UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DOE(P), Plaintiff, v. Hon. PORTER GOSS, Director, Central Intelligence Agency, and CENTRAL INTELLIGENCE AGENCY, Defendants.	Civil Action No. 1:04CV02122 (GK)

REPLY IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE SECOND AMENDED COMPLAINT

In Defendants' Motion to Dismiss the Second Amended Complaint ("Defs.' Memo"), Defendants argued that each of Plaintiff's asserted claims should be dismissed.[1] There is nothing in Plaintiff's opposition brief which defeats these arguments. Plaintiff's Privacy Act claims fail because Plaintiff's allegations are insufficient in several respects to state a claim, Plaintiff's own allegations establish causality for the adverse actions he experienced that is wholly distinct from his Privacy Act claims, and his claims are an attempt to collaterally attack his employment actions, which attack is precluded by the Civil Service Reform Act ("CSRA").

[1] Individual defendants James Pavitt, John Doe 1, and John Doe 2 have not been served with the Second Amended Complaint, which was filed on November 15, 2005, and thus are not presently represented by Government Defendants' counsel. These individual defendants were never served with the Amended Complaint either, which was filed on April 27, 2005. Pursuant to Federal Rule of Civil Procedure 4(m), the Court may sua sponte dismiss without prejudice these unserved individual defendants.

Plaintiff's Administrative Procedure Act ("APA") claim fails due to inadequate allegations, lack of standing, and the absence of any available remedy. Plaintiff's Federal Tort Claims Act ("FTCA") claim fails because the complained of actions do not constitute a tort in the relevant jurisdiction and because the CSRA precludes Plaintiff from using the FTCA to collaterally attack these employment actions. Plaintiff's contract and failure to convert claims fail because, according to Plaintiff's allegations, he was a contract employee, and he had no legal entitlement to keep his contract with the government or to have it converted into a staff employee relationship. Defendants therefore respectfully request dismissal of each of these claims.

I. PLAINTIFF'S ACCURACY CLAIM FAILS.

Plaintiff contends that he has identified the allegedly inaccurate documents with sufficient specificity. Plaintiff's Response to Defendants' Motion to Dismiss ("Pl.'s Memo") at 3-4. Defendants disagree. It is not clear from the Second Amended Complaint ("2AC" or "the Complaint") which documents are at issue or what about them is inaccurate. Defendants are precluded from meaningfully evaluating and responding to this claim because of the lack of specificity in the Complaint.

Plaintiff relies on M.K. v. Tenet, 99 F. Supp. 2d 12 (D.D.C. 2000), but that case is inapposite. In M.K., the complaint identified one or two files for each plaintiff and specifically described which information in those files was inaccurate. Id. at 21 (noting the allegation that "Security and Personal Files of Plaintiff M.K. contain inaccurate information, *inter alia*, concerning her responsibility for loss of Top Secret information contained on the laptop computers sold at auction."). By contrast, Plaintiff's Complaint essentially lists every type of file that exists on him at the Central Intelligence Agency ("CIA" or "the Agency") and does not

clearly specify the nature of the alleged inaccuracies within any of the files.[2] See 2AC ¶ 44 (listing his "Official Personnel File, Counter-Intelligence Center file, Office of Medical Services file, Center for CIA Security file, Office of Inspector General file and other files").

Plaintiff's accuracy claim also fails because Plaintiff has not adequately alleged that the alleged inaccuracies caused any adverse determination. See Hutchinson v. CIA, 393 F.3d 226, 230 (D.C. Cir. 2005). To the contrary, the Complaint clearly alleges that the cause of Plaintiff's termination was his alleged failure to alter intelligence, which is wholly unrelated to his Privacy Act claim. 2AC ¶¶ 33, 35. Plaintiff contends that the Complaint alleges that the allegedly false information was a necessary pretext for his termination. Pl.'s Memo at 9-11. However, because Plaintiff was a contract employee, no reason was needed in order to terminate him, so there is no basis for the contention that the information was a "pretext."[3] Defs.' Memo at 32. Further, Plaintiff alleges that he was not told the reason for his termination, 2AC at ¶ 31, so the allegedly false information did not serve as a pretext. Further, in looking at causation, the Court needs to look to what triggered the event at issue: Plaintiff's termination. See Defs.' Memo at 15.

