UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
GREENEVILLE

KATERI LYNEE DAHL,	]	
	]	
Plaintiff,	]	
	]	
v.	]	No. 2:22-cv-00072-KAC-CRW
	]	
CHIEF KARL TURNER, and	]	
CITY OF JOHNSON CITY, TENNESSEE,	]	
	]	
Defendants.	]	

MEMORANDUM BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON BEHALF OF CITY OF JOHNSON CITY, TENNESSEE

I. INTRODUCTION

The plaintiff, Kateri Dahl ("Dahl") asserts two claims against Johnson City: (1) Count IV, Tennessee Public Protection Act, and (2) Count V, National Defense Authorization Act. *See Doc. 56: First Amended Complaint, PageID ##: 808-10.*

II. SUMMARY JUDGMENT STANDARD

In *Kutchinski v. Freeland Cmty. Sch. Dist.*, 69 F.4th 350, 356 (6th Cir. 2023), the Sixth Circuit explained:

> Summary judgment is appropriate where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). In reviewing the motion, we view all evidence and draw all reasonable inferences in the light most favorable to the nonmoving party. *Palma v. Johns*, 27 F.4th 419, 427 (6th Cir. 2022).

III. CONCISE STATEMENT OF THE FACTUAL AND LEGAL GROUNDS WHICH JUSTIFY THE RULING SOUGHT

A. Background

Pursuant to a grant from the United States Department of Justice ("DOJ"), Dahl was

employed under a Memorandum of Understanding ("MOU") to be a Special Assistant United States Attorney ("SAUSA") tasked with assisting the Johnson City Police Department ("JCPD") in bringing federal charges against persons arrested by JCPD officers. Dahl originally began work in September of 2019, and the MOU was renewed for a second year effective July 1, 2020. However, the MOU was not renewed for a third year and it expired on June 30, 2021. *Sandos Decl., ¶ 3.*

B. Tennessee Public Protection Act claim

The first claim against Johnson City is a state law claim of an alleged violation of the Tennessee Public Protection Act (TPPA") which is found at Tennessee Code Annotated § 50-1-304(b). Dahl cannot make out a *prima facie* case for the following reasons: (1) she was not an employee of Johnson City, (2) she was neither discharged nor terminated, (3) she did not refuse to participate in illegal activities, (4) she did not refuse to remain silent about illegal activities, and/or (5) no one involved in the decision to not renew the MOU had any knowledge that Dahl was either refusing to participate in illegal activities or refusing to remain silent about illegal activities. Without such knowledge, Johnson City could not have taken action against her "solely" based on her alleged refusal to participate or remain silent about illegal activities. If the Court concurs with *any one* of the foregoing arguments, then Dahl's TPPA claim fails as a matter of law.

Alternatively, even if Dahl could make out a *prima facie* case, the TPPA sets forth that Johnson City then has a "burden of production" – not a burden of proof – to set forth a legitimate non-retaliatory reason for her "discharge" or "termination." Upon doing so, Dahl has the burden of proving that the proffered reason is pretextual and that the "sole" reason for her "discharge" or

“termination” was either her refusal to participate in illegal activities or her refusal to remain silent about illegal activities. In this brief, Johnson City will meet its burden of production. Furthermore, Johnson City will demonstrate that even if Dahl could make out a *prima facie* case, she cannot meet her burden of proving that the sole reason for her nonrenewal was based upon an alleged refusal to participate in or remain silent about illegal activities.

With respect to the events leading up to the non-renewal decision, on May 19, 2021 Dahl met with Turner and Captain Kevin Peters (“Peters”), the head of the Criminal Investigation Division (“CID”), to review Dahl’s progress on cases she was prosecuting in federal court for Johnson City. Turner had requested this meeting based upon complaints from the Special Investigations Squad (“SIS”) investigators regarding Dahl’s lack of responsiveness and lack of progress on her cases. *Turner Depo., ¶ 22.*

During that meeting, which Dahl secretly tape recorded, she stated that she would seek indictments on five specific individuals during the June 2021 Federal Grand Jury. Also, Peters explained to Dahl during the May 19, 2021 meeting that he needed her to update him directly so that he could update Turner. Dahl agreed to update Peters directly. Turner and Peters did not know the exact day the Federal Grand Jury was meeting in June. Peters sent Dahl an email on June 8, 2021 asking for a report. *Deposition of Dahl, p. 32 line 23 to p. 33 line 19, Ex. 6.* The Grand Jury did not meet until June 9, 2021. On that date Dahl did not seek indictments on any of the five persons for whom she represented she would seek indictments. Moreover, Dahl did not report back to Peters – as she had agreed to do. Peters learned from an SIS officer on the afternoon of June 9, 2021 that none of these persons had been indicted. He reported that fact to Turner, along with

the fact that Dahl had not reported back to him as promised. *Turner Decl., 31 and Exhibit H.*

Dahl's contract was set to expire at the end of June 2021. Under the terms of the MOU, it could only be renewed for a period of one year. Turner discussed the matter with the City Manager, Denis "Pete" Peterson, and the City Attorney, Sunny Sandos. Turner inquired of Attorney Sandos whether the contract could be renewed, but then terminated, if necessary, a few months later. Attorney Sandos advised him that it would be easier to not renew Dahl's contract as opposed to renewing the contract for another year and then attempting to terminate it early. *Sandos Decl., ¶ 6.* Therefore, Turner recommended to the City Manager that Dahl's contract not be renewed, and that is what occurred. *Turner Decl., ¶ 33.*

At the time of the decision not to renew, neither Turner, nor the City Manager nor Attorney Sandos had any knowledge that Dahl was refusing to participate in illegal activities or that she was refusing to remain silent about illegal activities. *Peterson Decl., ¶ 10, Sandos Decl., ¶ 15, and Turner Decl., ¶ 37.* Based on the foregoing, Johnson City is entitled to summary judgment as a matter of law as to the state law claim of an alleged violation of the TPPA.

