burdens of proof to determine whether a prohibited reprisal occurred. *See* § 1553(c)(1).

There is nothing in ARRA suggesting that a hearing or any other particular procedure is required beyond that specified or that otherwise would meet minimum due process. *Compare* with general Federal whistleblower statute, *see* 5 U.S.C. § 2302(b)(8)(B), in which the roles of the

U.S. Office of Special Counsel and the U.S. Merit System Protection Board (MSPB) are specified. *See* 5 U.S.C. § 1221.[6] With ARRA, Congress evidently balanced the need for a relatively expeditious process, commended largely to agency discretion, to address whistleblower complaints related to a limited appropriation against a potentially lengthier, more elaborate hearing process.

The Department has provided CCT adequate due process in this case. Due process is flexible and calls for such procedural protections as the particular situation demands. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). Just as there is no requirement as to the exact procedures to employ whenever a traditional judicial-type hearing is mandated (*compare Goss v. Lopez*, 419 U.S. 565 (1975); *Wolff v. McDonnell*, 418 U.S. 539 (1974); *Morrissey v. Brewer*, *supra*, with *Goldberg v. Kelly*, 397 U.S. 254 (1970)), there is no reason to require a judicial-type hearing in all circumstances. Further, "[r]equired procedures may vary according to the interests at stake, but [t]he fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Target Training Int'l v. Lee*, 1 F. Supp. 3d 927, 950, 2014 U.S. Dist. LEXIS (N.D. Iowa 2014) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)).

As far as the Department conducting a meaningful consideration of the record and hearing CCT's evidence "at a meaningful time and in a meaningful manner"—*see Target Training Int'l, supra*—in this case, the IG conducted a detailed and lengthy consideration of all evidence. That consideration spanned at least the sixty-nine exhibits attached to the ROI, seven of which were Investigative Activity Reports (IAR) reflecting often extensive interviews conducted during the investigation, including interviews of CCT representatives. *See* ROI Atts. 9, 12, 27, 33, 34, 40, and 68. Congress, in ARRA, directed the Department to consider the IG's report and make a determination about whistleblower protection on the basis of that report. *Cf. Jackson v. Mabus*, *supra*, 2014 U.S. Dist. LEXIS 95894 at **16-17 (D.D.C. 2014) ("it is not inherently problematic for a [deciding official] to seek out one or more advisory opinions . . . and then rely on the reasons in those opinions in coming to its determination").

The Reprisal Determination was amply supported by the record before the Department and included the IG's and the Department's consideration of CCT's submissions. The Department also gave both parties further opportunity to supplement the record and advance their interests through additional briefing and submissions. Notably, none of the information provided by CCT was substantiated to a level that would present a factual dispute warranting further inquiry or

[6] "At the request of [a person] seeking corrective action under subsection (a), the Board shall issue a subpoena for the attendance and testimony of any person or the production of documentary or other evidence from any person if the Board finds that the testimony or production requested is not unduly burdensome and appears reasonably calculated to lead to the discovery of admissible evidence." 5 U.S.C. § 1221(d)(1) (bracket added). *Cf. McGrath v. Mukasey*, 2008 U.S. Dist. LEXIS 32120 at **12-13 (S.D.N.Y. 2008) (the whistleblower statute "extends varying levels of protection in an effort 'to balance the legitimate interests of the various categories of federal employees with the needs of sound and efficient administration,'") (citing *United States v. Fausto*, 484 U.S. 439, 445 (1988)).

cross-examination. Further, CCT attempts to buttress its position with after-the-fact accusations against St. Marks or matters beyond the scope of the present inquiry such as claims that St. Marks attempted to defraud CCT and the United States through his company Arrow Enterprises; failed to perform certain contractual obligations subcontracted to Arrow by C-4; attempted to fire tribal judges and terrorized tribal judges and court staff; and attempted to abuse tribal funds. *See* CCT Submission at 3-5; 9-10; and 14-17. Now reaffirming that previous decision and ordering relief to St. Marks, we have thoroughly considered CCT's submissions and all other evidence put before the Department on this matter. Accordingly, we conclude that in the Reprisal Determination and in this final disposition, the Department provided ample due process to CCT in accordance with the provisions of ARRA.

C. The Reprisal Determination is Supported by the Record

1. Standards for Agency Determination under ARRA

Under ARRA § 1553, the IG of the government agency having jurisdiction with respect to the covered funds must investigate whistleblower complaints. ARRA § 1553(b)(1). After receiving the IG's "report of the findings of the investigation," *id.*, the agency head must "determine whether there is sufficient basis to conclude that the non-Federal employer has subjected the complainant to a reprisal prohibited by subsection (a)." *Id.* § 1553(c)(2). ARRA thus expressly creates a process in which the IG is the initial fact-finder with respect to whistleblower complaints and the agency is then to make its determination based upon the IG report.