---

[2] Plaintiff argues that one descriptive item about a person is sufficient to trigger the disclosure provisions of the Privacy Act. Pl.'s Memo at 4 n.4. As Plaintiff has no disclosure claim, it is unclear what the relevance of this argument is. Plaintiff further notes that even private notes of a supervisor may be subject to the Privacy Act's requirements. Id. Again, it is unclear how this relates to Plaintiff, as there is no allegation that there are inaccurate supervisor notes. Further, to be subject to the Privacy Act, such notes would need to be records within a Privacy Act system of records. 5 U.S.C. § 552a.

[3] Plaintiff argues throughout that the fact that he was terminated prior to the completion of the two investigations of him proves that they were a pretext for his termination. Pl.'s Memo at 5, 9, 13. The logic behind Plaintiff's pure supposition is seriously flawed. The fact that Plaintiff was terminated prior to the completion of the investigations plainly suggests that there is no relationship between the investigations and his termination. If the only purpose was for them to act as a pretext, they would have been quickly completed prior to termination.

According to Plaintiff, his termination was triggered by his alleged failure to falsify information. 2AC ¶¶ 31, 33, 35. Thus, that is the cause, not the allegedly inaccurate information in his files.

Plaintiff bases his assertion of causality upon statements in a CNN transcript. At the motion to dismiss stage, the Court should not consider evidence outside of the pleadings, Primax Recoveries, Inc. v. Lee, 260 F. Supp. 2d 43, 48 n.4 (D.D.C. 2003), particularly as this television interview constitutes inadmissible hearsay. See Fed. R. of Evid. 801, 802. Plaintiff contends that this transcript proves that the CIA used the investigations as pretext for his firing. However, the transcript contains no quotations from any CIA representative. Rather, it is a dialogue between Plaintiff's counsel and Wolf Blitzer. See Pl.'s Memo at Exh. 1. Further, where, as here, the Complaint clearly establishes that Plaintiff's theory of causality as to the adverse action has nothing to do with his Privacy Act claims, causality cannot be said to have been properly alleged.[4]

Finally, Plaintiff has failed to adequately allege wilfulness or intentionality, as required by the Privacy Act. See 5 U.S.C. § 552a(g)(4). Rather, he has made general allegations which constitute nothing more than a parroting of the language of the statute. Such conclusory allegations are insufficient. See Kowal v. MCI Communications Corp., 16 F.3d 1271, 1276 (D.C. Cir. 1994); White v. OPM, 840 F.2d 85, 87-89 (D.C. Cir. 1988) (affirming dismissal where

---

[4] Plaintiff asserts that he needs only to allege mental duress to constitute causation of an adverse effect under 5 U.S.C. § 552a(g)(1)(D). However, the case upon which he relies, Albright v. United States, 732 F.2d 181 (D.C. Cir. 1984), does not deal with accuracy or information-gathering claims. Rather, it deals with maintaining records on First Amendment activities, which is not at issue in this case. Id. at 184. Further, that case demonstrates Plaintiff's causality problem. Id. at 186-87. It is not enough for Plaintiff to assert that there were inaccurate records and also that he was fired (or suffered mental distress). There has to be a causal relationship. Plaintiff's allegations make clear that it is not the inaccurate records that are the causal link, but his alleged failure to falsify intelligence. 2AC ¶¶ 31, 33, 35.

Privacy Act complaint did not allege factual basis to support allegations of willful and intentional conduct on the part of the agency). Thus, Plaintiff's accuracy claim should be dismissed.

II. THE FAILURE TO COLLECT INFORMATION CLAIM FAILS.

Plaintiff has failed to adequately allege facts constituting a failure to collect information claim as to either of the Agency's investigations of him. Memorandum in Support of Defendants' Motion to Dismiss the Second Amended Complaint ("Defs.' Memo") at 8-13.

A. Plaintiff has failed to adequately allege a claim based upon the Inspector General's Investigation.

As to the Inspector General's investigation, Defendants note that the CIA sought information from Plaintiff regarding the financial allegations, and Plaintiff does not deny this fact. Pl.'s Memo at 5; Defs.' Memo at 9; 2AC ¶¶ 29-30. Plaintiff's contention that earlier discussions with him would have resolved the claims more quickly is not alleged in the Complaint and defies logic. See Pl.'s Memo at 5. Plaintiff was interviewed in July 2004, and Plaintiff alleges that the investigation did not conclude until April 2005.[5] 2AC ¶¶ 29-30, 36. Clearly, then, speaking with Plaintiff did not resolve the investigation, so there is no basis for a belief that interviewing Plaintiff earlier would have resolved the investigation any earlier. There is also no legal basis for contending that the delay in interviewing Plaintiff was unreasonable. See Defs.' Memo at 9-10.