C. <u>National Defense Authorization Act ("NDAA") claim</u>

The analysis of the NDAA claim is similar to the analysis of the TPPA claim. The NDAA claim should be dismissed for any one of the following grounds: (1) Dahl was not an "employee" of a grantee, (2) she did not make a complaint to an authorized official, (3) there is no proof of retaliation, (4) Dahl did not have a reasonable belief (under an objective standard) that the NDAA applies to her factual scenario, and (5) Dahl did not exhaust her administrative remedies to the extent she is relying on the federal grant for the pole camera.

IV. JOHNSON CITY IS ENTITLED TO SUMMARY JUDGMENT AS TO THE TPPA CLAIM BECAUSE DAHL CANNOT ESTABLISH A *PRIMA FACIE* CASE

A. Dahl's TPPA claim

The TPPA is found at Tennessee Code Annotated § 50-1-304. Specifically, Dahl alleges:

> 196. Johnson City terminated Dahl for refusing to participate in, or for refusing to remain silent about, illegal activities, namely Dahl's allegations about Johnson City Police Department's failures to investigate and seize Williams, and about Johnson City Police Department being either corrupt or plainly incompetent.

See Doc. 56, PageID #: 808.

B. Statutory language in TPPA

The "Act" reads in pertinent part at Tennessee Code Annotated § 50-1-304(b):

> (b) No employee shall be discharged or terminated solely for refusing to participate in, or for refusing to remain silent about, illegal activities.

C. Burden of proof

Tennessee Code Annotated § 50-1-304(f) sets forth the burden of proof as follows:

> (f) In any civil cause of action for retaliatory discharge brought pursuant to this section, or in any civil cause of action alleging retaliation for refusing to participate in or remain silent about illegal activities, the plaintiff shall have the burden of establishing a prima facie case of retaliatory discharge. If the plaintiff satisfies this burden, the burden shall then be on the defendant to produce evidence that one (1) or more legitimate, nondiscriminatory reasons existed for the plaintiff's discharge. The burden on the defendant is one of production and not persuasion. If the defendant produces such evidence, the presumption of discrimination raised by the plaintiff's prima facie case is rebutted, and the burden shifts to the plaintiff to demonstrate that the reason given by the defendant was not the true reason for the plaintiff's discharge and that the stated reason was a pretext for unlawful retaliation. The foregoing allocations of burdens of proof shall apply at all stages of the proceedings, including motions for summary judgment. The plaintiff at all times retains the burden of persuading the trier of fact that the plaintiff has been the victim of unlawful retaliation.

D. Summary of Johnson City's position

Dahl's claim fails as a matter of law because she cannot prove one or more of the required elements of her *prima facie* case: (1) that she was an employee of Johnson City, (2) that she was "discharged or terminated," (3) that she refused to participate in illegal activities, and/or that she refused to remain silent about illegal activities, (4) that Johnson City knew she was "refusing to participate in" or "refusing to remain silent about, illegal activities," ***and/or*** (5) that the decision to not renew the MOU was "solely" as a result of her "refusing to participate in" or "refusing to remain silent about, illegal activities." In the alternative, Johnson City has a non-retaliatory reason for the decision to not renew the MOU as set forth below.

E. Strict construction applies to the removal of sovereign immunity

In performing the legal analysis, *strict construction* applies to this Court's interpretation of the TPPA to the extent that any statutory language is subject to more than one interpretation because the TPPA is in derogation of sovereign immunity found at common law. *See Lucas v. State*, 141 S.W.3d 121, 124-25 (Tenn. Ct. App. 2004), *perm. app. denied* (citations omitted).

F. Dahl cannot prove that she was an employee of Johnson City

i. Definition of "employee" under the TPPA

The TPPA only protects "employees." Under the TPPA the terms "employee" and employer are defined in pertinent part at Tennessee Code Annotated § 50-1-304(a)(1) and (2):

(1) "Employee" includes, but is not limited to:

> (A) A person employed by the state or any municipality, county, department, board, commission, agency, instrumentality, political subdivision or any other entity of the state; …

(2) "Employer" includes, but is not limited to:

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> (A) The state or any municipality, county, department, board commission, agency, instrumentality, political subdivision or any other entity of the state; …

ii. Definition of employee at common law

Since the TPPA does not define the factors to consider in determining whether an individual is an employee or independent contractor, it is necessary to look to common law. In *Masiers v. Arrow Transfer & Storage Co.*, 639 S.W.2d 654 (Tenn. 1982), a workers compensation case, the Tennessee Supreme Court set forth factors that can be considered in determining whether an individual was an employee or independent contractor:

> There are a number of indicia to be considered by a trier of fact in determining the existence or nonexistence of an independent contractor relationship, such as, (1) the right to control the conduct of the work, (2) the right of termination, (3) the method of payment, (4) the freedom to select and hire helpers, (5) the furnishing of tools and equipment, (6) self-scheduling of working hours, and (7) being free to render services to other entities. *See Jackson Sawmill v. West*, 619 S.W.2d 105 (Tenn.1981); *Cromwell General Contractors, Inc. v. Lytle*, 222 Tenn. 633, 439 S.W.2d 598 (1969). These indicia are not absolutes which preclude examination of each work relationship as a whole, but are means of analysis. *Jackson Sawmill v. West*, *supra*.
>
> Although no indicia is "infallible or entirely indicative," it has generally been recognized by this court that "the primary test for determining claimant's status as employee or independent contractor is the 'right to control.'" *Lindsey v. Smith & Johnson, Inc.*, 601 S.W.2d 923 (Tenn.1980). This court has further noted that a party to a contract can exercise direction and control over the results of the work without destroying the independence of the contract or creating an employer-employee relationship. *Barnes v. National Mortgage Company*, 581 S.W.2d 957, 959 (Tenn.1979).
>
> Another factor that has gained controlling significance in the cases is the right of termination. *Wooten Transports, Inc. v. Hunter*, 535 S.W.2d 858 (Tenn.1976). The power of a party to a work contract to terminate the relationship at will is contrary to the full control of work activities usually enjoyed by an independent contractor. *Curtis v. Hamilton Block Company*, 225 Tenn. 275, 466 S.W.2d 220 (1971), quoting *Frost v. Blue Ridge Timber Corporation*, 158 Tenn. 18, 11 S.W.2d 860

(1927).

