

Investigation into Allegations of Reprisal Reprisal Not Found, But Lessons Learned

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Executive Summary

This report provides the results of an extensive investigation into an allegation of reprisal from an employee. The Auditor General's Office has the responsibility to investigate reprisal, in coordination with the City Manager's Office.

Reprisal investigations are complex. Termination is one of the most severe types of reprisal, and therefore the Auditor General initiated an investigation into the allegations.

The investigation involved the review of documents, emails, text messages, and Briefing Notes related to the case. The Auditor General's Office (AGO) also interviewed eight current or former staff members, some more than once, who had direct or indirect knowledge and/or involvement in the employee's termination. The employee whose employment was terminated was also interviewed.

The AGO considered several questions when evaluating whether there was sufficient evidence to support that reprisal occurred. These questions included:

1. Did the employee make a wrongdoing complaint?
2. Did the employee suffer significant negative action after reporting wrongdoing?
3. Did the person taking the negative action against the employee have knowledge that a wrongdoing complaint was made?
4. Was the negative action taken *because* the employee made a wrongdoing complaint?

The Auditor General has concluded that there was no reprisal. However, this report is being issued to communicate important lessons and to assure City employees, City Council, senior management, and the public know that all reprisal allegations are taken very seriously and are investigated to the fullest extent.

Background

Disclosure of Wrongdoing and Reprisal Protection

The Toronto Public Service By-law, Chapter 192, requires that employees immediately¹ report wrongdoing that has occurred. Wrongdoing includes the *"mismanagement of City resources or assets in a wilful, intentional, or negligent manner that contravenes a City policy or direction by Council,"* and *"violations of the City's Conflict of Interest provisions" or "breach of public trust".*

¹ Toronto Public Service By-law, Chapter 192

<https://www.toronto.ca/wp-content/uploads/2017/11/99b7-TPS-By-law-Disclosure-of-Wrongdoing-link-to-Chapter-192-sections-V1.1.pdf>

An employee who reports wrongdoing or reprisal in good faith is not to suffer any reprisal, regardless of whether their wrongdoing allegation is found to be substantiated or not.

Reprisal is any measure taken or threatened as a direct result of disclosing or being suspected of disclosing an allegation of wrongdoing. Reprisal can include disciplinary measures, demotion, suspension, intimidation or harassment, or any punitive measure that adversely affects the employee's employment or working conditions, including termination.

The Auditor General, in consultation with the City Manager, is required to investigate allegations of reprisal.

A strong whistleblowing system is one of the best mechanisms available for uncovering wrongdoing. There are many benefits to the City in having an effective whistleblowing system, most importantly being the early detection and/or prevention of harmful misconduct. Other non-quantifiable benefits are strengthened internal controls, improved policies and procedures, increased operational efficiencies.

A whistleblowing system is only effective, however, if employees feel their job is not in jeopardy when they report suspected wrongdoing. Reprisal protection helps to ensure employees feel safe when reporting potential wrongdoing. Thus for the Fraud and Waste Hotline to function effectively as the whistleblowing system, there must be no reprisal from reporting suspected wrongdoing.

Some recent cases which resulted from allegations reported to the Fraud and Waste Hotline include:

- **Raising the Alarm: Fraud Investigation of a Vendor Providing Life Safety Inspection Services.** This report centered around one life safety vendor the City had used for many years. This vendor was accused of not providing the services they were contracted to do, such as ensuring critical life safety equipment and systems were functioning, including emergency lighting, fire alarms and sprinkler systems. The report outlined systemic problems in the life safety industry. Toronto's Deputy Fire Chief Jim Jessop said the report sent "shockwaves through the industry" and likely "saved lives".
<https://www.toronto.ca/city-government/accountability-operations-customer-service/accountability-officers/auditor-general/reports/auditor-generals-reports/raising-the-alarm-fraud-investigation-of-a-vendor-providing-life-safety-inspection-services/>
- **Auditor General's Observations of a Land Acquisition at Finch Avenue West and Arrow Road by the Toronto Parking Authority – Part 2.** This report highlighted the need to urgently review a land transaction where the price of the land was inflated. Because of the report, the transaction was halted, resulting in avoided costs for the City. It also led to the overhaul of the Toronto Parking Authority Board.
<https://www.toronto.ca/legdocs/mmis/2017/au/bgrd/backgroundfile-105389.pdf>

