UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF COLUMBIA

DOE (P),[1]	)	
	)	
Plaintiff	)	
	)	
v.	)	Civil No. 04 CV 2122 (GK)
	)	
Hon. PORTER GOSS, *et al.*	)	
	)	
Defendants	)	

PLAINTIFFS RESPONSE
TO DEFENDANTS MOTION TO DISMISS

NOW COMES Plaintiff, Doe, by and through undersigned counsel, and responds in opposition to Defendants Motion to Dismiss.

In support thereof, Plaintiff avers as follows:

INTRODUCTION

Defendants have filed a sweeping Motion to Dismiss invoking nearly every provision of Rule 12(b), Fed.R.Civ.Proc., accompanied by a thirty (30) page Memorandum (Defendants Memorandum), seeking the dismissal of each and every Count in Plaintiff s Amended Complaint (AC) on grounds ranging from lack of subject matter jurisdiction to standing. In some instances, Defendants even attempt to resurrect arguments already rejected in-whole or in-part in the case of *M.K. v Tenet,* 99 F.Supp.2d 12 (D.D.C.2000).

In each instance, Defendants Motion to Dismiss is without supportable grounds and should be denied in its entirety.

---

[1] The notation (P) indicates that the preceding name is a litigation pseudonym for a Central Intelligence Agency covert employee.

ARGUMENT

Defendants have filed a typical sweeping motion to dismiss, characteristic of their response in all cases involving an employee of the Central Intelligence Agency (CIA). It raises every imaginable defense no matter how tenuous. In virtually every instance it aks this Court to ignore well established principles which govern motions to dismiss. It is well established that a complaint should not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). All well-pled allegations in the plaintiff's complaint must be accepted as true at this stage. *Miree v. DeKalb County*, 433 U.S. 25, 27 n. 2,(1976); *Phillips v. Bureau of Prisons*, 591 F.2d 966, 969 (D.C. Cir. 1979). Under the liberal rules of federal pleading, a complaint should survive a motion to dismiss if it sets out facts sufficient for the court to *infer* that all the required elements of the cause of action are present. *Wolman v. Tose*, 467 F.2d 29, 33 n.5 (4th Cir. 1972) . A complaint must contain either direct or inferential allegations respecting all the material elements necessary to sustain a recovery under some viable legal theory . . . . But such allegations need only state a possible claim, not a winning claim. *Herdrich v. Pegram*, 154 F.3d 362, 369 (7th Cir. 1998), *rev d on other grounds, Pegram v. Herdrich,* 530 U.S. 211 (2000). Neither the notice pleading requirements of Rule 8, nor the standards of Rule 12(b), dictate that Plaintiffs set out in detail the facts upon which each claim is based. *See, Williams v. United Credit Plan of Chalmette, Inc.,* 526 F.2d 713 (5th Cir.1976). Only a motion for more definite statement or for summary judgment is an appropriate device to narrow claims. *Id.*
These standards are stringent. *Bergen v. L.F. Rothschild,* 648 F.Supp. 582, 584 (D.D.C.1986).

I. Plaintiff s Privacy Act Claims Should Not Be Dismissed.

Defendants first argue that Plaintiff s claims under the Privacy Act, 5 U.S.C. §§ 552a, *et seq.,* must be dismissed because Plaintiff has not adequately identified the inaccurate records, has not adequately pled an information gathering claim, has not demonstrated an adverse action, and that use of the Privacy Act is improper to collaterally attack personnel decisions. (Defendants Memorandum at 5-18). Defendants arguments are without merit and in some instances border on the frivolous.

A. Plaintiff Has Adequately Identified The Inaccurate Records.

Defendants first content that Plaintiff has not adequately identified the inaccurate records upon which he bases his claim. However, even a cursory glance at the AC demonstrates that Plaintiff has quite specifically alleged inaccuracies in his Official Personnel File, Counter-Intelligence Center file, Office of Medical Services file, and Center for CIA Security file. (AC ¶ 35).[2]

This very argument was raised by these same Defendants in *M.K. v. Tenet,* 99 F.Supp2d 12, 21-22 (D.D.C.). In rejecting this argument, the Court held:

> Federal Rule of Civil Procedure 8(a) requires that a complaint set forth "a short and plain statement of the claim showing that the pleader is entitled to relief . . . ." The court concludes that this standard is satisfied with respect to the plaintiffs' allegations of the existence of inaccuracies in agency records. The amended complaint avers that there are inaccuracies in the security or personnel records of five of the six remaining plaintiffs, and they identify the general subjects of these inaccuracies.
>
> * * *

[2] The contents of these files are classified and Plaintiff s further identification of specifics would have been redacted from his Amended Complaint in any instance.

> The defendants provide no legal authority for the proposition that a heightened pleading standard applies to Privacy Act claims. Thus the court will not dismiss the Privacy Act claims for failure to plead with sufficient specificity.

Id. Defendants herein provide this Court no reason to reach a different holding.

Defendants contention that [i]f . . . [they] knew which documents were at issue, they could look at them to see whether they contained inaccuracies . . . (Defendants Memorandum at 7) simply rings hollow. Defendants plainly know which files to examine and Plaintiff is not an expert on what specific documents exist in each file or their form. He obviously cannot be expected to recite every specific objectionable document at this stage.[3]

B. Plaintiff Has Adequately Alleged That Information Was Not Obtained From Him to the Greatest Extent Possible.

Citing a collection of inapposite cases, Defendants next content Plaintiff has failed to adequately allege that information was not gathered directly from him during the course of the investigations purportedly underlying his termination because he admits he was interviewed during the Office of Inspector General (OIG) investigation and the counter-intelligence (CI) investigation is of such a nature that gathering information directly from him may not be feasible. (Defendants Memorandum at 9-13). Defendants contentions lack merit.