Id. at 656. These indicia for determining whether an individual is an employee or independent contractor have been applied in other contexts as well. *See e.g. All Access Coach Leasing, LLC v. McCord*, 2021 WL 4999300, *8 (Tenn. Ct. App. 2021)(citing with approval *Masiers*, *supra*, in the context of unemployment taxes).

iii. Application of common law factors

First factor: Right to control the conduct of the work

With respect to the right to control factor, Dahl was assisting the JCPD in the prosecution of federal crimes. Officers with the JCPD would refer to Dahl cases for possible prosecution. It was up to Dahl and the United States Attorney's Office in Greeneville whether a case was actually prosecuted. Dahl's supervisor in the U.S. Attorney's Office was AUSA Wayne Taylor ("AUSA Taylor"). Before Dahl could proceed with a federal prosecution, AUSA Taylor had to approve a prosecution memo prepared by her as a complaint and/or indictment. *Deposition of Dahl, p. 15, line 20 to p. 18 line 21.* Johnson City had no control over these matters. *Turner Decl., ¶ 40.* Because Johnson City had no right to control Dahl's work, this factor – *which is the most important factor* – supports a finding that Dahl was an independent contractor as far as Johnson City is concerned.[1]

Second factor: Right of termination

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[1] In further support of the fact that it was the U.S. Attorney's Office that controlled Dahl's work, in this lawsuit Johnson City had to obtain permission from DOJ to take Dahl's deposition because the DOJ controls the ability of a former SUASA to discuss their work under *Touhy*. This is true notwithstanding the fact that Johnson City would be asking Dahl questions about the prosecution of cases for Johnson City. *See Declaration of K. Erickson Herrin*, ¶ 5-6. *See also, Deposition of Dahl, p. 16 [Leah McClanahan is an AUSA representing the DOJ].*

In *Masiers*, *supra*, the Tennessee Supreme Court further addressed this issue as follows in the context of that case:

> Furthermore, under the contract, appellee did not have the right to terminate at will its relationship with appellant. The relationship could be terminated by either party only on thirty days notice. This method of termination is compatible with the existence of an independent contractor relationship. *See Curtis v. Hamilton Block Company*, 225 Tenn. 275, 466 S.W.2d 220 (1971).

Id. at 656.

In the case at bar, the MOU was executed by the U.S. Attorney's Office, the District Attorney of the First Judicial District, Washington County, Johnson City, and Dahl. *Sandos Decl., ¶ 3, at Exhibit A.* In pertinent part the MOU stated:

> Assistant District Attorney Kateri Dahl is being detailed by District Attorney Ken Baldwin to the USAO to act as a Special Assistant U.S. Attorney to assist the city of Johnson City in its continuing efforts in the Project Safe Neighborhoods program and the Targeted Community Crime Reduction Project (TCCRP), funded by the Department of Justice.

Id. at p. 1 of Exhibit A under heading "III. Federal and/or State Interest."

Next, under heading "X. Cancellation," the MOU stated:

> X. Cancellation
>
> Either the USAO or the State may withdraw its participation in this MOU at any time. Such withdrawal shall require notification in writing, and provide the withdrawal's effective date.

Id. at pp. 3-4.

In Tennessee, the District Attorney is "the State." *See e.g. Davis v. Earls*, 2001 WL 589138, *4 (Tenn. Ct. App. 2007) (holding that an assistant district attorney is a state employee); and *see State v. Campbell*, 1989 *Campbell*, 1989 WL 153899 (Tenn. Ct. Crim. Appeals 1989) ("We are,

of course, aware that an Assistant District Attorney General is an employee of the State of Tennessee, in whose name all criminal cases are prosecuted. T.C.A. § 40-3-104 …”). *Id.* at *3 fn. 5. *See also Pera v. Kroger Co.*, 674 S.W.2d 715, 723 (Tenn. 1984).

The MOU simply does not provide a mechanism for Washington County, Johnson City or Dahl to terminate the contract early. It is only the State and/or the United States Attorney’s Office who may withdraw from the MOU at any time. Therefore, this factor supports a finding that Dahl was an independent contractor as far as Johnson City is concerned.

Third factor: Method of payment

Under the MOU Dahl was paid as an independent contractor, not an employee. The MOU provides in pertinent part:

> VIII. Expenses and Training
>
> …
>
> Kateri Dahl understands that she will be paid monthly or bi-monthly at a rate that equals $87,000.00 per year. Kateri Dahl shall be considered an independent contractor by Washington County. Washington County shall issue a 1099 for all monies paid to Kateri Dahl. Kateri Dahl shall be responsible for payment of any and all taxes including, but not limited to, Federal and State income tax, FICA/Social Security and Medicare. Kateri Dahl understands that she shall not receive any state or county benefits.

Sandos Decl., at Exhibit A, p. 3. Therefore, this factor is in favor of Dahl being an independent contractor as far as Johnson City is concerned.