The Auditor General takes all allegations of reprisal seriously. Reprisal allegations take a great deal of time to investigate because of the complexities – by nature, retaliation is often difficult to prove. However, there are many benefits of a reprisal investigation, one of which is closure for those involved. Reprisal investigations also help to retain public confidence; if there was no reprisal the public needs to know, and if there was reprisal, the public needs to feel confident that the City is committed to taking appropriate steps to address the allegations.

Reprisal Complaint

The Auditor General received an allegation from the employee that their employment was being terminated because the employee made a report of wrongdoing and a previous complaint of reprisal. The results of the Auditor General's investigation are summarized in this report.

Investigation Procedures

Extensive work conducted

The Auditor General's Office performed extensive work in order to investigate the allegation, including:

- Reviewing hundreds of documents and communications, including emails, text messages, Briefing Notes, handwritten meeting notes, performance reviews, staffing charts, and meeting agendas that informed a 200-page chronology
- Interviews with eight current or former City of Toronto staff members who were directly or indirectly involved in the decision to terminate the employee's position, some more than once, along with the former employee.

Due to workload constraints and the complexity of this case, this investigation took over a year to complete.

Factors considered when reviewing the reprisal complaint

In order to support an allegation of reprisal, there must be sufficient evidence that, in our view, and on a balance of probabilities, a person's job or workplace has been negatively affected as a result of their report of wrongdoing.

The Auditor General uses four questions to assess whether there is sufficient evidence supporting retaliation, or whether the actions occurred because of other matters:

1. Did the employee previously make a wrongdoing complaint?
2. Did the employee suffer significant negative action after reporting wrongdoing?
3. Did the person taking the negative action against the employee have knowledge that a wrongdoing complaint was previously made by the employee?
4. Was the negative action taken against the employee *because* they made a wrongdoing complaint? That is to say, was there a causal link between the action of making a wrongdoing complaint and the negative action taken against the employee? For example, if a termination is unrelated to the employee's complaint, a conclusion of retaliation will not be made.

In relation to questions 1, 2 and 3, a review of the facts showed the employee made a wrongdoing complaint before. The source of the allegations was kept confidential. The investigation concluded there was insufficient evidence to substantiate the allegations of wrongdoing, but recommendations for training and other changes were made to avoid a similar situation in the future.

The employee also made a previous reprisal complaint. The person responsible for the termination had to be informed there was a reprisal complaint and the details so that the matter could be thoroughly investigated. The investigation by the Auditor General concluded there was insufficient evidence to support a finding of reprisal.

The employee's employment was subsequently terminated.

We now turn to Question 4: *Was the negative action taken against the employee because of the wrongdoing complaints, or was there some other reason for the action?* The results of the analysis of the fourth question are outlined below.

Investigation Results

Was the termination because of the employee's complaints or was there some other reason for the termination?

It can be difficult for affected employees to prove a link between the action taken against them and their wrongdoing complaint. Therefore, when assessing whether there is a link between a previous complaint and termination, the Auditor General looks at the events and circumstances surrounding the negative action to determine whether there is sufficient evidence to support reprisal, or whether the termination occurred for some other reason.²

The Auditor General's Office considered the following questions:

- A. Did the employee's termination occur soon after they reported the wrongdoing?
- B. What were staff members' explanations or understanding of the reason for the employee's termination?
- C. Who directed the termination, and was it directly or indirectly because of the wrongdoing complaint?
- D. Are there other relevant circumstances or reasons for the termination?