ARRA sets forth the pertinent burdens of proof governing an agency's determination. A whistleblower need only show that "a disclosure described in subsection (a) was a *contributing factor* in the reprisal." *Id.* § 1553(c)(1)(A)(i) (emphasis added). ARRA continues that a "disclosure may be demonstrated as a contributing factor in a reprisal . . . by circumstantial evidence, including (I) evidence that the official undertaking the reprisal knew of the disclosure; or (II) evidence that the reprisal occurred within a period of time after the disclosure such that a reasonable person could conclude that the disclosure was a contributing factor in the reprisal." *Id.* § 1553(c)(1)(A)(ii). ARRA further specifies that the head of an agency "may not find the occurrence of a reprisal . . . affirmatively established under subparagraph (A) if the non-Federal employer demonstrates by clear and convincing evidence that the non-Federal employer would have taken the action constituting the reprisal in the absence of the disclosure." *Id.* § 1553(c)(1)(B).

We concluded in the Reprisal Determination that St. Marks' protected disclosure was a contributing factor in his removal from the Business Committee and that CCT did not overcome

that showing with "clear and convincing evidence" that it would have taken the same removal action in March 2013 against St. Marks absent the disclosure. *See* § 1553(c)(1)(B); Reprisal Determination at 9-10. In light of the parties' submissions following that decision, we reaffirm our finding that CCT failed to make the requisite showing.

2. The Department's Evaluation of the Evidence is Sound

As noted, in determining whether a protected disclosure was a contributing factor in a prohibited reprisal, the deciding agency can make such a finding based on circumstantial evidence, including (1) evidence that the official undertaking the reprisal knew of the disclosure; or (2) evidence that the reprisal occurred within a period of time after the disclosure that a reasonable person could conclude that the disclosure was a contributing factor in the reprisal. ARRA § 1553(c)(A)(i)-(ii). The Reprisal Determination rested in part on facts falling into both of these categories of evidence.

CCT challenges that the Department's decision is not supported by the record, arguing that there is no evidence in the record that St. Marks sent an open letter dated March 5, 2013 to the CCT membership or that any member of the Business Committee was aware of his disclosures and cooperation with the IG and USBR regarding the alleged corruption at CCT. *See* CCT Submission at 32. This contention fails, however, in the face of the evidence before the Department.

Along with the IG's finding in the ROI that St. Marks issued the open letter dated March 5, 2013 that would have made CCT aware of his protected disclosures, *see* ROI at 3, the Department has confirmed that the IG's June 20, 2013 interview with CCT Tribal Judge Duane Gopher corroborates St. Marks' claim that St. Marks issued an open letter to the CCT membership. *See* **Attachment A** to this document (Excerpt from Transcript of June 20, 2013 Interview, at 11-12, supporting ROI Att. 27) (Judge Gopher stating that he "heard people talk about [the letter]"). The IG has also indicated to us that it confirmed in a March 4, 2015 discussion with Karen Blatt-St. Marks that, on March 8, 2013, she personally mailed approximately 300 copies of the March 5, 2013 letter to CCT members. Accordingly, the Department has a strong basis on which to confirm that the March 5, 2013 letter relied upon in the Reprisal Determination was in fact issued by St. Marks days before his removal from the Business Committee.

But even if the March 5, 2013 letter had not been issued, the record here is replete with evidence that CCT was well aware of St. Marks' communications to the IG and USBR a few short months before his removal. For example, the record shows that after St. Marks' November 2012 election, St. Marks was publically vocal with his suspicions that federal and tribal funds had been embezzled from CCT-owned Chippewa-Cree Construction Company (C-4), the Northern Winz Tribal Casino, and the CCT-owned business Plain Green. ROI Att. 9 at 2. Moreover, on

January 7, 2013, St. Marks directed CCT staff, including the CCT Attorney General LeAnn Montes, to provide documents to the IG in connection with the Department's investigation of C-4. *Id.* These facts are not so temporally distant from St. Marks' removal from the CCT Business Committee that the Department could not reasonably determine that a sufficient temporal connection exists to find that St. Marks' disclosures led to CCT's reprisal against him in March 2013.

Other incidents occurring around the time St. Marks was removed from the Business Committee in March 2013 also strongly suggest that CCT's reprisal was motivated by St. Marks' disclosures to the IG and USBR. On March 15, 2013, then-Business Committee member, John "Chance" Houle threatened to burn down St. Marks' house and harm St. Marks.[7] ROI at 5. St. Marks stated that an enrolled tribal member was purportedly approached by Houle to harm St. Marks because of his cooperation with federal investigators. ROI Att. 9 at 2. Joshua Seaton, former assistant to St. Marks, stated that two days after St. Marks was impeached by the Business Committee that he too was given a letter of termination. ROI Att. 34 at 1. Seaton said there were rumors on the Rocky Boy Reservation that individuals wanted to assault him for his affiliation with St. Marks and he believed that St. Marks could possibly get hurt by someone on the Reservation for bringing forward the information to the IG. *Id.* at 2. Further, St. Marks stated that tribal members could not speak ill of Houle due to repercussions such as job terminations on the reservation. ROI Att. 12 at 2. Following the standard set by ARRA, these facts offer, at the very least, significant circumstantial evidence that St. Marks' disclosures to the IG and USBR were a contributing factor in his removal from the Business Committee in March 2013.