Fourth factor: The freedom to select and hire helpers

Johnson City played no part in the selection of any assistants for Dahl. Whatever assistance she needed was provided by the United States Attorney’s Office. This included assistance of staff

in the United States Attorney's Office and other Assistant United States Attorneys. An example of attorney assistance is the case of *U.S.A. v. Melvin Chism*, No. 2:19-CR-115. Even though this was a "Johnson City" case, AUSA Emily Swecker was lead counsel and Dahl would have sat second chair if the case had gone to trial. *See Dahl depo., p.37, lines 6-11, p.44 lines 6 to 14.* Therefore, this factor supports a finding that Dahl was an independent contractor as far as Johnson City is concerned.

Fifth factor: The furnishing of tools and equipment

This factor weighs in favor of a finding that Dahl was an independent contractor. Both Johnson City and the U.S. Attorney's Office provided computer equipment to Dahl to use during her work as a SAUSA. However, Dahl had an email address associated with the United States Attorney's Office that she used for work done pursuant to the MOU with the City, and all of her emails related to work done for JCPD remained in the custody and control of the U.S. Attorney's Office, even after the non-renewal of her contract. In fact, in order to obtain any of Dahl's emails from her @usa.doj.gov account, the parties to this litigation had to serve a subpoena on the U.S. Attorney. *See Herrin Decl., ¶ 6. See also, Dahl depo. p 44 [Leah McClanahan is an AUSA representing DOJ Touhy compliance].*

Sixth factor: Self scheduling of working hours

Johnson City did not schedule Dahl's working hours. Johnson City assumes that Dahl scheduled her own work hours with the exception that she was in the United States Attorney's Office or the Federal District Court when required to be there by AUSA Taylor or by the Court. *See Turner Decl. ¶ 40.* Therefore, this factor supports a finding that Dahl was an independent

contractor as far as Johnson City is concerned.

Seventh factor: Being free to render services to other entities

To the best of Johnson City's knowledge, Dahl's work duties were limited to Johnson City matters. The only exceptions (of which Johnson City is aware of at this time) are Federal District Court records showing Dahl as counsel for the United States in two "transfer of jurisdiction" matters, which do not appear to be Johnson City matters.[2] Therefore, this factor is in favor of Dahl being an employee.

Conclusion

In summary, when reviewing all of these factors together, it is clear that Dahl was not an employee of Johnson City. Therefore, if Dahl was not an employee, then she cannot sue for a violation of the TPPA. As a result, Johnson City is entitled to summary judgment based upon this issue alone.

G. Dahl cannot prove that she was "discharged or terminated"

Even if one were to assume that Dahl was an "employee" of Johnson City, she was neither "discharged" nor "terminated." Her contract was simply not renewed. Therefore she cannot prove this element of her *prima facie* case. In *Howard v. Life Care Centers of America, Inc.*, 2004 WL 1870067 (Tenn. Ct. App. 2004), Dr. Larry Howard sued for retaliatory discharge in violation of the TPPA. He had been employed as a Medical Director of a nursing home facility pursuant to a one-year contract. *Id.* at *1. The contract specified that he was an independent contractor. But in analyzing the defendant's motion for summary judgment, the Court of Appeals found sufficient

[2] *See USA v. Nguyen*, No. 2:19-cr-155 and *USA v. Cook*, No. 2: 19-cr-160.

evidence of a disputed material fact on that issue based primarily on Dr. Howard's testimony that the defendant controlled the means and methods of his work. *Id.* at *4-5. However, the Court of Appeals still affirmed the grant of summary judgment based on the fact that Dr. Howard was neither discharged nor terminated. The Court of Appeals held:

> Tenn Code Ann. § 50-1-304 requires that the employee be "terminated". This would clearly require an act on the part of the employer to end the employment relationship. In this case, the employment relationship ended by operation of the parties' contract and not due to any action on the part of the employer. The employer in this case did not terminate Dr. Howard. His employment contract simply expired. There is no authority in Tennessee which gives an individual the right to sue for failure to renew a contract and we do not deem it appropriate to create such a cause of action in this case.

Id. at *5.

The position of the City of Johnson City is even stronger. In the case just referenced, Life Care Centers of America, Inc. was not a governmental entity. Therefore, the Tennessee Court of Appeals was applying basic statutory construction principles in holding that a nonrenewal of a contract is not a "discharge" or a "termination." But in the case at bar, Johnson City is a governmental entity and as addressed earlier, "strict construction" applies to the removal of sovereign immunity. Therefore, under the strict construction standard a court is even more restrained from expanding the definition of "discharge" or "termination" to include a "non-renewal" of a contract. As a result, Johnson City is entitled to summary judgment because Dahl cannot establish this element of her *prima facie* case.

H. <u>Dahl cannot prove that she refused to remain silent about illegal activities</u>

i. Two types of TPPA claims

An employee can prove a violation of the TPPA by showing that she was discharged or

terminated for: (1) refusing to participate in illegal activities or (2) refusing to remain silent about illegal activities. This second type of claim – a whistleblower claim – is addressed here. The first type of claim is addressed in the next sub-section, "I. ".

ii. Definition of "illegal activities"

Before analyzing whether Dahl can make out a *prima facie* case, it is first necessary to recite the definition of "illegal activities" as set forth in the statute. "Illegal activities: (A) Means activities that are in violation of the criminal or civil code of this state or the United States or any regulation intended to protect the public health, safety, or welfare …" *See Tennessee Code Annotated § 50-1-304(a)(3).*

It is important to note that this definition of "illegal activities" is much narrower than the concept of "protected conduct" under the First Amendment. In other words, there may be speech that touches on a matter of public concern that does not involve "illegal activities." For example, Dahl puts in the category of "illegal activities" the concepts of corruption and "plain incompetence." Alleged incompetence would not be an illegal activity under the TPPA. Therefore, for purposes of the TPPA claim, the distinction between protected speech under the First Amendment and "illegal activities" under the TPPA is relevant to the analysis.