---

[5] For purposes of this motion to dismiss, Defendants assume that the allegations in the Complaint are true. Defendants do not concede the accuracy of any of these allegations. Plaintiff contends that the fact that information in the Complaint was redacted by the Agency for classification reasons necessarily means that it is true. Pl.'s Memo at 2 n.2. That is not correct. The Agency redacts information which addresses classified subject matters, regardless of whether the particular allegation is true or false.

Nor can Plaintiff articulate any legal import to his contention that the investigation would have been resolved earlier. There is no allegation that such resolution would have prevented Plaintiff's termination, which was allegedly caused by Plaintiff's failure to alter information. 2AC ¶ 35. Further, there is no obligation to seek information at the earliest possible opportunity, as the caselaw cited in Defendants' opening brief establishes. Defs.' Memo at 10-12.

B. Plaintiff has failed to adequately allege a claim based upon the Counterintelligence Investigation.

With regard to the Counterintelligence ("CI") investigation into allegations of an illicit sexual relationship with an asset, Plaintiff contends that the cases cited by Defendants are inapposite because there is no evidence that he tried to improperly influence the witness. However, there does not need to be any such evidence. Rather, what the caselaw shows is that if the person under investigation is in a position to engage in such influence, it is permissible not to interview that person. See Brune v. IRS, 861 F.2d 1284, 1287 (D.C. Cir. 1988); Hudson v. Reno, 130 F.3d 1193, 1205 (6th Cir. 1997) (abrogated on other grounds by Pollard v. E.I. du Pont de Nemours & Co., 532 U.S. 843 (2001)). Because of the nature of the relationship between a CIA officer and an asset, the officer necessarily is in a position to improperly influence testimony.[6] Therefore, it would have been impracticable to interview Plaintiff for this investigation, and the Complaint contains no allegations, other than statutory boilerplate, suggesting that it would have been practicable to interview him. See 2AC ¶ 46.

---

[6] Plaintiff attempts to claim that the CIA officer has little power over the asset because he has little contact with her and she can break off the relationship at any time. Pl.'s Memo at 8. This contention ignores the fundamental risk of becoming an asset. The officer does not have to have contact with the asset to potentially harm her; he need only tell an interested party of her asset status. It is this situation that inevitably creates a power dynamic between the officer and the asset.

Plaintiff contends that he could have provided objective information that would help resolve the issue. Pl.'s Memo at 7. A blanket denial of wrongdoing does not constitute "objective" information. Objective information is that which can be definitively established and which does not alter based on people's perceptions or emotions. See Mirriam-Webster Online Dictionary at http://www.m-w.com/dictionary/objective. For example, in Waters v. Thornburgh, 888 F.2d 870, 872-74 (D.C. Cir. 1989), abrogated on other grounds by Doe v. Chao, 540 U.S. 614 (2004), the objective information at stake was whether the individual had taken the bar examination. Similarly, in Dong v. Smithsonian Inst., 943 F. Supp. 69, 71-72 (D.D.C. 1996), the issue was whether the person had couriered a painting to New York. These cases are therefore not analogous to Plaintiff's situation because of the objectivity of the information at issue in Waters and Dong.

Plaintiff argues that a CI investigation is not a law enforcement investigation. Pl.'s Memo at 6-8. It is unclear why this distinction is relevant. It remains the case that, under the Privacy Act, the agency is not required to interview the subject of an investigation at the beginning of the investigation, if at all.

Plaintiff claims that Defendants' argument invites speculation by the Court. Pl.'s Memo at 7-8. This is incorrect. Defendants are arguing that Plaintiff has not alleged that the Agency did not gather information from Plaintiff to the greatest extent practicable. In making this argument, Defendants have explained that what constitutes "the greatest extent practicable" is context-dependent and that, in certain contexts, gathering no information at all from an individual may still constitute gathering information to the greatest extent practicable. None of the arguments advanced in this section by Plaintiff deny the fundamental fact that the Complaint

does not specifically allege that, in this context, more information could have been gathered from Plaintiff.