In response, CCT suggests that the temporal link the Department identified is somehow broken by the fact that St. Marks began cooperation with the United States concerning CCT's alleged ARRA improprieties before his election in November 2012. CCT also asserts that there is no evidence of individuals objecting to St. Marks providing information to the Department or any other evidence that would indicate that St. Marks was in fact removed because of his disclosures and not because of his unlawful acts in office. CCT Submission at 2. To support its argument, CCT relies on *Gerhard v. D Constr. Inc.*, Civil Action No. 11-c-0631, 2012 U.S. Dist. LEXIS 35406 (March 14, 2012). CCT Submission at 36. The instant situation—one rife with threats and intimidation against individuals in the tribal community, including St. Marks, by those ultimately shown to have engaged in criminal wrongdoing—could not differ more than *Gerhard.*

[7] Houle was indicted for embezzlement, tax evasion, obstruction of a federal grand jury investigation, and bribery directly involving ARRA funds (*see United States v. John Chance Houle, et al*, indictments, U.S. District Court, D. Montana, Great Falls, CR-14-45-GF-BMM, CR-14-50-GF-BMM and CR-14-67-GF-BMM) and, on December 8, 2014, pled guilty to four felonies, with sentencing initially set for March 19, 2015, but now continued until May 28.

In *Gerhard*, the plaintiff, a field safety inspector, identified potential OSHA violations at two projects receiving ARRA funding. *Id.* at **2-3. Later, the employer asked the plaintiff to attend a training program to perform work. The plaintiff did not attend the training program and the employer terminated him. *Id.* at *2. The district court held that the plaintiff failed to show his protected disclosures were a "contributing factor" in the employer's decision to end the plaintiff's employment. *Id.* at *3. The only evidence that existed in the record were the dates when the plaintiff's protected activity occurred and the date when the plaintiff was terminated; furthermore, there was no evidence in the record of any opposition from the defendant employer to the plaintiff's ARRA related entries in his safety audits or that the employer was even aware that the plaintiff was engaging in a protected activity under ARRA. *Id.* Unlike in *Gerhard*, the ROI in St. Marks' case provides both ample direct and circumstantial evidence upon which to reasonably conclude that there was a connection between St. Marks' communications to the Federal government about CCT's possible misuse of ARRA funds and the Business Committee's decision to remove St. Marks from the Chairman position. CCT has not provided any "clear and convincing" evidence that it would have proceeded with St. Marks' removal independent of his disclosure activities or proof that CCT was unaware of such activities.

3. CCT Does Not Meet the "Clear and Convincing Evidence" Standard

As stated above, in successfully rebutting ARRA whistleblower allegations, the employer must demonstrate "by clear and convincing evidence" that it would have taken the action in the absence of the employee's protected disclosure. ARRA § 1553(c)(1)(B). As demonstrated in the Reprisal Determination, CCT failed to meet that burden. Despite levying seven charges against St. Marks in March 2013 as purported justification for his removal from the Business Committee, CCT has failed to substantiate them with "clear and convincing evidence" that ARRA requires.[8] Each of the seven charges was examined by the IG. Following ARRA's mandates, we relied on that examination to reach the Reprisal Determination. Nothing offered by CCT, either prior to the Reprisal Determination or since then, has altered our view.

On Charge 1 (tribal judge removal and appointment charge), where CCT asserts that St. Marks violated Article XII, § 2 of the CCT Constitution by removing acting Chief Judge Michelle

[8] In this regard, the MSPB has held that in determining whether the employer has met the "clear and convincing" burden, the deciding official may consider "(1) the strength of the [employer's] evidence in support of its action; (2) the existence and strength of any motive to retaliate on the part of the [employer] officials who were involved in the decision; and (3) any evidence that the [employer] takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated." *See Shannon v. Department of Veteran's Affairs*, 2014 M.S.P.B. 41, 24, 2014 MSPB LEXIS 3593 at **24 (2014) (*citing to Carr v. Social Security Administration*, 185 F.3d 1318, 1323 (Fed. Cir. 1999)) (brackets added). Applying these guidelines only would further support our initial Reprisal Determination as well as this current Final Disposition.

Ereaux and unilaterally appointing Duane Gopher to the position, the IG found that the Business Committee did not submit evidence in support of the allegation. Further, Tribal Judge Gopher provided the IG agent a draft contract from former tribal attorney Joel Rosette. The transmission of that draft indicates that the Business Committee knew that Gopher was hired because Attorney Rosette only acted after the Business Committee approved the hiring of Judge Gopher. From this evidence one could reasonably conclude that the decision to remove Ereaux and hire Gopher was a Business Committee decision and that the Committee instructed the Tribe's attorney to draw up the contract. ROI at 11; Atts. 66 and 67.

On Charge 2 (St. Marks' unlawful voting charge), St. Marks submitted a written statement to the IG explaining that he acted in accordance with tribal election rules because when he was on the Business Committee, council members were allowed to cast one vote to hire a prospective employee. The IG found that the Business Committee minutes from a regular meeting held on December 22, 2012, showed that St. Marks supported one candidate that did not win Business Committee support. Another employment candidate would have won without any support from St. Marks. ROI at 11. As St. Marks' votes were inconsequential, these facts bring into question why this charge was even raised.