Key to Defendants argument and cited authorities is the premise that Plaintiff was somehow either in a position to intimidate witnesses or was actually engaged in such intimidation and that Defendants were performing a law enforcement function. Neither is valid,

---

[3] Indeed, a record sufficient to trigger the disclosure protections of the Act can consist of as little as one descriptive item about a person, *Williams v. Department of Veterans Affairs,* 104 F.3d 670 (4th Cir.1997). Even the private notes of a supervisor are subject to the Act s requirements if they are used to make decisions about a person s employment status. *Johnston v. Horne,* 875 F.2d 1415 (9th Cir.1989); *Bowyer v. United States Department of the Air Force,* 804 F.2d 428 (7th Cir.1986).

particularly at this stage where Defendants cannot interject factual allegations or inferences.

1. Irrespective of His Interview by the Office of Inspector General, Defendants Nonetheless Failed to Adequately Obtain Information Directly from Plaintiff.

Plaintiff does not dispute that investigators from the CIA OIG eventually did interview him, after some delay, concerning allegations that he diverted money intended for an asset. However, an earlier attempt to obtain information directly from Plaintiff would have resulted in an earlier favorable resolution of this investigation, which Defendants have publicly cited as the basis for his termination.[4]

In a statement to CNN on or about December 9, 2004 Defendants asserted

> that . . . [Plaintiff] was disciplined, nothing to do with his political view or his intelligence reporting. He was disciplined for totally unrelated matters, namely that he stole U.S. government money he was supposed to use to recruit spies abroad and that he was improperly having some sort of sexual affair with a so-called asset, another undercover agent.

(*See,* Transcript of CNN interview with undersigned counsel, copy attached as Exhibit 1).[5]

Contrary to Defendants insinuation, absolutely no basis exists to believe that Plaintiff in any manner attempted to influence witnesses or otherwise interfere with the OIG investigation. Defendants invitation to factually speculate is wholly inappropriate, particularly at this stage where Plaintiff s allegations must be accepted as true and viewed in their most favorable light.

---

[4] Plaintiff believes that the OIG investigation of him was favorably resolved on or before April 19, 2005 with no finding of wrongdoing. (Amended Complaint ¶ 34).

[5] Curiously, if the allegations under OIG investigation were genuinely the grounds for termination of Plaintiff s employment, Defendants have offered no explanation of why he was terminated some seven months *before* the investigation was completed. (AC ¶¶ 27 & 34).

Similarly inapposite is Defendants cited authority. (Defendants Memorandum at 9). In *Cardamone v Cohen*, 241 F.3d 520 (6th Cir.2001), the court ruled that the agency did not fail to elicit information to the greatest extent practicable directly from the subject of an investigation only because it was investigating a charge of hostile managerial practices where there were practical considerations of threats and intimidation of fellow co-workers if agency interviewed the subject first.

In *Carton v Reno,* 310 F.3d 108 (2d Cir.2002), the court ruled that in an action stemming from an INS inquiry into complaints that an INS investigator had used abusive tactics, the investigator could not show that INS failed to collect information directly from him to greatest extent practicable pursuant because it would have been impracticable to contact the investigator before interviewing complainants.

In both cases, the subject of the investigation was alleged to have engaged in threatening, abusive or intimidating behavior presenting the peril of witness intimidation or other interference with the investigation. No such concerns existed in the OIG investigation of Plaintiff and it is improper for Defendants to invite this Court to speculate otherwise.

2. Defendants Did Not Gather Information From Plaintiff to the Greatest Extent Possible During Its Counter-Intelligence Investigation of Him.

Defendants advance a similar, though less valid argument that Plaintiff cannot state a claim for failure to gather information directly from him during the CI investigation, again suggesting that the risk of witness intimidation is too great and again relying on inapposite authorities. (Defendants Memorandum at 10-13).

As a threshold matter, unlike an OIG investigation, a CI investigation is conducted by the CIA Counter Intelligence Center (CIC) and has no color of law enforcement. Indeed, Defendant CIA is specifically prohibited from conducting a law enforcement investigation. The

National Security Act of 1947 which created CIA, 50 USCS § 403-1 (as amended), specifically provides as follows:

> Responsibilities. The Director of the Central Intelligence Agency shall--
> (1) collect intelligence through human sources and by other appropriate means, *except that the Director of the Central Intelligence Agency shall have no police, subpoena, or law enforcement powers or internal security functions;* (emphasis added).

50 USCS § 403-4a(d)[6] Hence, case law cited by Defendants which involves law enforcement functions is legally inapposite to a CI investigation, which by its nature is conducted quite differently than a criminal investigation and has a different objective.

Second, unlike in the OIG investigation, Plaintiff has *never* been interviewed as part of the CI investigation. Thus, Defendants have gathered *no* information whatsoever directly from him, despite the fact that he could provide the very type of objective information to resolve this issue that Defendants admit applicable law requires be obtained directly from him. (Defendants Memorandum at 11, *citing, Waters v. Thornburgh,* 888 F.2d 870, 872-74 (D.C.Cir.1089); *Dong v. Smithsonian Inst.,* 943 F.Supp. 69, 71-72 (D.D.C.1996)).