iii. Dahl must have "blown the whistle"

Next, in order to make out a TPPA claim based on a refusal to remain silent about illegal activities, Dahl must be able to show that she blew the whistle on "illegal activities." In *Haynes v. Formac Stables, Inc.*, 463 S.W.3d 34 (Tenn. 2015), the Tennessee Supreme Court explained that complaining to an "outside entity, such as law enforcement" about "illegal activities" would be

sufficient. *Id.* at 37.

iv. Analysis

Dahl makes no allegation that she reported "illegal activities" to a decisionmaker at Johnson City. However, she does claim that she met with FBI Special Agent Bianca Pearson on May 11, 2021. In her Complaint Dahl alleges:

> 84. On May 11, 2021, on her own initiative and outside her chains of command at the U.S. Attorney's Office and the Johnson City Police Department, Dahl made a report to an agent with the local Federal Bureau of Investigation office expressing her concerns about how Johnson City Police Department had handled the Williams case.

Doc. 56, PageID #: 780.

Dahl does not allege that she was a whistleblower as to "illegal activities." Moreover, in her deposition she testified that she had two conversations with Special Agent Pearson – the first time was on May 11, 2021 *before* the decision to not renew the MOU and the second time was *after* Johnson City decided to not renew the MOU. With respect to these meetings, Dahl testified as follows in her deposition:

> Q. Did you meet with anybody other than Agent Bianca Pierson?
>
> A. In the FBI?
>
> Q. Yes.
>
> A. No.
>
> Q. Was that at the Johnson City office?
>
> A. Correct.
>
> Q. Behind closed doors or not?

A. I believe at one point we were in, like, a conference room behind closed doors, and I think at the other meeting I was at her desk and it was just kind of an open air office situation.

Q. Did you make any accusations against Chief Turner in either your E-mails or in your meeting with Biance Pierson?

A. Yes. In the second meeting – well, in the first meeting, I conveyed my concerns as to how the case had been handled and how I had certain suspicious (sic), just generally speaking. And then after I was terminated, I went to Bianca and conveyed my issues and my concerns in a much stronger fashion and let her know that I was concerned that there could be an element of corruption in this case.

Q. And corruption of Chief Turner.

A. Not – I don't remember if I named Chief Turner specifically, but I definitely referenced at least JCPD.

See Deposition of Dahl at page 164, line 8 to page 165, line 10.

In summary, there is no evidence that Dahl reported any alleged "illegal activities" prior to the decision not to renew her contract to either the management of Johnson City or a law enforcement agency such as the FBI or any other person, agency or entity. *Peterson Decl., ¶ 10, Sandos Decl., ¶ 15, and Turner Decl., ¶ 37.* Therefore, to the extent she is asserting a "whistleblower" claim under the TPPA, it fails as a matter of law.

I. Dahl cannot prove that she refused to participate in illegal activities

To the extent that Dahl is asserting a "refusal to participate" claim under the TPPA, it fails as a matter of law because Dahl has no evidence that she refused to participate in illegal activities prior to the decision to not renew her contract.

J. Dahl cannot prove that the decisionmaker(s) of Johnson City *knew* she refused to participate in or remain silent about illegal activities

As to this factor Johnson City adopts verbatim the evidence presented by Chief Turner in his motion for summary judgment as to the First Amendment retaliation claim on the subject of whether he knew that Dahl had engaged in "protected activity" under the First Amendment. In addition, Johnson City relies on the declarations of Attorney Sandos and the City Manager for the proposition that neither of them had any knowledge that Dahl was refusing to participate in or remain silent about "illegal activities." Likewise, Johnson City also relies on their declarations that they were not aware of any illegal activities – such as corruption – by Chief Turner or any JCPD officer as of the date of the decision to not renew Dahl's contract. *Sandos Decl., ¶¶ 12, 14-15; and Peterson Decl., ¶ 7, 9-10, 12.*

Based upon the foregoing, while the City Manager was the decisionmaker as to whether to recommend to the City Commission the renewal of Dahl's contract for another year, there is no evidence that Chief Turner, Attorney Sandos or the City Manager – the three officials involved in the discussions of whether to renew Dahl's contract – knew that Dahl was refusing to participate in or remain silent about illegal activities. *Without that knowledge it is logically impossible for Johnson City to have retaliated against Dahl in violation of the TPPA.* Therefore, this additional ground justifies the grant of summary judgment on behalf of the City.

K. Dahl cannot prove that the decision to not renew her contract was "solely" based on her "refusing to participate in" or "refusing to remain silent about, illegal activities."

As addressed in sub-section "J.", if Dahl cannot prove that Johnson City *knew* that she was refusing to participate in or remain silent about illegal activities, then Dahl cannot prove that Johnson City's decision to not renew her contract was "solely" based on her refusing to participate in or remain silent about illegal activities. Therefore, this additional ground is a basis for finding

that she cannot establish a *prima facie* case.

V. JOHNSON CITY IS ENTITLED TO SUMMARY JUDGMENT AS TO THE TPPA CLAIM BECAUSE IT POSSESSED A LEGITIMATE, NON-RETALIATORY REASON FOR NOT RENEWING HER CONTRACT

A. Overview

Johnson City does not believe it is necessary to reach this issue because Dahl cannot make out a *prima facie* case for the reasons set forth above. But nonetheless, Johnson City had a clear non-retaliatory reason for not renewing Dahl's contract as proven by Dahl's own secret recording of May 19, 2021.