On Charges 3 (harassment charges) and 4 (sexual harassment charges), CCT's attorney submitted affidavits and a letter from individuals who alleged that they were subjected to the verbal harassment. ROI at 11-12; Atts. 60-65. Although the IG did not make a specific finding on the verbal harassment charges, the IG's interview with former CCT Tribal Judge Gopher indicates that the credibility of Fawn Tadios is questionable because she was not truthful of locations of the sexual harassment and her story contained inconsistencies. *See* ROI Att. 27, Interview of Duane Gopher. Further, Tadios' credibility is suspect because she has been indicted for and convicted of precisely the kinds of activities that St. Marks was attempting to bring to light as Chairman.[9]

On Charge 5 (vehicle purchase charge), the IG determined that the Tribe's motor pool operator, Angela Duran, prepared the check voucher for purchase of the vehicle. In addition, the check voucher contained St. Marks' signature and two other council members' signatures. ROI at 13; Att. 59; Ex. B. This evidence suggests that members of CCT's Business Committee were aware of the vehicle purchase and that St. Marks acted with tribal authorization.

[9] Ms. Tadios, former Chief Executive Officer of the Rocky Boy Health Clinic, was convicted of two counts of theft of tribal funds and one count of theft from a healthcare facility. *See United States v. Fawn Tadios*, U.S. District Court, D. Montana, Great Falls, No. 4:13-cr-00051. On October 22, 2014, she was sentenced to serve twelve months and one day in prison, to be followed by a two-year period of supervised release, and ordered to pay $15,000 in restitution.

On Charge 6 (making unauthorized payments of $2,000 to tribal members Larry Ray Stanley, Ozzie Windy Boy, and Linda M. Gopher in violation of tribal law), the IG found that the documents do not indicate that any official approved the transaction except St. Marks. But St. Marks explained that he gave money from his paycheck to members of the tribe who were having financial difficulties before he asked for a $50,000 decrease in his own salary. ROI Att. 67. The IG found that the evidence submitted to show wrongdoing by St. Marks was unclear. In addition, if the CCT Business Committee found such wrongdoing by St. Marks, it appears to us that CCT failed to refer this case to investigative authorities promptly. ROI at 13; Att. 67.

On Charge 7 (credit card-related claims), CCT submitted a tribal credit card account statement and alleged that St. Marks made unauthorized charitable payments to the National Congress of American Indians. The IG made no finding as to whether this documentary evidence proved that the transactions were unauthorized. ROI at 13; Att. 59, Ex. F. Nonetheless, CCT never took formal disciplinary action in a timely fashion regarding this charge.

Even if some of the charges against St. Marks remain open questions, the IG's examination of the evidence and ROI, as well as our examination demonstrate that there is not "clear and convincing evidence" that the CCT Business Committee would have removed St. Marks based on the seven charges raised against him in March 2013 had he not made protected disclosures to the IG and USBR. Notably, CCT never sought to formally discipline St. Marks until after St. Marks made his disclosures to USBR and the IG concerning the misuse of ARRA funds. Moreover, there is no evidence in the record to show that CCT ever sought a criminal referral concerning St. Marks' alleged misuse of funds until very recently. Furthermore, CCT's record on these charges lack contemporaneous evidence documenting discovery of the alleged unauthorized behavior and timely, formal CCT Business Committee (or other tribal entity) process and procedure to investigate and adjudicate any of the allegations. A laundry list of unsubstantiated findings in a tribal government document is wholly insufficient to support the drastic and significant measure of removing an elected official. Indeed, CCT's continued pursuit of all seven charges despite evidence either challenging or failing to support their veracity calls into question the Business Committee's credibility and motive and renders the charges as pretext. Accordingly, we find no reason to reverse our Reprisal Determination.[10]

4. Further Inquiries with the IG and the Office of the United States Attorney, District of Montana

In the days following our receipt of the CCT Submission, we contacted the IG in order to revisit various aspects of this matter. We spoke with IG agents in March 2015 who either had

[10] As noted in our summary of CCT's Submission, above, much of the wrongful conduct that CCT now offers as the basis for St. Marks' removal involves either events allegedly occurring well after his March 2013 or events not included in the seven charges brought against him in March 2013. *See* CCT Submission at 3-5; 9-10; 14-17.

investigated the initial seven charges raised against St. Marks leading to his removal in March 2013 or who continue to investigate allegations of corruption at CCT relating to various federally-funded projects, including claims made against St. Marks pertaining to the Sewer Lagoon waste water project and other aspects of the core pipeline project (referred to as the Tiber Project). *See* CCT Submission Exhibit B (November 21, 2014 Notice of Removal Hearing detailing Charges 8 and 9 that CCT has subsequently added to the seven original charges used to remove St. Marks); February 27, 2015 St. Marks letter (attaching February 15, 2015 CCT Business Committee letter to St. Marks setting out fifteen purported charges supporting his removal and setting a March 2, 2015 Business Committee meeting). None of those discussions gave us reason to alter our conclusions about the questionable validity of the charges used to remove St. Marks from the Business Committee in March 2013.