Finally, both aspects of Plaintiff's information-gathering claim are subject to the same problems as his accuracy claim: Plaintiff has not adequately alleged causality to any adverse action, nor has he adequately alleged intentionality or wilfulness. And, as noted below, the claim is essentially a challenge to an employment action, which is preempted. Each of these arguments independently justifies dismissal of this claim.

III. THE CSRA PRECLUDES PLAINTIFF'S PRIVACY ACT CLAIMS AND HIS NEWLY-ASSERTED EXPUNGEMENT CLAIM.

In their opening brief, Defendants argued that Plaintiff's Privacy Act claims are nothing more than an attempt to challenge his termination and, as such, are precluded by the CSRA. Defs.' Memo at 16-18. Plaintiff's arguments are unsupported in law.

Plaintiff argues that Privacy Act claims are not ipso facto preempted by the CSRA. Pl.'s Memo at 11-12. Defendants have not contended that they are. However, when Privacy Act claims are actually employment grievances cloaked in the guise of the Privacy Act, they are preempted. See United States v. Fausto, 484 U.S. 439, 454-55 (1988); Kleiman v. Dep't of Energy, 956 F.2d 335, 338 (D.C. Cir. 1992); Pellerin v. Veterans Admin. of U.S. Gov't, 790 F.2d 1553, 1555 (11th Cir. 1986) (Privacy Act "may not be employed as a skeleton key for reopening consideration of unfavorable federal agency decisions") (quoting Rogers v. United States Dep't of Labor, 607 F. Supp. 697, 699 (N.D. Cal. 1985)) (emphasis omitted). Here, Plaintiff's primary contention is that the CIA improperly terminated him because he allegedly failed to falsify information. He presents this argument in the form of Privacy Act claims, but that does not change his essential claim. Thus, it is preempted by the CSRA.

Plaintiff argues that the CSRA cannot preempt his Privacy Act claims because CIA employees are exempt from the CSRA. Pl.'s Memo at 13. However, the law is to the contrary. See Am. Postal Workers Union v. United States Postal Serv., 940 F.2d 704, 709 (D.C. Cir. 1991) ("The Supreme Court and several of our sister circuits have held that the exclusion of a class of employees from the protections of the CSRA does not leave these employees 'free to pursue whatever judicial remedies [they] would have had before enactment of the CSRA.'") (quoting Fausto, 484 U.S. at 447-49)). Where the Congress has deliberately chosen to exclude a group from the CSRA, that group is still precluded from bringing the claims covered by the CSRA to Court. Fausto, 484 U.S. at 448-49; Spagnola v. Mathis, 859 F.2d 223, 227-28 (D.C. Cir. 1988).

Plaintiff contends that even if his Privacy Act claim were preempted, he would have a remedy in equity–expungement. Pl.'s Memo at 14. However, just as the CSRA preempts Plaintiff's attempt to use the Privacy Act to challenge his employment, it also preempts Plaintiff's attempt to base the same challenge on equity.[7] See Bush v. Lucas, 462 U.S. 367, 388 (1983); Steadman v. Governor, United States Soldiers' & Airmen's Home, 918 F.2d 963, 967 (D.C. Cir. 1990). Further, the Complaint asserts no equitable right to expungement, and such a claim cannot be added in the opposition brief.

The new expungement claim would fail, in any event. Courts, in limited circumstances, have recognized a right to expungement of records based on a constitutional claim, rather than the Privacy Act. See, e.g., Sullivan v. Murphy, 478 F.2d 938, 968 (D.C. Cir. 1973). However,

---

[7] Plaintiff has also not administratively exhausted his "expungement" claim. Claims for expungement of records need to be brought pursuant to the amendment provisions of 5 U.S.C. § 552a(d)(2)&(3) administratively before being brought to court. Dickson v. Office of Personnel Mgt., 828 F.2d 32, 40-41 (D.C. Cir. 1987).