B. Prior complaints leading up to the May 19, 2021 meeting

As set forth earlier (and as described in more detail in Chief Turner's declaration), in the latter part of 2020, Turner and Peters became aware of complaints from SIS officers – through their supervisor, Sgt. LeGault – about Dahl's work performance. Sgt. LeGault was asked to prepare a list of cases, and on December 11, 2020, Sgt. LeGault emailed Turner and Peters a list of cases: (a) sent to Dahl for possible federal prosecution, and (b) not sent to Dahl due to her lack of progress on cases sent to her. On December 15, 2020, Turner forwarded Sgt. LeGault's email and attached list to AUSA Taylor, Dahl's supervisor in the United States Attorney's Office in Greeneville. Turner was requesting an update on Dahl's cases. Next, on March 23, 2021 Sgt. LeGault sent a revised list of cases to Turner and Peters that was similar to the December 11, 2020 list. Then, on April 22, 2021 and May 1, 2021, Sgt. LeGault sent an email to Turner and Peters complaining about Dahl's lack of responsiveness related to an attempt to obtain a federal criminal complaint in

order to keep in custody a dangerous individual who was subject to making bail on a state charge. *Turner Dec., ¶¶ 12-21 and Exhibits A, B, C, D and E.*

C. Events of May 19, 2021 and up to Johnson City's decision to not renew

Based on prior complaints regarding Dahl's work performance, Turner requested a meeting with Dahl to review the status of her cases. That meeting occurred on May 19, 2021. Dahl secretly tape recorded that meeting. Johnson City has had a court reporter prepare a transcript. A copy of the secret tape recording of May 19, 2021 is being filed under seal to the City's *Motion for Summary Judgment. A copy of the transcript with redactions is filed as an Exhibit to the City's Motion for Summary Judgment.* Although the transcript is not official, it should assist the Court in following the secret recording. For ease of reference, citations to the transcript are provided as necessary.

During the May 19, 2021 meeting, Dahl stated that she would seek indictments on five specific individuals on the May 19, 2021 list of cases at the June 2021 Grand Jury. *Motion for Summary Judgment, May 19, 2021 Transcript, p. 102 line 6 to p. 103, line 25.*

During the May 19, 2021 meeting, Peters requested that Dahl report directly back to him on the indictments obtained because he told her that there were apparently some communication issues within the JCPD and he wanted to know from her the indictments obtained so that he, in turn, could report directly to Chief Turner. She agreed to send Peters an email report. *Motion for Summary Judgment, May 19, 2021 Transcript, p. 114 line 24 to p. 115, line 12.*

During the May 19, 2021 meeting, the exact date of the June Grand Jury was not mentioned. On June 8, 2021, Peters sent an email to Dahl requesting a status report on the June

Grand Jury. The Grand Jury actually met the next day. Dahl never reported back to Peters as promised in the May 19, 2021 meeting; and she never responded to his June 8, 2021 email. *See Dahl deposition, p. 32, line23 to p. 33 line 19 and Exhibit 6.* ___. Peters learned from an SIS investigator on the afternoon of June 9, 2021 that Dahl had not sought any of the indictments she said she would seek. Peters reported this information to Chief Turner, along with the fact that Dahl has not reported back to him as promised. *Turner Decl., ¶¶ 30-31.*

After receiving this report from Peters, Turner discussed his concerns about Dahl with Johnson City's City Manager and Attorney Sandos. Turner was especially concerned because at the end of June 2021 Dahl's one-year contract (the MOU) would be up for renewal. Turner asked Attorney Sandos whether it would be possible for the City to renew the MOU, but then terminate it a few months later if Dahl's work performance had not improved. Attorney Sandos advised that it would be easier to not renew the MOU as opposed to renewing the MOU and then attempting to terminate it early. *Sandos Decl., ¶ 6.* Based on that advice, Turner made the recommendation that the MOU not be renewed to the City Manager, who had the ultimate authority. He agreed with Turner. Attorney Sandos advised Turner that there was no need to advise the other parties to the MOU of the City's decision. Attorney Sandos prepared the non-renewal letter and presented it to Turner for his signature. He signed it. *Turner Decl., ¶ 33.*

D. Summary

Johnson City had a legitimate basis to not renew Dahl's contract for the following reasons:

> 1. Sometime in the latter part of 2020, Chief Turner and Captain Peters began hearing complaints from Sgt. LeGault, on behalf of himself and SIS investigators, about Dahl's work performance. Eventually, on two separate occasions (December 11, 2020 and March 23, 2021), Sgt. LeGault sent Turner

and Peters lists of Dahl's cases – including cases that could have been sent to her, but had not been sent based on her lack of progress on cases that had been sent to her. Also, Sgt. LeGault sent two emails (April 22, 2021 and May 1, 2021) complaining about Dahl's lack of responsiveness on an important criminal matter. *Turner Decl., ¶¶ 12-21.*

2. Based on the complaints, Turner scheduled a meeting with Dahl on May 19, 2021 to review her progress on cases. In that meeting, she identified five persons for whom she would seek indictments at the June Grand Jury and she agreed to report back directly to Peters regarding those persons indicted. During the meeting on May 19, 2021, Turner was expecting Dahl to do what she said she was going to do and he expected to recommend the renewal of her MOU that was set to expire June 30, 2021, notwithstanding the history of complaints from Sgt. LeGault. *Turner Decl., ¶¶ 22-29.*

3. In June Peters reported back to Turner that Dahl had not sought any of the indictments that she said she would seek, and she had not reported back to Peters as agreed. Dahl later testified that it was a mistake on her part not to report back to Peters as she had agreed to do, including not responding to Peters' email reminder about the need for an update. *Turner Decl., ¶¶ 30-31; and Dahl deposition, p. 32_, line 23 to p. 33, line 19 and Exhibit 6.*