Indeed, those discussions yielded additional insightful facts. For example, we learned that on December 4, 2014, Assistant U.S. Attorney (AUSA) Carl Rostad wrote to CCT's counsel in response to a January 13, 2014 letter and December 3, 2014 email from CCT's counsel to the AUSA's office concerning alleged fraud and misuse of federal funds by St. Marks and his company, Arrow Enterprises. *See* CCT Submission, Exhibit KK.[11] In that December 4, 2014 letter, AUSA Rostad advised CCT's counsel that the U.S. Department of Agriculture IG had conducted an inquiry into allegations against St. Marks with respect to the Sewer Lagoon waste water project, but that the inquiry "was closed after finding no credible evidence for further investigation." *See* **Attachment B** to this document. AUSA Rostad further advised CCT that with respect to allegations of bribery that may have affected "the fresh-water pipeline project"—allegations that had been the "focus of several investigations"—a "review of thousands of financial records produced no information that St. Marks transferred funds to tribal officials." *Id.* AUSA Rostad also noted that "when the agent assigned to the whistle-blower case attempted to interview tribal officials about the allegations they all refused to be interviewed." *Id.* But AUSA Rostad did leave open that, "[i]f that has changed," CCT's counsel could provide the names of tribal officials to be interviewed. *Id.*

Shortly following issuance of AUSA Rostad's December 4, 2014 letter, there were several communications between CCT's counsel and the IG. *See* CCT's February 13, 2015 Submission, Exhibit JJ. The IG's December 10, 2014 email to CCT's counsel, which considered documents that CCT previously had provided to the IG through counsel by a December 8, 2014 email, stated in relevant part:

> In advance of our meeting [for the following week], I am formally requesting all documents in your, or the Chippewa Cree Tribe's possession that support the

[11] CCT's January 13, 2014 letter had with it the same three documents that CCT provided as Exhibits C, F and H to the CCT Submission. Accordingly, the allegations presented to the U.S. Attorney for Montana in January 2014 correspond to Charges 8 and 9 that the Business Committee currently maintains against St. Marks.

> Business Committee's allegation that Arrow Enterprises made fraudulent misrepresentations in connection with their work on the Rocky Boys North Central Montana water project, that Arrow Enterprises failed to properly excavate and install water lines and that Arrow Enterprises has breached their contractual obligations due to unsatisfactory and substandard quality of work, as detailed [in the] November 21, 2014 letter [of the Business Committee].
>
> Thank you for the documents you have forwarded. Possibly these are all of the documents that exist. If that is the case, I may need to simply conduct interviews with the five tribal officials who signed the November 21 letter. Based on my initial review of the documents provided, they appear to be summary statements by the tribe of yet unsupported allegations.
>
> In your earlier email, you noted that your firm had conducted an investigation into St. Marks' criminal conduct. If that is the case, would it be possible for you to forward your firm's investigative files, or investigative summaries?

In a December 11, 2014 email response, CCT's counsel stated that it had "conducted an investigation into allegations that Ken St. Marks defrauded the Tribe and various federal agencies of more than $2 million in both the pipeline and lagoon projects," but that "the Business Committee members were not witnesses to St. Marks' fraud." *See* CCT Submission, Exh. JJ (December 11, 2014 email from Richard J. Zack to IG agent). CCT's counsel went on to say that a "detailed description of St. Marks' criminal conduct is contained in our letter and in our counterclaims which were filed in Tribal Court and which we supplied to you previously." *Id.* This likely refers to CCT's January 13, 2014 letter to the U.S. Attorney for Montana. CCT's counsel stated further that "I am not sure what you mean by your statement that you 'simply need to confirm the specificity and attribution of the tribal allegations against St. Marks.' We have requested that you investigate the matter and refer it to the United States Attorney for prosecution. We renew that request now." *Id.* The IG has confirmed that following those exchanges in December 2014, it has had no further contact with CCT's counsel nor received any of the additional documentation requested in its December 8, 2014 email to CCT's counsel. These emails and other communications call sharply into question any CCT allegation that investigative authorities have failed or refused to engage with CCT tribe members or other possible witnesses to St. Marks' alleged wrongdoing.

Pertinent to the substance of CCT's latter allegations (Charges 8 and 9) against St. Marks, the IG has provided four Investigative Activity Reports (IAR). The first IAR documents an IG conversation with the USBR Deputy Regional Director on December 4, 2014. *See* **Attachment C1** to this Final Disposition. The IAR reveals that the Deputy Regional Director expressed doubt concerning claims that Arrow Enterprises had performed inadequate or substandard work

on the Tiber Project because all work had been "inspected, reviewed, certified and approved for payment by the tribe's project engineer – AE2S Engineering." *Id.* That is, C-4 had retained AE2S Engineering as the Tiber Project engineer in order to certify that Arrow's work was performed in accordance with Project plans and specifications. Had Arrow's work not been in conformance, AE2S Engineering "could be held financially liable for corrective action." *Id.*