² We have seen cases, for example, where employees who are experiencing work-related performance issues make complaints of wrongdoing possibly hoping that if their employment is terminated, the reprisal protection will act as a shield.

A. Timing

In some³ reprisal⁴ cases in the United States, for example, if employees suffer an adverse action soon after they reported wrongdoing, it is a possible indicator of, but not conclusive evidence that reprisal may have occurred.

While the timing of the start of the termination process is close in time to when the results of the initial reprisal complaint were communicated, it is just one piece of evidence supporting possible retaliation. It is not conclusive of retaliation.

Further information is contained in Confidential Attachment 1.

B. Staff members' understanding of the reasons for termination

Further information is contained in Confidential Attachment 1.

C. Who directed the termination, and was it because of the wrongdoing complaint?

It was clear that the person who was the subject of the wrongdoing complaint, did not direct the termination, but rather supported the recommendation from senior staff to terminate employment.

Further information is contained in the Confidential Attachment.

D. Other relevant circumstances surrounding the employee's termination

Several factors made this investigation more complicated. They are described below.

Performance Reviews

Performance evaluations give managers and employees the opportunity to discuss goals, the role, and any challenges the employee may have in meeting the role's expectations. If challenges are found, both the manager and the employee put together a plan of action to address the issues.

Supervisors have a responsibility to clearly define expected outcomes and to inform their employees when there are performance issues, and to address the issues. This means there must be difficult conversations, but those conversations and performance reviews are absolutely critical.

Further information is contained in Confidential Attachment 1.

³ *Richardson v. Petasis, District of Columbia, 2013*. "... the very close temporal proximity between Ms. Richardson's protected activity and the materially adverse action is quite plain. Ms. Richardson filed her EEOC complaint on August 13, 2012, and, at or around the same time, she filed a complaint with JHU's Office of Institutional Equity. Ms. Richardson alleges that Mr. Petasis removed her supervisory duties on September 11, 2012, less than one month later. This falls within the generally accepted range for establishing a causal connection." https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2013cv0826-48;

⁴ *Singletary v. District of Columbia, 2003*. "...this circuit has held that a close temporal relationship may alone establish the required causal connection. And here the temporal proximity was quite close: Singletary was denied promotion to the acting supervisor position in June 1993, the month after he filed his appeal with the D.C. Court of Appeals." <https://caselaw.findlaw.com/us-dc-circuit/1061739.html>

HR and Legal not informed of wrongdoing complaint

Informing the HR and Legal departments of all issues related to an employee's upcoming termination will help to proactively manage any potential challenges that may arise.

Further information is contained in Confidential Attachment 1.

There is insufficient evidence to support the allegation of reprisal

Based on the evidence gathered and the interviews conducted for this investigation, the Auditor General has concluded the allegation of reprisal is not supported.

Recommendations

Human resources are one of the City's most important assets. The City delivers critical services through people. Staff must be supported in ensuring key outcomes are identified in their performance planners, and staff must be held to account if they are not doing the job they are expected to do. The primary lessons learned from this investigation relate to managing and supporting staff to do their job, including the importance of:

1. Developing a culture of transparency and openness to ensure difficult issues and shortcomings are addressed with the employee and that appropriate supports are provided so that the employee can improve.
2. Defining key outcomes and deliverables in performance planners as opposed to process-related tasks.
3. Training managers in having difficult conversations with employees when they are not performing as expected.
4. Holding managers to account if they do not give accurate performance appraisals.

Recommendations:

1. **This recommendation is included in Confidential Attachment 1.**
2. **City Council request the City Manager to include in performance appraisals of managers and supervisory staff an evaluation of whether they are giving accurate and timely feedback to staff who are not meeting expectations.**

Conclusion

There is insufficient evidence to support the allegation of reprisal.

The Auditor General's recommendations in this report will help the City to better manage employees' performance, and will help management in handling the difficult circumstances that may arise when terminating an employee's position.

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