Third, Defendants argument again invites rank speculation by this Court as to what may or may not have happened, for which the factual record at this juncture provides not a shred of support. Defendants suggest that Plaintiff was in a position to intimidate the asset with whom he was alleged to have had a sexual liaison, and that investigators *might* reasonably have concluded that . . . [Plaintiff] *might* be able to convince the asset to give the investigator false information or otherwise coerce her (emphasis added). (Defendants memorandum at 10-11). This agues an

---

[6] Formerly 50 USC § 403(d).

inference upon an inference, objectionable even in a formal evidentiary context, *see, e.g., United States v. Pahulu,* 274 F. Supp.2d 1235, 1238 (D.Ut.2003), let alone in a speculative context where not a single allegation exists that Plaintiff was in any way acting to intimidate the asset or otherwise interfere with the CI investigation.[7]

In their continuing speculation, Defendants also suggest that [a] CIA officer holds far more power over an asset, than did the IRS agent over the taxpayer in *Brune v. IRS,* 861 F.2d 1284, 1287 (D.C.Cir.1988). (Defendants memorandum at 10). This ignores the nuances of operational tradecraft. Contact between a CIA Officer and an asset is carefully circumscribed, typically occurring infrequently, sometimes as little as once a year or less, and usually for only brief periods of time obviously to minimize detection of the relationship by a hostile security service. The opportunity for Plaintiff to influence the asset on a contemporary basis is virtually nonexistent. Moreover, it is the asset who can break off the relationship at any time and who must be carefully handled throughout the relationship.

Defendants conclude by parsing Plaintiff s AC and contend it contains no specific allegations regarding the extent or practicality of gathering information from him regarding his alleged illicit sexual relationship with a female asset. (Defendants Memorandum at 13). To the contrary, Plaintiff clearly denies it (AC ¶ 24), but no one ever asked him. This disregard for even basic CI investigative methodology reveals the CI investigation for the sham that it is. Defendants were never interested in conducting a proper CI investigation, only creating a paper

[7] Defendants suggestion that Plaintiff was accused of blackmail (Defendants Memorandum at 11), confuses his allegation that he was told that Defendant Pavitt believed Plaintiff was blackmailing him about WMD intelligence, not that Plaintiff was alleged to have blackmailed an asset or witness to one of the two investigations of him. (AC ¶ 24).

trail pretext for terminating Plaintiff s employment for the ulterior reasons he alleges.

C. Plaintiff Has Demonstrated That An Adverse Action Was Proximately Caused by Violations of the Privacy Act.[8]

Defendants next contend that Plaintiff has not demonstrated proximate cause between the Privacy Act violations and the adverse action he suffered, because he alleges that the *motivation* for the adverse action was retaliation and thus the proximate cause cannot be violations of the Privacy Act, but rather the intent to retaliate. (Defendants Memorandum at 13-15). Defendants contention confuses motivation of an actor with proximate cause of an event and must fail.[9]

Defendants begin by claiming that according to Plaintiff s allegations the same adverse action would have been taken against him regardless of whether the information in the file . . . [was] accurate or whether Defendants gathered information directly from . . . [Plaintiff]. (Defendants memorandum at 13-14). Nothing could be further from the truth. Plaintiff expressly alleges that [a]bsent the [inaccurate] information . . . , Plaintiff would not have been terminated from his employment because Defendants would have lacked a plausible pretext for so doing. (AC ¶ 32). No reasonable inference from this allegation, let alone one taken in the light most favorable to Plaintiff, would support Defendants claim. Plaintiff was a highly respected and

---

[8] Plaintiff need not demonstrate proximate cause between any subject document and the termination of his employment in order to proceed under § 552a(e)(5). Mere mental duress suffered as the result of an inaccurate or incomplete record is itself sufficient to constitute an adverse effect under § 552a(g)(1)(D). *Albright v. United States,* 732 F.2d 181, 186 (D.C.Cir. 1984).

[9] As a threshold matter, the question of proximate cause is ordinarily a question of fact. Restatement of Torts 2d § 434(2). Since Defendants Motion is one of law relying only on Rule 12(b). Fed.R.Civ.Proc., they bear a nearly insurmountable burden at this stage to overcome Plaintiff s allegations of fact, which must be taken as true and construed in a light most favorable to Plaintiff.

decorated Operations Officer with twenty-two years experience. (AC ¶ 14). Summary termination of his employment without some justification would have produced detrimental consequences to Defendants, who concede as much with their public statement to CNN that he was terminated based upon the information underlying the OIG and CI investigations. (Exhibit 1). If Defendants did not believe a justification was required, they need only have declined comment in response to media inquiries, as is their normal practice.[10]

Defendants reliance upon *Hutchinson v. CIA,* 393 F.3d 226, 230 (D.C.Cir.2005) for support is misplaced. In *Hutchinson,* the Court observed only that a single record omission did not proximately cause the plaintiff s termination where both decision-makers focused on her overall poor performance, rather than any one incident. *Id.* Such is not the case here. Plaintiff alleges his records are replete with a cacophony of inaccuracies and omissions, which Defendants have publicly declared were the grounds for his termination. (Exhibit 1).

