UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

ALETA BUSSELMAN,

Plaintiff,

v.

BATTELLE MEMORIAL INSTITUTE, an Ohio nonprofit corporation,

Defendant.

No. 4:18-CV-05109-SMJ

ORDER GRANTING PLAINTIFF'S MOTION *IN LIMINE* TO EXCLUDE UNTIMELY REPORT BY DOE'S OFFICE OF INSPECTOR GENERAL

Before the Court is Plaintiff Aleta Busselman's Motion *in Limine* to Exclude Untimely Report by DOE's Office of Inspector General, ECF No. 11. The motion raises an issue of first impression—whether an adverse investigative report by the U.S. Department of Energy's Office of Inspector General, issued after a claimant exhausted administrative remedies and filed a de novo action in district court, is admissible in evidence under the National Defense Authorization Act, 41 U.S.C. § 4712(c)(3) ("NDAA"). Plaintiff argues the report is inadmissible because the Inspector General issued it after losing jurisdiction. Defendant Battelle Memorial Institute argues the report is admissible because the Inspector General did not lose jurisdiction. After reviewing the file and relevant legal authorities, the Court grants

the motion and excludes the Inspector General report from evidence in this case.

BACKGROUND

The underlying facts, as Plaintiff alleges them, are set forth in the Court's October 10, 2018 Order Granting in Part and Denying in Part Plaintiff's Request for Judicial Notice, and Denying Defendant's Motion to Dismiss, ECF No. 20.

On June 21, 2017, Plaintiff filed a whistleblower retaliation complaint with the Inspector General. ECF No. 11-1 at 2. Over 180 days later, the Inspector General had not issued its investigative report regarding Plaintiff's complaint. *See id.* On December 27, 2017, Plaintiff agreed to an extension granting the Inspector General an additional sixty days to issue its report. *Id.* On February 26, 2018, Plaintiff agreed to another extension granting the Inspector General an additional thirty days to issue its report. *Id.* The deadline for the Inspector General report was March 28, 2018. *Id.*

Plaintiff filed a de novo action in this Court on April 24, 2018. *See* Complaint for Damages, Injunctive and Declaratory Relief and Demand for Jury Trial, *Busselman v. Battelle Mem'l Inst.*, No. 4:18-cv-05072-SMJ (E.D. Wash. Apr. 24, 2018), ECF No. 1. Based on the parties' stipulation, this Court dismissed that case without prejudice on July 27, 2018. *See* Order Granting Defendant's Unopposed Motion to Dismiss Complaint Without Prejudice, *id.* (E.D. Wash. July 27, 2018) (No. 4:18-cv-05072-SMJ), ECF No. 16.

Plaintiff filed this de novo action in this Court on July 2, 2018. ECF No. 1.

The Inspector General issued its report on July 5, 2018. ECF No. 11-1 at 2, 6.

LEGAL STANDARD

"The basic rules of statutory construction are long-standing and well-settled . . . ." *Adams v. Bowen*, 872 F.2d 926, 928 (9th Cir. 1989). "In construing a statute in a case of first impression, [the Court] look[s] to the traditional signposts of statutory construction: first, the language of the statute itself; second, its legislative history, and as an aid in interpreting Congress' intent, the interpretation given to it by its administering agency." *Id.* (quoting *Funbus Sys., Inc. v. Cal. Pub. Util. Comm'n*, 801 F.2d 1120, 1125–26 (9th Cir. 1986)).

DISCUSSION

The NDAA provides, as relevant here,

> (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. Unless the Inspector General determines that the complaint is frivolous, fails to allege a violation of the prohibition in subsection (a), or has previously been addressed in another Federal or State judicial or administrative proceeding initiated by the complainant, the Inspector General shall investigate the complaint and, upon completion of such investigation, submit a report of the findings of the investigation to the person, the contractor or grantee concerned, and the head of the agency.
> (2) Inspector General action.—
> (A) Determination or submission of report on findings.—Except as provided under subparagraph (B), the Inspector General shall make a determination that a complaint is frivolous, fails to allege a violation of the prohibition in subsection (a), or has previously been addressed in another Federal or State judicial or