that right is narrowly circumscribed,. See, e.g., United States v. McMains, 540 F.2d 387, 389-90 (8th Cir. 1976); see also United States v. Bagley, 899 F.2d 707, 708 (8th Cir. 1990) (noting that expungement is infrequently used and is to be reserved for "unusual or extreme cases"). Courts are reluctant to employ the expungement power in a manner that will undermine statutory schemes. See United States v. Doe, 859 F.2d 1334, 1335 (8th Cir. 1988); cf. United States v. Janik 10 F.3d 470, 472 (7th Cir. 1993) (holding that federal courts lack jurisdiction to order executive agency to expunge records); Blazy v. Tenet, 979 F. Supp. 10, 27 (D.D.C. 1997) (noting that, insofar as the constitutional claims were reiterations of the Privacy Act claims, the constitutional claims must fail). Further, Plaintiff has made no effort to even discuss the standards for evaluating expungement claims with regard to this case. See Menard v. Saxbe, 498 F.2d 1017, 1023 (D.C. Cir. 1974). Plaintiff's attempt to add this claim to the case should be denied.

IV. PLAINTIFF'S ADMINISTRATIVE PROCEDURE ACT CLAIM FAILS.

As Defendants noted in their opening brief, Plaintiff's APA claim is not adequately pled, Plaintiff lacks standing to bring it, and there is no available relief for his claim.

A. Plaintiff has not adequately pled his APA claim.

The Complaint does not identify the regulations that Plaintiff alleges he is challenging. There is a vague description in the Complaint of the regulations that Plaintiff apparently believes exist, 2AC ¶ 39, however, the Agency has not been able to identify any regulation matching that

description. Thus, the allegations in the Complaint are not sufficient to put Defendants on notice as to what Plaintiff is challenging under the APA.[8]

The arguments presented in Plaintiff's brief suggest that Plaintiff himself has no idea what regulations, if any, he is talking about. He indicates that, once he has discovery, he can tell the CIA what regulations are at issue. Pl.'s Memo at 15-16. This means that Plaintiff wants a fishing expedition through the Agency's regulations to see if there is such a regulation. This is improper. In essence, Plaintiff is conceding that his claim has no basis in law or fact and should be dismissed.

Plaintiff asserts that he has claims pursuant to 5 U.S.C. §§ 706(1) & (2)(B)-(D). Pl.'s Memo at 15-16. However, the agency actions that Plaintiff describes in his opposition brief all constitute employment actions, which cannot be challenged under the APA, because such challenges are precluded by the CSRA. Graham v. Ashcroft, 358 F.3d 931, 935-36 (D.C. Cir. 2004). Further, even in his opposition brief, Plaintiff makes no attempt to articulate the nature of that claims that he alleges fall under §§ 706(2)(B)-(D).[9] Pl.'s Memo at 16.

B. Plaintiff lacks standing to bring his APA claim.

Plaintiff cannot articulate any injury-in-fact. The regulations that he describes, assuming they even exist, apparently deal with protecting the integrity of the intelligence gathering. 2AC

---

[8] Plaintiff contends that if he had put the number of the regulations into the Complaint, it would have been redacted for classification reasons. Pl.'s Memo at 15. Without knowing which regulation is at issue, there is no way to know whether that statement is correct. Even if it were, however, if Plaintiff had put the regulations in the Complaint and the Agency had redacted them, the Agency would at least know what regulations are at issue.

[9] Plaintiff claims that he has a constitutional claim, however, that is not part of his APA claim. Pl.'s Memo at 16. Rather, the constitutional claim is a Bivens claim against the individual defendants who have never been served in this case. 2AC ¶¶ 54-59.

¶ 39. Plaintiff contends that they would therefore be intended to protect all United States citizens, of which Plaintiff is one. Pl.'s Memo at 17. Such generalized assertions of injury do not constitute the type of personal injury necessary to establish standing. See Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 883 (1990). Plaintiff further contends that the alleged regulations also exist for the protection of the CIA's employees. Pl.'s Memo at 17-18. Again, because Defendants are not aware of any regulations meeting Plaintiff's description, they are prevented from fully addressing the claim, which is why the claim is not adequately alleged. Furthermore, based on the description of the regulations as provided by Plaintiff, it has nothing to do with CIA employees and is focused solely on the protection of the intelligence itself. 2AC ¶ 39.