Defendants next contend that the proximate cause of Plaintiff s termination was not inaccuracies or omissions in his records, but rather the retaliation that he alleges. Defendants appear to confuse *motivation* with *causation.*

At this stage Plaintiff does not know who made the decision to terminate his employment. He only knows, and alleges, who he believes had motivation to retaliate against him and the reasons. From that point, Plaintiff knows only that baseless OIG and CI investigations were initiated against him, and that Defendants publicly declared the information in the resulting records were the reason he was terminated. (Exhibit 1). While Plaintiff clearly believes an

[10] So much for Defendants contentions that Plaintiff lacked a basis to allege that false information constituted a pretext for his termination or that they even needed a pretext to terminate a contract employee. (Defendants Memorandum at 15).

underlying motive of retaliation exists at some point, that did not present itself as the basis for his termination. Quite the opposite.

Similarly, Defendants analysis of causation, even if factually correct, overlooks the well settled principle of concurrent causation, providing that a wrong may have more than one cause. Restatement, Torts 2d § 430, Comment d. Even if his termination was directly ordered by someone seeking to retaliate against him, of which there is no record evidence at this stage, the fact that it was also caused by information in records actionable under the Privacy Act does not deprive him of his remedies thereunder.[11]

D. Plaintiff Has A Right to Challenge the Inaccurate Records Even if the Records Are Employment Related.

Defendants next argue that because Plaintiff is attempting to challenge personnel decisions that he alleges constitute adverse action for Privacy Act purposes, his claims are precluded by the Civil Service Reform Act (CSRA) and, alternatively, even if not, they should be dismissed because they improperly challenge decisions rather than the records underlying the decisions. (Defendants Memorandum at 15 & 17). Defendants argument relies on a collection of inapposite cases and flawed analogies.

From the premise that claims under the Privacy Act are preempted by the CSRA,

---

[11] Defendants also dwell on a meritless discussion concerning the requirement that Plaintiff must show that Defendants acted intentionally or wilfully in order to recover under 5 U.S.C. § 552a(g)(4), asserting that he has failed to allege conduct rising to this level. (Defendants Memorandum at 14 n.14). Plaintiff plainly alleges that Defendants acted wilfully and intentionally in their violations of the Privacy Act. (AC ¶¶ 31 & 42). Further, the type of conduct alleged, initiating sham OIG and CI investigations based upon false allegations to cover-up a massive intelligence failure is plainly so patently egregious and unlawful as to rise to the level of unlawfulness contemplated in *Langham v. United States Navy,* 813 F.2d 1236, 1242 (D.C.Cir.1987), upon which Defendants rely.

Defendants first argue that despite the exemption from the CSRA for CIA employees, courts have refused to allow aggrieved employees to circumvent remedies provided under the CSRA through resort to the Privacy Act. (Defendant s Memorandum at 15-17). Defendant s argument must be rejected as it misconstrues Plaintiff s claim and ignores applicable law.[12]

As a threshold matter, the Privacy Act is not *ipso facto* preempted either by the CSRA [or by the Whistleblower Protection Act (WPA). *See,* 5 U.S.C. §§ 2302(a)(2)(A), & 7512.] The mere existence of a remedial scheme in the fashion of the CSRA and WPA to address prohibited personnel practices does not automatically extend to bar separate claims that simply happen to arise during the course of or at the place of employment.

For example, in *Brock v. United States,* 64 F.3d 1421, 1422 (9th Cir.1995), an employee of the United States Forest Service brought an claim under the Federal Tort Claims Act (FTCA) based upon an assault and rape by her supervisor. In denying defendant s motion to dismiss, the Ninth Circuit ruled that the CSRA provides relief only from prohibited personnel practices specifically enumerated in § 2302 and extends no further. The court held that because assault or rape were not among those personnel practices so prohibited, plaintiff s claims were not preempted and she could proceed under the FTCA. *Brock,* 64 F.3d at 1424.

Here, Plaintiff alleges not that he was the victim of any specifically enumerated prohibited personnel practices, but the subject of two sham investigations initiated for the purpose to discredit him, discredit his refusal to participate in corrupting intelligence reporting concerning WMD and provide a public justification for his employment termination. The fact

---

[12] Plaintiff does not seek restoration of his CIA employment under the Privacy Act as Defendants appear to suggest, but merely clearing his reputation. Plaintiff does seek reinstatement under his Administrative Procedure Act claim. (AC ¶ 39).

that his employment was terminated seven moths before the OIG investigation was even concluded [and which resulted in no adverse action against him], supports his allegation.

Defendants therefore provide no basis to support their contention that Plaintiff s claims under the Privacy Act would be automatically barred by either the CSRA [or WPA] even should they apply to CIA employees which they do not.

Second, as Defendants readily concede, CIA employees are exempted from the CSRA [and the WPA]. It is axiomatic that neither can therefore preempt Plaintiff s Privacy Act claims. In *Hubbard v. EPA,* 809 F.2d 1, 5 (D.C. Cir.1986), the D.C. Circuit explained that while the CSRA preempts jurisdiction to review prohibited personnel practices, the District Courts retain jurisdiction to award damages for an adverse personnel action *actually caused* by an inaccurate or incomplete record (emphasis in original). 809 F.2d at 5. In order to avoid exceeding their jurisdiction, however, courts must carefully analyze the asserted causation link. *Id.; see, also, Murphy v. United States,* 121 F.Supp.2d 21, 28 (D.D.C.2000).