> administrative proceeding initiated by the complainant or submit a report under paragraph (1) within 180 days after receiving the complaint.
>
> (B) Extension of time.—If the Inspector General is unable to complete an investigation in time to submit a report within the 180-day period specified in subparagraph (A) and the person submitting the complaint agrees to an extension of time, the Inspector General shall submit a report under paragraph (1) within such additional period of time, up to 180 days, as shall be agreed upon between the Inspector General and the person submitting the complaint.
>
> . . . .
>
> (c) Remedy and enforcement authority.—
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> (1) In general.—Not later than 30 days after receiving an Inspector General report pursuant to subsection (b), the head of the executive agency concerned shall determine whether there is sufficient basis to conclude that the contractor or grantee concerned has subjected the complainant to a reprisal prohibited by subsection (a) and shall either issue an order denying relief or shall take one or more of the following [three] actions:
>
> . . . .
>
> (2) Exhaustion of remedies.—If the head of an executive agency issues an order denying relief under paragraph (1) or has not issued an order within 210 days after the submission of a complaint under subsection (b), or in the case of an extension of time under paragraph (b)(2)(B), not later than 30 days after the expiration of the extension of time, and there is no showing that such delay is due to the bad faith of the complainant, the complainant shall be deemed to have exhausted all administrative remedies with respect to the complaint, and the complainant may bring a de novo action at law or equity against the contractor or grantee to seek compensatory damages and other relief available under this section in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy. . . .
>
> (3) Admissibility of evidence.—An Inspector General determination and an agency head order denying relief under paragraph (2) shall be admissible in evidence in any de novo action at law or equity brought pursuant to this subsection.

41 U.S.C. § 4712.

Plaintiff moves the Court to exclude the Inspector General report from evidence in this case, arguing the report is inadmissible because it is a nullity where the administrative agency issued it after losing jurisdiction. Initially, Defendant makes several procedural arguments in opposition.

Defendant argues Plaintiff's motion *in limine* is premature. The Court generally agrees with Defendant. But the Court makes an exception for this unique situation. Plaintiff's motion *in limine* presents a purely legal issue of admissibility that does not require any factual development beyond what the parties have presented. The Court's ruling on Plaintiff's motion *in limine* depends solely on statutory interpretation and will not change throughout the course of this case, regardless of what discovery reveals or what evidence the parties offer at later stages. Nothing prohibits the Court from ruling on a properly noted pretrial motion, concerning a purely legal issue of admissibility, merely because the movant presents it early in the proceedings. On the contrary, the Court may "rule[] definitively" on such a motion "either before or at trial." Fed. R. Evid. 103(b).

Defendant accuses Plaintiff of presenting her motion *in limine* for an ulterior purpose—either to furtively constrain the scope of discovery without a protective order or to improperly influence the Court's ruling on other motions. The record reveals no wrongdoing, however atypical the timing of Plaintiff's motion *in limine* may be. Regardless, the Court is not prejudiced by collateral considerations. The

Court's only concern is to faithfully apply the law. Counsel are reminded to conduct themselves according to the local civility code. *See* LCivR 83.1(j).

Defendant also argues the Court lacks jurisdiction to declare the Inspector General report a nullity because such a ruling would exceed the NDAA's grant of jurisdiction over a de novo action. Similarly, Defendant argues the Court may not declare the Inspector General report a nullity because the administrative agency is not a party to this case and has not been afforded notice or an opportunity to be heard. Defendant conflates a pretrial ruling excluding evidence in one discrete case with an order reviewing and invalidating an administrative decision for all intents and purposes. Here, the Court considers only whether, under the NDAA, the Inspector General report is admissible as evidence in this case. The Court does not review or invalidate the Inspector General report. The Court turns now to the merits of Plaintiff's motion *in limine* and Defendant's substantive arguments in opposition.

Enacted in 2013, the NDAA provides, "[a]n Inspector General determination and an agency head order denying relief under paragraph (2) shall be admissible in evidence in any de novo action at law or equity brought pursuant to this subsection." 41 U.S.C. § 4712(c)(3) (enacted as the National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, § 828(a)(1), 126 Stat. 1632, 1839). The NDAA borrowed this language word for word from 10 U.S.C. § 2409(c)(3), which originated in the National Defense Authorization Act for Fiscal Year 2008, Pub. L.

No. 110-181, § 846(c)(3), 122 Stat 3, 242–43. The Court finds no legal authority interpreting this language in any setting, let alone in the context of an adverse administrative decision issued after a claimant exhausted administrative remedies and filed a de novo action in district court.

The NDAA expands and automatizes admissibility of administrative decisions. The Supreme Court has noted that "[p]rior administrative findings made with respect to an employment discrimination claim may, of course, be admitted as evidence at a federal-sector trial de novo." *Chandler v. Roudebush*, 425 U.S. 840, 864 n.39 (1976) (citing Fed. R. Evid. 803(8)(C) (amended 2011 and 2014; current version at subsection (8)(A)(iii) and (B))). Federal Rule of Evidence 803(8) provides a hearsay exception for "[a] record or statement of a public office if . . . it sets out . . . in a civil case . . . factual findings from a legally authorized investigation; and . . . the opponent does not show that the source of information or other circumstances indicate a lack of trustworthiness."