4. *Even then*, Chief Turner inquired of the City's Attorney whether it was possible to renew the MOU – *which was pursuant to an annual DOJ grant* – but then terminate the MOU early if Dahl's work performance did not improve. The City Attorney advised him that it would be simpler for the City not to renew the MOU as opposed to renewing a one-year contract and then seeking to terminate it early. Based upon this advice, Turner recommended to the City Manager that the MOU not be renewed, and the City Manager followed that recommendation. *Sandos Decl., ¶¶ 4-8; Turner Decl., ¶¶ 32-33; and Peterson Decl., ¶ 5.*

Under these circumstances Dahl's failure (after the May 19, 2021 meeting) to either do what she said she would do -- *or at least report back to Chief Turner or Captain Peters as to why she could not achieve what she said she would do* – is shocking because Dahl knew the following: (1) her primary job duty was to assist Johnson City in the prosecution of federal cases, (2) on December 15, 2020 Chief Turner had sent an email to her supervisor at the United States Attorney's Office requesting a status report on her cases, (3) the May 19, 2021 meeting was at the

request of Chief Turner to go over her cases, (4) she had represented that she would seek the indictment of five people at the June Grand Jury[3], (5) she had not sought any of those indictments, and (6) she represented she would report back to Peters and failed to do so.

In summary, even if Dahl could establish a *prima facie* case, Johnson City is still entitled to summary judgment as to the TPPA claim because there was a legitimate reason for the non-renewal of her contract. Therefore, Dahl's TPPA claim should be dismissed as a matter of law.

VI. JOHNSON CITY IS ENTITLED TO SUMMARY JUDGMENT AS TO THE NATIONAL DEFENSE AUTHORIZATION ACT CLAIM

A. Dahl's claim

Dahl alleges that Johnson City violated 41 U.S.C. § 4712 by not renewing her contract. *Doc. 56, PageID #: 809.*

B. Law

41 U.S.C. § 4712(a)(1) prohibits an employee of a grantee of a federal contract from taking an act of "reprisal" against the employee for:

> disclosing to a person or body described in paragraph (2) information that the employee reasonably believes is evidence of gross mismanagement of a Federal contract or grant, a gross waste of Federal funds, an abuse of authority relating to a Federal contract or grant, a substantial and specific danger to public health or safety, or a violation of law, rule, or regulation related to a Federal contract … or grant.

C. Argument

i. Dahl not an employee

[3] Dahl did indict one old case, Demetrius Bolden, who was not on the December 15, 2020 or March 23, 2021 lists.

To be protected by this statute, the person must be an "employee" of a "grantee." For the reasons set forth earlier in this brief, Dahl was not an employee of Johnson City. Therefore, her NDAA claim fails on this ground alone.

ii. Dahl did not report to a person or body "described in paragraph (2)"

Dahl must prove she made a report to one of the persons or bodies listed in 41 U.S.C. § 4712(a)(2) – (and that she was retaliated against for doing so). In her First Amended Complaint, she alleges she complained to "people outside her chain of command, including to the FBI and to DOJ colleagues." *Doc. 56, PageID #: 810 at ¶ 204* Based on this allegation, Dahl is apparently asserting that her report was made to persons in the following sub-category:

> (E) An authorized official of the Department of Justice or other law enforcement agency.

See 41 U.S.C. § 4712(a)(2). Undersigned counsel searched for a definition of who constitutes "an authorized official." No definition was found. A Special Agent of the Federal Bureau of Investigation ("FBI") would be an "official" of the Department of Justice ("DOJ"), but one would assume that the statutory term "authorized official" refers to an official authorized to receive and investigate whistleblower complaints. Therefore, without evidence that Dahl reported to an "authorized official," her NDAA claim fails on this ground as well.

(iii) Dahl cannot prove a "reprisal" for making a disclosure

As to this factor Johnson City adopts verbatim the evidence presented by Chief Turner in his motion for summary judgment as to the First Amendment retaliation claim on the subject of whether he knew that Dahl had engaged in "protected activity" under the First Amendment. Johnson City also adopts the arguments made earlier in this brief that the City Attorney and City

Manager had no knowledge that Dahl had made any report of alleged misconduct to the FBI or anyone else. Logically, if the City officials involved in the non-renewal decision did not know that Dahl had engaged in conduct protected by the NDAA, then Johnson City could not have retaliated against Dahl in violation of the NDAA. For this reason alone, Johnson City is entitled to summary judgment as to the NDAA claim because there was no reprisal.

(iv) Dahl does not have a reasonable belief that her allegations fall within the protections of 41 U.S.C. § 4712(a)

Johnson City does not dispute that Dahl's position was funded in part by a federal grant, but Dahl cannot show a reasonable belief that the grant for her SAUSA position or the grant for a pole camera triggers the protections of the NDAA in the context of her factual allegations.

Dahl alleges as follows:

> 203. Dahl had information that she reasonably believed was evidence of "gross mismanagement of a Federal contract or grant, a gross waste of Federal funds, an abuse of authority relating to a Federal contract or grant, a substantial and specific danger to public health or safety, a violation" or "a violation of law, rule, or regulation related to a Federal contract or … grant.

Doc. 56, PageID #: 809 (footnote omitted).

With respect to her factual allegations that support her NDAA claim, Dahl alleges in paragraph 203:

> Particularly, Dahl had information that Johnson City allowed evidence seized from Williams's apartment not to be properly searched for evidence of Williams's sex crimes, had information that Johnson City refused to adequately investigate Williams for his sex crimes, and had information that Johnson City bungled its attempted arrest of Williams on the Ammo FIP charge. Further, the use of the federally-funded pole camera to surveil Williams was useless, of no investigatory benefit, and yielded no evidence against Williams.

Id., PageID ##: 809-10.