Even were the Privacy Act to somehow be preempted as Defendants ague, Plaintiff s right to challenge inaccurate records does not reside in the Privacy Act alone. Even beyond the domain of the Privacy Act, it is well settled that courts in their equitable discretion may order inaccuracies removed from government records where necessary to vindicate rights secured by statute or by the Constitution. *R.R. v. Department of the Army,* 482 F.Supp. 770, 774 (D.D.C. 1980). *See, also, Turner v. Department of the Army,* 447 F.Supp. 1207, 1213 (D.D.C.1978), *aff d mem.,* 593 F.2d 1372 (D.C.Cir.1979).

In *Chastain v. Kelley,* 510 F.2d 1232, 1236 (D.C.Cir.1975), the Circuit explained that even outside the purview of the Privacy Act, individuals have a right not to be adversely affected

by information that is inaccurate or was acquired by *fatally flawed procedures* (emphasis added). Even criticisms contained in a proficiency report may be expunged if shown to be based upon factual assertions about which substantial, factual controversy exists. *See, Hewitt v. Grabicki,* 794 F.2d 1373, 1378 (9th Cir. 1986).

Hence, Plaintiff has both a Privacy Act right as well as an equitable right to challenge the offending records, and where, as here, [t]he facts at issue [are] clearly provable, the district court must conduct a *de novo* review of the evidence to determine the accuracy of the records. *Blazy v. Tenet,* 979 F. Supp. 10, 20 (D.D.C.1997), *quoting, Sellers v. Bureau of Prisons,* 959 F.2d 307, 311 (D.C.Cir. 1992). It is only where the facts or the underlying bases for an opinion are incapable of being verified that the courts must refrain from credibility determinations and ensure only that the agency acted fairly. *Id.; see, also, Doe v. United States,* 821 F.2d 694, 699-701 (D.C.Cir.1997);[13] *Webb v. Magaw,* 880 F.Supp. 20, 24-25 (D.D.C.1995),[14]

II. The Court Has Jurisdiction Over Plaintiff s Administrative Procedures Act Claims.

Defendants next ague that Plaintiff s claims under the Administrative Procedures Act (APA), 5 U.S.C. §§ 701 *et seq.*, must be dismissed because they are inadequately pled, Plaintiff lacks standing and there is no available relief. (Defendants memorandum at 18-27). Once again, Defendants argument distorts facts and relies upon inapposite law.

---

[13] The facts in *Doe* are illustrative of what the courts have found to be facts incapable of being verified. In *Doe,* the plaintiff was interviewed by a State Department special agent whose file indicated she made a statement which she later denied making. Only the plaintiff and the agent were present when the statement was allegedly made. Hence, its occurrence was incapable of being verified and would involve the court in a credibility determination. 821 F.2d at 697.

[14] Similarly, in *Webb,* the court refrained from review of opinions contained in a proficiency report based only upon the absence of facts controverting the opinions. *Id.*

A. Plaintiff Has Adequately Pled His APA Claim.

Defendants again claim that Plaintiff has not adequately pled his claim because he has not identified the specific regulations providing for the integrity of intelligence collection and reporting upon which he relies. This contention is no more valid here than when Defendants asserted it as a defense to Plaintiff s claims under the Privacy Act.

The regulations upon which Plaintiff relies are classified and even if Plaintiff had pled specific citations, Defendants would have redacted them from his AC. If, as Defendants appear to suggest, they are incapable of ascertaining even the most fundamental of their own regulations, Plaintiff will be pleased to point them to specific citations once discovery commences. However, at this point neither Plaintiff nor his undersigned counsel have access to CIA regulations.

Defendants cited authorities are facially inapposite to Plaintiff s claims. In neither *Bergen,* 648 F.Supp. at 586, nor *Haynesworth v. Miller,* 820 F.2d 1245, 1254 (D.D.C.), was classified information at issue. Moreover, in *Bergen,* the court ruled only that the allegations therein did not suffice to meet the heightened pleading requirements for fraudulent concealment under Rule 9(b), Fed.R.Civ.Proc. 648 F.Supp. at 587. An issue not present in this case. Similarly, in *Haynesworth,* a heightened standard of pleading was required to overcome qualified immunity. 820 F.2d at 1254-55. An issue also not present for purposes of Plaintiff s APA claims.

Defendants also contend that Plaintiff has not pled any facts to support a claim under §§ 706(1) & (2)(A)-(D). (Defendants Memorandum at 19-20). Section 706(1) provides that the reviewing court shall compel agency action unlawfully withheld or unreasonably delayed. Plaintiff s AC clearly alleges that he was due a promotion, an award and a new position that were all unlawfully withheld, actionable under § 706(1). (AC ¶¶ 24 & 26). Similarly, Plaintiff also

alleges violation of a Constitutional right actionable under § 706(B)(2). (AC ¶¶ 52-57). Plaintiff s allegations also can be fairly read at this stage to implicate violations of the National Security Act of 1947, as amended, as well as procedural violations, actionable under §§ 706(2)(C) & (D).

Defendants concede that Plaintiff s claims implicate § 706(2)(A), which allows this Court to hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law, but contends that Plaintiff makes no such allegations, only that Defendants acted not in accordance with law. (Defendants Memorandum at 20). However, Defendants then make the same circular argument as before, that Plaintiff has failed to specifically identify regulations that were violated. This argument is no more valid here than was it before. Plaintiff will be pleased to identify specific regulations once he has obtained discovery or otherwise has access to the regulations at issue.