The remaining IARs document the IG's conversations with a project engineer for USBR and a lead engineer from AE2S, on December 4, and with Dan Belcourt, C-4's attorney, on December 5. *See* **Attachments C2-C4** to this document. The USBR and AE2S engineers provided additional details confirming that Arrow Enterprises properly performed the work and could not have received payment had it done otherwise. *See* **Attachments C2-C3**. Attorney Belcourt did not provide any specific statement or evidence supporting Charge 8 against Arrow Enterprises and St. Marks, which he characterized only as a "civil matter." But he said that he would later provide the C-4 Board's response supporting allegations of St. Marks' "misrepresentations" and failure to pay Davis-Bacon wages. *See* **Attachment C4**. We are not aware of any additional evidence provided by Attorney Belcourt.

This newly learned information in our consideration of the parties' submissions following the issuance of the Reprisal Determination raises serious questions about the validity of Charges 8 and 9 raised against St. Marks in subsequent efforts to remove him from the Business Committee following his re-election and reinstatement as Chairman after he was initially removed in March 2013. While those charges are not specifically under consideration here, CCT's continued assertion of Charges 8 and 9 despite a lack of any supporting evidence as demonstrated by the IG's substantial review further harms CCT's credibility in maintaining Charges 1-7 against St. Marks and bolsters our conclusion that St. Marks' communications to the IG and USBR about possible ARRA-related corruption at CCT were a "contributing factor" in his March 2013 removal. *See* § 1553(c)(1)(A)(i). Further, we conclude from this new information that any allegation that CCT was deprived of any meaningful opportunity to meet with cognizant IG agents or other investigative officials is wholly without merit.

III. Relief Awarded

ARRA provides that if an agency head finds that there was a prohibited reprisal by the employer, the agency head take one or more of the following actions:

- order the employer to take affirmative action to abate the reprisal;
- order the employer to reinstate the person to the position that the person held before the reprisal, together with the compensation (including back pay), compensatory damages, employment benefits, and other terms and conditions of employment that would apply . . . if the reprisal had not been taken; and/or

- order the employer to pay the complainant an amount equal to the aggregate amount of all costs and expenses (including attorneys fees and expert witnesses' fees) that were reasonably incurred by the complainant" in bringing the complaint of reprisal.

ARRA § 1553(c)(2)(A)-(C). Finding that the Reprisal Determination should not be overturned, relief to St. Marks is ordered as follows:

1. Abatement

CCT is ordered to stop any and all reprisals against St. Marks arising out of or relating to his communications with the IG and USBR concerning ARRA-related funding for and activities by CCT.

2. Back Pay

St. Marks requests full back pay. *See* St. Marks' January 12, 2015 Submission at 17; Att. 29 at 1. Back pay is normally calculated from the date of the adverse action to the date of reinstatement. Actions taken in anticipation of an adverse action may influence the back pay calculation. *Lavelle v. Dep't of Navy*, 37 MSPR 86, 91 (1988) (on second, PFR, 40 MSPR 329, 332 (1989)). The first step in calculating a back pay award is to "compute for the period covered by the corrective action the pay, allowances, and differentials the employee would have received if the unjustified or unwarranted personnel action had not occurred." *See* 5 C.F.R. 550.805(a)(2); *Collins v. USPS*, 64 MSPR 684, 688-689 (1994). The typical back pay calculation is the difference between what the employee would have earned for the period of absence less the amount the employee actually earned. *Mascarenas v. Dept. of Defense*, 57 MSPR 425, 431 (1993). The back pay obligation of an agency terminates upon the employee's reinstatement. The agency must act reasonably concerning the exact date of reinstatement. *Saal v. Dep't of Navy*, 38 MSPR 670, 675-676 (1988).

St. Marks bases his back pay claim on the following calculation: when St. Marks was elected Chairman of CCT, his salary was $128,000 per year (approximately $10,666.66/month). St. Marks claims he was paid for only two months in 2013 leaving an unpaid principal balance of ten months' salary (totaling $106,666.66). We also understand that St. Marks has not been paid any of his annual salary in 2014 ($128,000) or for any of his salary that he would have earned as Chairman in 2015 through the date of this decision (April 2015) (4 months @ $10,666.66/month) (totaling $42,666.64). Accordingly, we order that St. Marks be paid $277,333.30 in back pay.

3. Front Pay

St. Marks requests that he be awarded "front pay" (*i.e.* payment through the end of the term for which he was elected) if the Department does not order his reinstatement as Chairman. *See* January 12, 2015 Submission at 17; Att. 29 at 2. As discussed below, the Department will not order reinstatement of St. Marks as Chairman. Given that St. Marks was eligible for a four-year term as Chairman ending in November 2016, we order that he is entitled to front pay from the date of this order through November 2016. Accordingly, CCT is ordered to pay St. Marks in monthly installments (at a rate of $10,666.66/month based on an annual salary of $128,000) starting May 2015[13] until November 2016 (the end date of the term for which St. Marks was elected). Alternatively, CCT may pay St. Marks a lump sum of $202,666.54 (19 months @ $10,666.66/month) immediately, which is the total sum of the salary that would be paid to St. Marks for the remainder of his term ending in November 2016.