In response to Defendants' argument that there is no causal relationship between the alleged violation of the alleged regulations and any injury to Plaintiff, Plaintiff provides an explanation which still contains no causal linkages. Pl.'s Memo at 18-19. Assuming it were true that these regulations existed and that they had been violated, the result would be that the intelligence would be faulty. This has nothing to do with the fact that Plaintiff was not promoted, was terminated, or was subject to other personnel decisions. There is no causal relationship alleged or logically present.

Plaintiff contends that he does not need to establish an imminent risk of harm. He is mistaken. The cases cited by Defendants establish that if there is no imminent risk, a party cannot seek injunctive relief under the APA. See Defs.' Memo at 23. The injury Plaintiff alleges that he has suffered is discrete, in the past, and incapable of repetition. Therefore,

Plaintiff cannot seek injunctive relief to change future conduct. See O'Shea v. Littleton, 414 U.S. 488, 495-96 (1974); Golden v. Zwickler, 394 U.S. 103, 109 (1969).[10]

With respect to redressability, Plaintiff argues that he is seeking reinstatement and promotion, which would redress his injuries. Pl.'s Memo at 19-20. However, as noted previously, he cannot seek redress of employment actions under the APA because he is precluded by the CSRA, so his attempt to obtain reinstatement and promotion under the APA must fail. See, e.g., Nat'l Treasury Employees Union v. Egger, 783 F.2d 1114, 1116 (D.C. Cir. 1986). Furthermore, it is clearly outside of this Court's jurisdiction to order reinstatement for a former CIA contract employee under the APA. See Webster v. Doe, 486 U.S. 592, 601 (1988) (finding that district court lacked jurisdiction to review CIA's termination decision under APA because CIA employment decisions are committed to agency discretion).

C. Plaintiff is not entitled to any relief.

Even if Plaintiff could state an APA claim, there is no relief that he could seek. Plaintiff contends that, while he is not entitled to money damages, he is entitled to an equitable claim for monetary relief. Pl.'s Memo at 20-22. It is true that claims for specific monetary relief may be available under the APA. See, e.g., Bowen v. Massachusetts, 487 U.S. 879, 893-94 (1988). However, Plaintiff cannot seek back pay under the APA. See Hubbard v. EPA, 982 F.2d 531, 534 (D.C. Cir. 1992) (en banc) (holding that back pay does not constitute specific relief available

[10] The Complaint also seeks a rulemaking as relief. 2AC ¶ 42. Defendants argued in their opening brief that such relief for an individual was improper and unavailable. Defs.' Memo at 25-27. Plaintiff claims that the rulemaking he sought was for all CIA employees. Pl.'s Memo at 23. However, the Complaint clearly requests regulations "to ensure protection of Plaintiff's rights," which Plaintiff appears to concede is improper. 2AC ¶ 42. Plaintiff cannot alter the relief sought in the Complaint in his opposition brief.

under APA section 702). None of the cases cited by Plaintiff suggest that Plaintiff can obtain specific monetary damages in this case. Pl.'s Memo at 21. See, e.g., Nat'l Ass'n of Counties v. Baker, 842 F.2d 369, 373 (D.C. Cir. 1988) ("[T]he relief sought by the local governments is not money damages as that term is used in the APA. The local governments are seeking funds to which a statute allegedly entitles them rather than money in compensation for the losses they may have suffered by virtue of the withholding of those funds. Therefore, the relief sought by the local governments is specific relief and not classical money damages.").

Plaintiff relies on Kidwell v. Department of Army, 56 F.3d 279 (D.C. Cir. 1995); however, that case is inapposite. It addresses a situation in which no monetary relief was requested, however the end result of the granting of the injunctive relief is that money would flow to the plaintiff. Id. at 283-84. That is not the case here. Plaintiff's Complaint seeks money damages as well as back pay, not just injunctive relief.

Plaintiff contends that his situation is analogous to the example discussed in Hubbard, 982 F.2d at 533-34 n.4, of an individual who worked for a year without receiving pay and could therefore possibly seek back pay as a form of specific relief. Pl.'s Memo at 22. This analogy does not hold. As an initial matter, any back pay that Plaintiff seeks as a result of his termination could not possibly fall into this category. 982 F.2d at 535-38 (explaining that back pay is not specific relief under the APA). Plaintiff's contention that he can seek as equitable relief the money he would have received as a result of the promotion he did not get is similarly flawed. See M.K. v. Tenet, 99 F. Supp. 2d 12, 24-25 (D.D.C. 2000) ("The APA does not waive sovereign immunity where the employee alleges he was deprived of pay by wrongful firing, demotion, non-hiring or non-promotion."); Nat'l Treasury Employees Union v. Horner, 654 F.