B. Plaintiff Has Standing to Relief Under the APA.

Defendants next contend that Plaintiff lacks standing to bring his APA claim because he is unable to establish any required element thereof. (Defendants Memorandum at 21-24).

Standing is composed of three elements: (1) injury in-fact an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical; (2) a causal connection between the injury and wrongful conduct; and (3) a likelihood that the injury will be redressed through a favorable decision. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-1 (1992) (internal citations omitted).

1. Injury In-Fact

Injury in-fact need not be substantial, an identifiable trifle will suffice. *Public Citizen v.*

Lockheed Aircraft Corp., 565 F.2d 708, 714-5 (D.C.Cir.1977). Economic injury is sufficient to confer standing. *Tax Analysts and Advocats v. Simon,* 390 F.Supp. 927, 938-9 (D.D.C.1975); *Associated Gas Distributors v. FERC,* 899 F.2d 1250, 1258-9 (D.D.C.1990). Compulsory, prescriptive or regulatory agency action which has merely a chilling effect on the exercise of Fist Amendment rights confers standing on one who is affected. *National Federation of Federal Employees v. United States,* 688 F.Supp. 671, 683 (D.D.C.1988), *vacated & remanded on other grounds, sub nom,* 490 U.S. 153 (1989), *opinion on remand,* 732 F. Supp. 13 (D.D.C.1990). Once injury in-fact is demonstrated a plaintiff is presumptively entitled to judicial review. *City of Rochester v. Bond,* 603 F.2d 927, 931 (D.C.Cir.1979).

Defendants first contend that Plaintiff cannot show injury-in-fact because the regulations at issue (despite their previous contention that they are unable to divine what regulations to which Plaintiff refers) exist to protect the integrity of the nation s intelligence gathering and not the employees of the CIA. Defendants provide no supporting authority for this assertion, however. (Defendants Memorandum at 22). Assuming that the regulations do exist to protect the integrity of the nation s intelligence system, the regulations would be for the ultimate benefit of United States citizens, which Plaintiff is. He would therefore have suffered injury-in-fact from violation of these regulations, as would any other United States citizen. Second, no reason exists at this point, and Defendants provide none, to conclude that the regulations do not also exist to protect CIA employees from politically motivated attempts to meddle with their collection and reporting of intelligence. Indeed, the opposite would be a far more logical inference.

Defendants also contend that no casual relationship exists between violation of its regulations and the harm Plaintiff has suffered. This is illogical. Accepting Plaintiff s allegations

as true, as this Court must at this stage, the harm suffered by Plaintiff, retaliatory lack of promotion, termination, and sham CI and OIG investigations would plainly be precluded by the regulations violated.

Finally, Defendants argue that Plaintiff cannot establish any imminent risk of harm, citing to *Branton v. FCC,* 993 F.2d 906, 908-9 (D.C.Cir.1993); and *Los Angeles v. Lyons,* 461 U.S. 95, 103 (1983). Both are inapposite to Plaintiff s claims. As a threshold issue, Plaintiff has clearly pled that he has a direct injury from violation of the CIA regulation, *i.e.,* denial of promotion, termination, and retaliatory CI and OIG investigations, which CIA has publicly cited as grounds for his termination. (Exhibit 1). This type of harm is itself sufficient to state an APA claim under either case.

In *Branton,* the plaintiff alleged only that he was offended by profanity used in an NPR radio broadcast. The Circuit ruled that one who seeks neither damages nor other relief for that harm, but instead requests the imposition of a sanction in the hope of influencing another's future behavior does not meet the requirement if unaccompanied by any continuing, present adverse effects (internal citations omitted). 993 F.2d at 909.

Here, Plaintiff plainly alleges that he suffers continuing, present adverse effects, the loss of his promotion, loss of his employment, and public stigma by CIA s assertions that he was terminated for the reasons leading to the CI and OIG investigations. He also seeks relief from these harms, through reinstatement and other remedies. Plaintiff therefore is squarely within *Branton* ruling circumscribing the requirement of harm for standing. *Accord*, *Los Angeles,* 461 U.S. at 103-5; *O Shea v. Littleton,* 414 U.S. 488 495-96 (1974). Further, Plaintiff is also certain to suffer future harm from Defendants violations of its regulations. Plaintiff has spent his entire

adult career in foreign policy and intelligence. It is his only known career and profession. In order to continue in this profession he will require a security clearance. His termination by CIA for purported CI and OIG investigations will almost certainly cause denial of any future attempt by him to obtain a security clearance.

2. Causation.

Defendants next contend that Plaintiff cannot establish a causal connection between his injury and the conduct complained of because nothing in the Amended Complaint . . . suggest[s] that, had the President been provided with different intelligence, anything would have been different for Plaintiff. (Defendants Memorandum at 23-24). Defendants contention is confusing and without merit.

Plaintiff does not allege that the harm he suffered resulted from the President being misled on WMD. Quite the opposite. He alleges that because of Defendants actions towards him, in sequestering or attempting to falsify intelligence he collected, a result was that the president was misled. But the harm suffered by Plaintiff personally, denial of promotion, loss of employment, etc., resulted from Defendants actions directly against him, based upon his refusal to acquiesce to Defendants demands. Plaintiff does not seek any relief for harm to the President.