Recognizing that St. Marks could win another special election held by the Tribe to fill the Chairman's position for the remainder of St. Marks existing term, or that St. Marks might be reinstated to the Chairman position through ongoing proceedings in the CCT judicial system challenging his removal, CCT is not required to provide front pay to St. Marks for any time that he actually serves as Chairman of the Business Committee from the date of this decision until his term expires in November 2016 *as long as* St. Marks is otherwise compensated by CCT for that service as Chairman at a rate based on his annual salary of $128,000.

4. Compensatory Damages

St. Marks requests compensatory damages for loss of business opportunities. *See* January 12, 2015 Submission at 17; Att. 29 at 2. Compensatory damages are available for a reprisal. *Simonton v. USPS*, 85 MSPR 189, 195 (2000). These damages can include pecuniary and non-pecuniary harm. Non-pecuniary losses are those that are not subject to precise quantification. Compensatory damages may include injury to professional standing, injury to character, and injury to credit standing. *Rountree v. Glickman*, EEOC Appeal No. 01941906, slip op. at 6 (July 7, 1995). *See also Currier v. U.S. Postal Serv.*, 72 MSPR 191, 196 (1996).

St. Marks alleges that he attempted to engage in a "1031" exchange to purchase a Days Inn in Billings, Montana, and also attempted to get a loan from more than one bank for this purpose. *See* January 12, 2015 Submission at 18. He alleges that because of the legal conflict in which he was engaged with CCT, he could not secure a loan to complete the purchase. St. Marks requests damages in the amount of $7,000 in lost appraisal fees and $250,000 in compensatory damages. *See* Att. 29 at 2.

[13] Although this opinion is issued before the end of April 2015, because St. Marks' back pay calculation includes all of April 2015, the front pay calculation provided here begins with May 2015.

We deny St. Marks' request for compensatory damages. It is not clear from the evidence provided by St. Marks that his inability to complete the hotel purchase resulted from his removal from the Business Committee. While citing St. Marks' ongoing disputes with CCT as problematic, one potential lender noted that St. Marks' loan request was declined because the bank did not "provide loans to a business or individual for ventures that (1) are outside of their normal line or business, or (2) that are outside of the Bank's trade area." *See* January 12, 2015 Submission, Att. 29 (St. Marks' Affidavit and Independence Bank Letter). Another lender suggested that St. Marks loan application could be evaluated again once his various disputes with CCT were resolved. *Id.* (Email from Darin Maas, VP, Commercial Loan Officer to Karen St. Marks dated Tuesday, April 22, 2014). This communication, however, does not confirm that St. Marks was guaranteed to have had his loan request approved – let alone that he would have realized a $250,000 profit – if he had not been removed from the CCT Business Committee. Moreover, St. Marks' request for $250,000 as compensation for this lost business opportunity is speculative. He offers no evidence other than his own projection that he would have earned that amount of profit from the hotel purchase he sought. *Id.*, Att. 29 (St. Marks' Affidavit) at 2.

We also decline to order CCT to pay St. Marks the amount of $282,098.92 arising out of contracts between Arrow Construction Corporation and CCT. *See* submission dated January 12, 2015 at 17; Att. 29. In refusing to order this compensation, we take no position on the merits of the ongoing contractual dispute between Arrow and CCT. Rather, we recognize that a judicial proceeding concerning that matter is currently pending in the CCT Tribal Court and do not intend to interfere with its resolution of the dispute.

In declining to order the compensatory damages requested by St. Marks, we note that ARRA does not obligate us to order such relief even if we found that the loss complained of directly resulted from the prohibited reprisal. ARRA expressly provides the Department broad authority to order "[one] or more" types of relief provided in the statute upon finding a prohibited reprisal. *See* § 1553(c)(2)(A)-(C).

5. Travel Costs

St. Marks has requested travel and hotel costs associated with meeting and working with a U.S. Congressman, DOI, USBR, and OIG officials in regard to the prohibited reprisal by CCT. *See* submission January 12, 2015 at 17; Att. 29 at 2. St. Marks claims a total of $2,955.60 for such costs. *See* January 12, 2015 Submission, Att. 29 (St. Marks' Affidavit at 2 and Travel Invoices). We order CCT to reimburse St. Marks for these costs. As the costs were incurred in making protected disclosures about ARRA-related issues regarding CCT, St. Marks is entitled to reimbursement under § 1553(c)(2)(C), which covers costs and expenses reasonably incurred by the complainant in connection with bringing the complaint of reprisal.