As a starting point, the allegation that Johnson City "allowed" evidence not to be searched is a reference to Sean Williams' computer and SIM card. On December 8, 2020, Turner and Peters met with Dahl to discuss the Sean Williams case and Turner specifically asked Dahl whether "Wayne" – meaning her supervisor, AUSA Wayne Taylor – thought there was sufficient evidence to seek a search warrant. According to the transcript of Dahl's secret recording of that meeting, Turner specifically asked Dahl what "Wayne" – meaning her supervisor, AUSA Wayne Taylor – thought on the issue of whether there was probable cause for a search warrant, and Dahl responded that both she and AUSA Taylor were 50/50, which Turner interpreted as meaning that they were not entirely confident there was sufficient probable cause for a search warrant to be approved. *Turner Decl., ¶ 45.*

Moreover, during that December 8, 2020 meeting, Dahl agreed to work with Investigator Sparks in preparing a search warrant. According to Dahl's testimony, after Sparks emailed her a draft of the search warrant on January 12, 2021, she claims that Turner called her asking about the status of the search warrant, she spent a week to a week and a half analyzing the issue (in addition to her other work duties), and then she decided it was stale. Dahl deposition, p. 133, line 12 to p. 134, line 10; and p. 135, lines 1-13. This factual scenario does not involve a reasonable belief of gross mismanagement of a federal grant or gross waste of federal funds – or any other category under 41 U.S.C. § 4712(a). Consistent therewith, one assumes that Dahl is not alleging that her duties as a SAUSA – which primarily involved prosecuting federal crimes arising in Johnson City – were "grossly mismanaged" or "grossly wasted" by the actions of investigators of the JCPD related to Sean Williams.

Next, Dahl's allegation that Johnson City refused to adequately investigate Sean Williams for his sex crimes does not involve a reasonable belief of gross mismanagement of a federal grant or gross waste of federal funds – or any other category that would entitle Dahl to whistleblower protection under 41 U.S.C. § 4712.

Next, the allegation that Dahl had information that "Johnson City bungled its attempted arrest of Williams on the Ammo FIP charge" is a reference to Officer Jason Lewis going to Sean Williams' condominium door on May 5, 2021 on a scouting mission after a BOLO ("be on the lookout") had been issued – which evolved into an interaction with a male behind the door, Officer Lewis calling for backup, and then a supervisor arriving on the scene. Eventually, the three officers left the scene and Sean Williams disappeared. Chief Turner had no knowledge of these events until after they occurred. *Turner Decl., ¶ 47.* In Dahl's original Complaint, she asserted a conspiracy claim against Turner on the theory that he was in league with these three officers to intentionally "bungle" the arrest. *Doc. 1, PageID #: 33 at ¶¶ 142-143.* That claim has been dropped in the First Amended Complaint. This factual scenario does not involve a reasonable belief of gross mismanagement of a federal grant or gross waste of federal funds – or any other category that would entitle Dahl to whistleblower protection under 41 U.S.C. § 4712.

Next, Dahl alleges that "the federally-funded pole camera to surveil Williams was useless, of no investigatory benefit, and yielded no evidence against Williams." *Doc. 56, PageID #: 54 at ¶ 203.* The pole camera was installed in downtown Johnson City in February 2021. The camera was aimed at a garage owned by Sean Williams where he was known to have parties. *Deposition Peters, p. 106 line 5 to line 11.*The fact that the camera yielded no evidence against Sean Williams

does not create a reasonable belief of gross mismanagement of a federal grant or gross waste of federal funds – or any other category under 41 U.S.C. § 4712(a).

Consistent with Johnson City's position as to the inapplicability of the NDAA to the facts of this case, on June 23, 2022 (the same day she filed this lawsuit) Dahl submitted a whistleblower complaint to the United States Department of Justice, Office of Inspector General ("OIG").

]. As a result, this is an alternative ground for granting summary judgment as to Dahl's NDAA claim.

(v.) Dahl did not exhaust her administrative remedy related to the pole camera

41 U.S.C. § 4712(b) reads in pertinent part:

> (b) Investigation of complaints.—
>
> (1) Submission of complaint. – A person who believes that the person has been subjected to a reprisal prohibited by subsection (a) may submit a complaint to the Inspector General of the executive agency involved.

Notwithstanding the permissive language of "may submit," courts have held that this is actually an exhaustion requirement. In *Dowd v. Catalyst Campus for Technology and Innovation*, 2023 WL 8702587 (D.Utah 2023), the District Court explained:

> Both the DCWPA and the NDAA require a Plaintiff to exhaust her administrative remedies prior to filing an action in the district court. Plaintiff contests this conclusion, arguing that the statutes merely state that a person who believes they have been unlawfully retaliated against under either act "*may*" submit an administrative complaint. ECF No. 11, at 3–4. Yet both Acts authorize a complainant to bring suit only if she has exhausted her administrative remedies.[1] Courts have routinely followed the statutes' plain language by requiring a Plaintiff under the DWCPA or the NDAA to exhaust her administrative remedies prior to filing suit.[2] Because Plaintiff has made no effort to allege or argue that she exhausted her administrative remedies before filing her complaint, Defendant is correct: Plaintiff's second and third causes of action are subject to dismissal pursuant to Rule 12(b)(6). Defendant's motion to dismiss is granted with respect to Plaintiff's DWCPA and NDAA claims.

*Id. at *1 (footnotes 1 and 2 omitted).*

As set forth earlier, Dahl made a whistleblower submission to the OIG on the same day she filed this lawsuit (June 23, 2022). [Therefore, to the extent that Dahl is

now seeking to pursue a NDAA claim based on the pole camera, she has failed to exhaust her administrative remedies.

(vi.) Summary

Dahl's NDAA claim fails as a matter of law based on any one of the foregoing arguments.

VII. CONCLUSION

Based on the foregoing, the City of Johnson City is entitled to summary judgment as a matter of law.

Respectfully submitted,

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