3. Redressability.

Defendants next argue that Plaintiff cannot establish standing because he cannot show that the injury Defendants contend he pled, insufficient intelligence collection and reporting, will be redressed by a favorable decision, citing to *Bennett v. Spear,* 520 U.S. 154, 167 (1997), for support. (Defendants Memorandum at 24). Defendants completely misconstrue Plaintiff s claim and cite to indirect authority.

Contrary to Defendants warped contention, Plaintiff does not seek to redress the deficient intelligence provided to the President. That is for the administration, Congress and the American people to remedy. But rather, Plaintiff seeks only to redress the harm he suffered for refusing to acquiesce in the scheme to provide such deficient intelligence. Plaintiff seeks merely to secure reinstatement, restitution and a rule making to protect himself and others from future such harm for doing no more than that which he is sworn to do.

Bennett, merely notes that standing requires that it be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. (internal citation omitted). 520 U.S. at 167. While this principle is true, it is of no help to Defendants since Plaintiff does not complain of the harm they suggest.

C. The APA Waives Sovereign Immunity for Equitable Claims Seeking Specific Monetary Relief.

Defendants then take their foregoing argument one step further, contending that there is no relief available to Plaintiff under the APA. (Defendants Memorandum at 24-27). Again, Defendants argument misconstrues facts and misapplies law.

While the APA waives sovereign immunity for suits seeking judicial review of federal administrative agency action, the waiver of immunity does not apply to suits for money damages. Not all claims for monetary relief, however, are claims for monetary damages. The equitable remedy of specific monetary relief is distinct from money damages for this purpose. Thus, the APA permits claims for specific monetary relief. *Bowen v. Massachusetts*, 487 U.S. 879, 893, (1988); *National Ass'n of Counties v. Baker*, 842 F.2d 369, 373 (D.C. Cir. 1988), *cert. den.*, 488 U.S. 1005 (1989); *M.K.,* 99 F.Supp.2d at 24; *Anselmo v. King*, 902 F. Supp. 273, 275 (D.D.C.

1995). Even if success on the merits may obligate the United States to pay the complainant, an action can still be considered non-monetary for the purposes of §§ 702. *Kidwell v. Department of the Army*, 56 F.3d 279, 284 (D.C. Cir. 1995). As long as the sole remedy requested is declaratory or injunctive relief that is not 'negligible in comparison' with the potential monetary recovery, the government is not immune to the requested relief. *Id*. (quoting *Hahn v. United States*, 757 F.2d 581, 589 (3d Cir. 1985). However, the D.C. Circuit has held that the APA permits only equitable claims for payment for work already performed. *Hubbard v. EPA,* 982 F.2d 531, 533 & n.4 (D.C.Cir.1992); *M.K.,*.99 F.Supp.2d at 24-25.

In the instant action, Plaintiff seeks specific monetary relief for payment of wages earned but withheld during the period his promotion to GS-15 was wrongfully embargoed by Defendants, and for the award of the CIA Medal of Intelligence and accompanying benefits, which was also wrongfully withheld by Defendants. (AC ¶¶ 202, 26 & 38). Plaintiff plainly states a colorable APA for this relief.

Defendants contend that the APA does not waive sovereign immunity for such wages, citing to *Hubbard, M.K., and Larson v. United States Navy,* 346 F.Supp.2d 122-129-30 (D.D.C. 2004), for support.[15] (Defendants Memorandum at 25 & 27). Defendants reliance on these cases is misplaced.

In *Hubbard,* the plaintiff sought an award of back pay for a position at the Environmental Protection Agency which he was denied. Characterizing his claim as one for damages to compensate for unlawful deprivation of employment, the D.C. Circuit held it was not recoverable under the APA because it sought a monetary award for services that he did not perform. However the Court went on to observe that

> [w]e do not suggest that back pay must always be viewed as money damages and can never be properly categorized as specific relief. If

[15] It is unclear, however, if Defendants also contend that the APA also does not provide a means by which Plaintiff can seek his wrongfully withheld Medal of Intelligence. A plain reading of the APA suggests that it does permit Plaintiff to seek such relief.

> Hubbard had been hired by the EPA and worked for the agency for a year without being paid, his legal claim might well be viewed differently. In that case, the money that Hubbard had a right to receive in exchange for his labor might well be the very thing that was taken from him.

982 F.2d at 533-34 & n. 4.

Similarly, in *Larsen,* plaintiffs brought a claim for instatement as Navy chaplains and seeking enhanced retirement standing for the period during which they were wrongfully denied these positions. As in *Hubbard,* these plaintiffs did not perform the work of Navy chaplains during the relevant period. In denying an APA claim for this relief, the court reasoned that [t]he plaintiffs never obtained the chaplain positions and thus the law deems them unentitled to whatever pay-level increases or enhanced retirement prospects that one in those positions would normally acquire. 346 F.Supp.2d at 129-30. This holding comports squarely with that in *Hubbard.*

While the ruling in *M.K.,* does include compensation for non-promotion as being outside the scope of specific monetary relief recoverable under the APA, it cites only to *Hubbard* in reaching this conclusion. 99 F.Supp.2d at 25-26. As discussed above, nowhere in *Hubbard* does such an exclusion for non-promotion exist, in-fact, quite the contrary. This aspect of the holding in *M.K.* is thus without adequate support.

Here, Plaintiff alleges that his promotion to a higher GS grade was wrongfully embargoed by Defendants, but that he quite clearly performed the same work that he would have had it not, just at a lower pay scale. He therefore performed work for which he was not fully compensated and which is recoverable under the APA.