Rule 803(8) limits admissibility to administrative decisions setting out "factual findings." While "factually based conclusions or opinions are not on that account excluded from the scope of Rule 803(8)[]," *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 162 (1988), "[p]ure legal conclusions are not admissible as factual findings," *Sullivan v. Dollar Tree Stores, Inc.*, 623 F.3d 770, 777 (9th Cir. 2010).

Further, Rule 803(8) limits admissibility to administrative decisions bearing

"trustworthiness." "Relevant factors include '(1) the timeliness of the investigation; (2) the investigator's skill or experience; (3) whether a hearing was held; and (4) possible bias when reports are prepared with a view to possible litigation.'" *Sullivan*, 623 F.3d at 778 (quoting *Beech*, 488 U.S. at 167 n.11).

Of course, "[a] federal statute . . . may provide for admitting or excluding evidence independently from the[Federal Rules of Evidence]." Fed. R. Evid. 1101(e). The NDAA does just that for "[a]n Inspector General determination and an agency head order denying relief under paragraph (2)." § 4712(c)(3). First, the NDAA appears to expand admission of such administrative decisions to include legal conclusions rather than limiting admission to factual findings. *Id.* (extending admission to "determination[s]" and "order[s]" that "deny[] relief"). Second, the NDAA makes admission of such administrative decisions automatic rather than dependent upon criteria like trustworthiness. *Id.* (providing determinations and orders denying relief "shall be admissible").

But the NDAA does not eliminate the requirement that, to be admissible, such administrative decisions must derive from "legally authorized investigation[s]." Fed. R. Evid. 803(8)(A)(iii). Instead, the NDAA particularizes this requirement by specifying that the only admissible determinations and orders are those denying relief "under paragraph (2)." § 4712(c)(3). And paragraph (2) only authorizes denial of relief within a certain timeframe. § 4712(c)(2). Denial of relief outside that

timeframe does not fall "under paragraph (2)." § 4712(c)(3). Such administrative decisions are therefore inadmissible in a de novo action under the NDAA.

This interpretation is consistent with the NDAA's overall framework. Despite expanding and automatizing admissibility of administrative decisions, the NDAA nonetheless provides a "de novo action at law or equity" for a whistleblower claim in district court. § 4712(c)(2)–(3). Thus, Congress "clearly chose to permit de novo judicial trial of such complaints rather than mere judicial review of . . . agency determinations."[1] *Chandler*, 425 U.S. at 852. Critically, the NDAA does not provide a de novo action until after a claimant is "deemed to have exhausted all administrative remedies." § 4712(c)(2). Exhaustion is "[t]he pursuit of options until none remain." *Exhaustion*, *Black's Law Dictionary* (10th ed. 2014). A claimant with administrative options remaining has not exhausted those remedies. Thus, the NDAA declares that once the claimant exhausts administrative remedies, the district court "shall have jurisdiction over such an action," if timely filed. *Id.*

This construction is also consistent with judicial interpretations of analogous statutes. The Energy Reorganization Act, 42 U.S.C. § 5851(b)(4), contains a de novo

[1] By definition, a de novo action "entails consideration of an issue as if it had not been decided previously." *Stone v. Instrumentation Lab. Co.*, 591 F.3d 239, 246 (4th Cir. 2009) (internal quotation marks omitted). "The sum of . . . a de novo process is a new adjudication." *Id.* (internal quotation marks omitted). Because the NDAA requires considering the merits of a whistleblower claim anew, taking steps that in effect defer to an administrative decision conflicts directly with the statutory mandate to consider an issue as if it had not been decided previously. *See id.*

review 'opt-out provision' for whistleblower claims, much like the NDAA.[2] The Ninth Circuit noted this opt-out provision creates a cause of action in an "alternative forum" when an administrative agency fails to comply with its aggressive timetable for resolving whistleblower claims. *Tamosaitis v. URS Inc.*, 781 F.3d 468, 488 (9th Cir. 2015). The court concluded, "Congress thereby gave an administrative agency a 'first crack' at resolving the dispute; after one year, jurisdiction is available in federal courts, at which point any findings made by the agency have no preclusive effect." *Id.* And the court continued, "[i]n sum, absent a final decision from the agency within the specified period, 'the employee may . . . file a federal civil cause of action,' and the 'proceedings begin anew in district court.'" *Id.* (omission in original) (citations omitted) (quoting *Day v. Staples, Inc.*, 555 F.3d 42, 53 (1st Cir. 2009); *Stone*, 591 F.3d at 248).

The Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A(b)(1)(B), also contains a de novo review 'opt-out provision' for whistleblower claims, much like the NDAA.[3] The Fourth Circuit interpreted this opt-out provision in the context of an adverse administrative decision issued after a claimant exhausted administrative remedies and filed a de novo action in district court. *Stone v. Duke Energy Corp.*,

[2] Unlike the NDAA, 42 U.S.C. § 5851 does not provide for the admissibility of administrative decisions.

[3] Unlike the NDAA, 18 U.S.C. § 1514A does not provide for the admissibility of administrative decisions.

432 F.3d 320, 322–23 (4th Cir. 2005). The court concluded the administrative decision "was a nullity because it was entered after jurisdiction had vested in the district court." *Id.* at 322. As the court reasoned, "when [the plaintiff] filed his first complaint in federal court . . . , jurisdiction became lodged in the district court, depriving the [administrative law judge] of jurisdiction to enter his order." *Id.* at 323. The Court finds this reasoning persuasive.

Defendant argues the NDAA requires the Inspector General to issue a report, even an untimely one, because the statute does not relieve the administrative agency of that duty merely because the deadline passed. The Court disagrees with Defendant because this interpretation fails to consider the NDAA as a whole and in light of the other legal authorities above.

The NDAA provides, "the Inspector General shall investigate the complaint and, upon completion of such investigation, submit a report of the findings of the investigation." § 4712(b)(1). The very next subsection, referred to as "paragraph (2)," imposes an aggressive timetable for resolving the whistleblower claim: "the Inspector General shall . . . submit a report under paragraph (1) within 180 days after receiving the complaint" or "within such additional period of time, up to 180 days, as shall be agreed upon." § 4712(b)(2). As Defendant argues, "'[s]hall' means shall." ECF No. 15 at 12 (quoting *Brower v. Evans*, 257 F.3d 1058, 1068 n.10 (9th Cir. 2001)).

The Inspector General's failure to comply with paragraph (2)'s timetable produces two results. First, a claimant "shall be deemed to have exhausted all administrative remedies." § 4712(c)(2). Second, the district court "shall have jurisdiction over such an action," if timely filed. *Id.* Considering the NDAA as a whole and in light of the other legal authorities above, the Court concludes an Inspector General report issued after the statutory deadline does not deny relief "under paragraph (2)" because the report does not comply with paragraph (2)'s timetable. § 4712(c)(3). And an Inspector General report that does not deny relief "under paragraph (2)" is not admissible in a de novo action under the NDAA.

Finally, Defendant argues the Inspector General report is valid because no evidence shows the administrative agency knew, at the time it issued the report, that Plaintiff had filed this de novo action in this Court. Defendant cites no legal authority for the proposition that an administrative agency retains jurisdiction as long as it is ignorant of a fact divesting it of jurisdiction. And the Court finds no legal authority establishing a nexus between administrative agency knowledge and jurisdiction.

Here, the Inspector General issued its adverse investigative report on July 5, 2018, which was (1) more than 210 days after receiving Plaintiff's administrative complaint on June 21, 2017; (2) more than thirty days after the March 28, 2018 extended deadline that Plaintiff agreed to; (3) sixty-nine days after Plaintiff was

deemed to have exhausted administrative remedies; and (4) three days after Plaintiff filed this de novo action in this Court on July 2, 2018. Therefore, the Inspector General report does not deny relief "under paragraph (2)." Consequently, the Inspector General report is not admissible in this de novo action under the NDAA. The Court accordingly excludes the Inspector General report from evidence in this case.

Despite this ruling, counsel are advised "it can be expected that, in the light of the prior administrative proceedings, many potential issues can be eliminated by stipulation or in the course of pretrial proceedings." *Chandler*, 425 U.S. at 864 n.39.

Accordingly, **IT IS HEREBY ORDERED**:

Plaintiff's Motion *in Limine* to Exclude Untimely Report by DOE's Office of Inspector General, **ECF No. 11**, is **GRANTED**.

IT IS SO ORDERED. The Clerk's Office is directed to enter this Order and provide copies to all counsel.

DATED this 24th day of October 2018.

SALVADOR MENDOZA, JR.
United States District Judge