6. Attorneys Fees and Costs

St. Marks has requested attorneys fees and costs associated with the whistleblower protection he has sought. *See* ARRA § 1553(c)(2)(C). A party requesting an award of attorneys fees and costs must show that the amount claimed, including the billing rates and the number of hours worked claimed, is reasonable. *Santella v. Special Counsel*, 86 MSPR 48, 66 ¶36 (2002). Reasonableness of fees may be determined in part by the quality and length of work product produced rather than on the strength or weakness of the position defeated. *Weaver v. Dept. of Army*, 29 MSPR 565, 568 (1985). In order to establish the appropriate hourly rate, the fee application must contain a fee agreement, if any, as well as the attorney's customary billing rate for similar work. *Mitchell v. Dep't of Health and Human Servs.*, 19 MSPR 206, 210 (1984). A request for attorneys fees must also be supported by citation to past fee awards or to comparable awards in the community to attorneys of comparable backgrounds, to demonstrate the reasonableness of the retainer rate. *Lizut v. Dep't of Navy*, 42 MSPR 3, 7 (1989).

Some factors courts look to when determining reasonableness of attorneys fees include: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the level of skill required to perform the legal service properly; (4) the preclusion of employment by the attorney due to the acceptance of the case; (5) the attorney's customary hourly rate; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or circumstances; (8) the amount involved in the case and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of professional relationship with the client; and (12) awards in similar cases. *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974).

Having examined the attorney bills submitted by St. Marks, *see* January 12, 2015 Submission, Atts. 30-32, and Fredericks Peebles & Morgan LLP Letter dated April 24, 2015, we order that CCT pay him $165,474.91 to cover the legal fees and costs St. Marks has incurred.[14] Consistent

[14] This value is broken down as $162,014.91 (Fredericks, Peebles & Morgan LLP) and $3,460 (Rosette LLP). The Department concludes that fees and costs associated with matters not directly involving St. Marks' whistleblower matter, *e.g.* Arrow-related litigation and Tadios sexual harassment allegation, would not be recovered under this action. This is consistent with the Department's treatment of St. Marks' request for recovery in this matter of those funds at issue in the Arrow Enterprises v. C-4 contractual dispute now pending in the CCT Tribal Court. The Department thoroughly reviewed St. Marks' January 12, 2015 Submission, which included the Affidavit of St. Marks (Att. 29), Fredericks Peebles & Morgan LLP Attorneys Fees Invoices (filed under seal) (Att. 30), Rosette Invoices (filed under seal) (Att. 31) and Joe McKay's attorney fees (Att. 32), and the Fredericks Peebles & Morgan LLP Letter dated April 24, 2015 and its accompanying affidavit and invoices (filed under seal). The Department examined these bills and time descriptions closely to ensure that the time was spent working on the whistleblower matter and not ancillary disputes involving St. Marks and CCT. Because the McKay invoice (Att. 32) failed to sufficiently describe the work done on St. Marks' behalf in any meaningful way, we decline to add any of the total reflected on that invoice to the relief ordered in this opinion. The Department also declines to award any legal fees and costs incurred by St. Marks beyond January 30, 2015, which is the date on which St. Marks' final submission

with the standards set forth in guiding authority cited above, we find this amount of fees and costs is reasonable.

This constitutes a total monetary award to Mr. St. Marks of $648,430.35 for back pay, front pay, travel costs, and legal fees and related costs.

7. Reinstatement

We decline to order reinstatement of St. Marks as CCT Chairman. As suggested in the Reprisal Determination, where we also noted the ongoing struggle over St. Marks' efforts at restoration to the Chairman position, we do not believe such an order would be prudent here. *See* Reprisal Determination at 10 and n. 10. Proceedings challenging St. Marks' removal from the Business Committee are pending in the CCT courts. Thus, the Department will not order any relief that complicates the CCT judiciary's consideration of what relief, if any, should be awarded to St. Marks concerning reinstatement.

We do not reach this decision lightly, however. As found in our Reprisal Determination and confirmed here, CCT acted wrongfully towards St. Marks. Moreover, the numerous criminal indictments and convictions of CCT employees and officials create significant concern for the Department about the welfare of CCT's government and its members. Accordingly, we appreciate St. Marks' efforts to bring concerns about ARRA-related corruption and malfeasance at CCT to the attention of the United States. Still, in strong support and recognition of tribal sovereignty and self-determination, we decline at this time to inject the Department into an issue concerning tribal leadership further than is absolutely necessary. Accordingly, we award monetary relief to St. Marks as described above, and look to the CCT judiciary and electorate to resolve outstanding issues concerning CCT's leadership.

IV. Conclusion

Having considered the parties' various submissions along with relevant information from the Inspector General, we uphold the conclusion we reached in the Reprisal Determination and order relief to St. Marks as set forth above.

In accordance with ARRA § 1553(c)(5), any person adversely affected or aggrieved by an order issued under § 1553(c)(2) may obtain review of the order's conformance to § 1553(c), and any regulations issued to carry out this section, in the United States court of appeals for a circuit in

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was due to the Department concerning the remedy that should be ordered in this matter. Accordingly, the Department will order only $32,563.40 of the total reflected on the invoices submitted by St. Marks on April 24, 2015 be added to the amount of recoverable legal fees and costs.

which the reprisal is alleged to have occurred. Further, no petition seeking to review this order may be filed more than 60 days after issuance of this order. *Id.*

Sincerely,

Hilary C. Tomkins
Solicitor

Enclosures

cc: LeAnn Montes, Esq.