Relying on a complete misreading of *Webster v. Doe, Webster v. Doe,* 486 U.S. 592, 601 (1988), Defendants also contend that this Court lacks jurisdiction to order reinstatement of a CIA employee. (Defendants Memorandum at 27). This contention is without merit. In *Webster,* the Supreme Court specifically held that a claim for termination of a CIA employee arising under the

Constitution was reviewable under the APA. The Court also observed that CIA must abide by its own regulations in its treatment of employees, presumably giving rise to an APA claim if it does not. 486 U.S. at 602 n.7. Plaintiff clearly alleges that CIA violated its own regulations in terminating his employment, as well as in embargoing his promotion and Intelligence Medal. He therefore states a claim under the APA for which this Court has jurisdiction.

Finally, Defendants go on at length arguing that Plaintiff is not entitled to obtain the rule making he seeks under the APA. Defendants again misread Plaintiff s allegations and cite to inapposite authority. (Defendants Memorandum at 25-27).

Contrary to Defendants contention, Plaintiff does not seek a rule making solely to benefit himself, but to protect all CIA employees from the harm that was visited upon him, to provide them a means to protect themselves when CIA chooses to violate its cited regulations on the integrity of intelligence collection and reporting. To the extent such rule making would protect Plaintiff from future retaliation by Defendants should this Court order his reinstatement, it is an altogether appropriate remedy. Defendants provide nothing of substance to controvert these facts.

III. Plaintiff Has Pled An Actionable Claim For Breach of Contract.

Defendants contend that Plaintiff s claim for breach of contract must be dismissed because CIA is always at liberty not to renew such contracts, Federal employees serve by means of appointment, not contract, and because Plaintiff s contract claim is an attempt to circumvent the CSRA. (Defendants Memorandum at 27-29).[16]

Contrary to Defendants assertion that Plaintiff admits he was a contractor and not a staff

[16] Defendants futile reliance on the CSRA is discussed *supra* at 11-14.

employee, Defendant merely alleges that is what Defendants stated to him. He was always under the impression that he was a staff employee from 1995 onward. (AC ¶¶ 15 & 29). Because the nature of Plaintiff s employment is apparently an issue of disputed fact, these facts must be fully determined before any ruling can be rendered by this Court on Defendants Motion to Dismiss. *See, United States* v. *Hopkins*, 427 U.S. 123, 130 (1976) (remand to determine nature of government contract is appropriate when facts not evident).

If, as Plaintiff contends, he was an employee and not a contractor, he was not afforded the procedural due process of a CIA Personnel Evaluation Board before his employment was terminated and at minimum would be entitled to a name clearing hearing. *See, Codd v. Velger*, 429 U.S. 624, 627, (1976) (*per curiam*); *Lyons v. Barrett,* 851 F.2d 406, 410-11 (D.C.Cir.1988); *Doe v. U.S. Department of Justice,* 753 F.2d 1092, 1113-14 (D.C.Cir.1985).

If Plaintiff was a contractor, he alleges that his contract was terminated in violation of CIA regulations. This gives rise to a colorable claim for breach of contract. *See, Gull Airborne Instruments, Inc. v. Weinberger,* 694 F.2d 838, 841 (D.C.Cir.1982) (government violation of regulations creates breach of contract claim). Even should this unknown contract contain a termination-for-convenience clause, a termination may still be challenged on contract principles. *Ingersoll-Rand Co. v. United States,* 780 F.2d 74,78 (D.C.Cir.1985), *citing, Torncello v. United States*, 231 Ct. Cl. 20, 681 F.2d 756, 772 (Ct. Cl. 1982) (holding that Government may not use termination-for-convenience clause to dishonor contract with impunity).[17]

[17] Defendants reliance on *Webster* is misplaced. Irrespective of provisions of the National Security Act of 1947, 50 U.S.C.§ 403-4(e)(2005), CIA cannot terminate employees in violation of its own regulations. 486 U.S. at 601-2 & n.7.

IV. Plaintiff Has Pled An Actionable Claim For Defendants Failure to Convert His Employment From Contractor to Staff.

Defendants next argue that Plaintiff cannot state a claim for their failure to convert him from a contractor to a staff employee because no waiver of sovereign immunity exists for such a claim. (Defendants Memorandum at 29-30). Defendants argument ignores principles of contract law.

Defendants affirmatively represented to Plaintiff in 1995 that his employment was converted from that of contractor to staff employee. Plaintiff acted in reliance upon this representation for nearly ten years. If this representation was not performed or was false when made, Plaintiff has a colorable claim for Defendants failure to perform or for misrepresentation. These claims may be raised irrespective of any termination-for convenience provision that may or may not exist in this unseen contract. *See, Ingersoll-Rand Co.,* 780 F.2d 74; *Torncello,* 231 Ct. Cl. 20, 681 F.2d at 772.

CONCLUSION

Based upon the foregoing, Defendants Motion to Dismiss should be denied in its entirety.

Respectfully submitted,

Roy W. Krieger
D.C. Bar #375754
KRIEGER & ZAID PLLC
1920 N St., N.W.
Suite 300
Washington, D.C. 20036
202/223-9050

CERTIFICATE OF FILING

I, Roy W. Krieger, do hereby certify that a true and correct copy of the foregoing was electronically filed this ________ day of _________________, 2005.

____
Roy W. Krieger