Supp. 1159, 1166-67 (D.D.C. 1987) (categorizing back pay and promotions as damage issues). Plaintiff received the money that he earned while working for the Agency. His contention that he should have earned more money because he was entitled to a promotion does not create a claim for "specific relief," but one for money damages. Cf. United States v. Testan, 424 U.S. 392, 404-05 (1976).

In response to Defendants' argument that the Court lacks jurisdiction to order reinstatement of a CIA employee, Plaintiff relies on Webster v. Doe, 486 U.S. 592 (1988). Pl.s' Memo at 23. However, in Webster, the Court found that a constitutional claim could be brought, notwithstanding the CSRA, because of the importance of constitutional claims. Plaintiff's claim is not a constitutional claim, but an APA claim predicated on the Agency's alleged violation of unknown regulations. 486 U.S. at 603. The relevant part of Webster is that which holds that the district court lacked jurisdiction to review CIA's termination decision under APA because CIA employment decisions are committed to agency discretion. Id. at 601. The Court therefore lacks jurisdiction to order reinstatement or retroactive promotion.[11]

V. PLAINTIFF'S FEDERAL TORT CLAIMS ACT CLAIM FAILS.

Plaintiff has not stated a claim under the FTCA because what he alleges is not a tort in the relevant jurisdiction and any claim that Plaintiff seeks to bring under the FTCA regarding the conditions of his employment is preempted by the CSRA. See Defs.' Memo at 28-31.

---

[11] Plaintiff wholly conflates his various claims in making this argument. Plaintiff contends that his termination violated the regulations. Pl.'s Memo at 23. However, that is not what the Complaint alleges. Plaintiff has alleged that the regulations deal with protection of intelligence, not with termination of employees. 2AC ¶ 39. Thus, while collecting inaccurate information may be a violation of the alleged regulations, terminating Plaintiff for his failure to follow the alleged instructions to alter the information would not violate the regulations.

Plaintiff contends that the tort he is alleging is negligent administration of records. Pl.'s Memo at 24-25. This tort has not been adequately pleaded, as Defendants were in no way able to glean such a claim from a fair reading of the Complaint. In addition, in determining whether a private individual could be found liable for a tort under like circumstances, courts look to local tort law. See, e.g., Art Metal-U.S.A., Inc. v. United States, 753 F.2d 1151, 1157 (D.C. Cir. 1985). In this case, that would be the law of the District of Columbia ("D.C." or "the District"). There may be jurisdictions that recognize a negligent administration of records tort, but the District is not among them, as Plaintiff appears to recognize. Pl.'s Memo at 24. Plaintiff contends that the Court can guess as to how a D.C. court would rule if presented with such a claim. Id. That is not correct. It is not an FTCA claim if the tort is not recognized in the appropriate jurisdiction. See Art Metal, 753 F.2d at 1157 ("[T]he FTCA waives the immunity of the United States only to the extent that a private person in like circumstances could be found liable in tort under local law. It is true that negligent performance of (or failure to perform) duties embodied in federal statutes and regulations may give rise to a claim under the FTCA, but only if there are analogous duties under local tort law."). That is, D.C. would have to have already recognized the tort, which it has not.

Plaintiff's citation to Commissioner of Internal Revenue v. Estate of Bosch, 387 U.S. 456 (1967), is inapposite, as that is not an FTCA case. Pl.'s Memo at 24. In Bosch, the court applied the Erie doctrine where the underlying substantive rule in resolving the federal tax issue was based upon state law. 387 U.S. at 465. The instant case bears no similarities to Bosch. The FTCA requires that local law have already recognized a tort. If the state court (or the District

court, in this case) has not already ruled that the tort exists in that jurisdiction, then for FTCA purposes, it does not.

Plaintiff also contends that the doctrine of res ipsa loquitur applies. Pl.'s Memo at 25-26. The case Plaintiff relies on involves a person in police custody who fell while in the control of the police. Sheehan v. United States, 822 F. Supp. 13, 16-17 (D.D.C. 1993). This case has no possible relevance to the instant case. What happened to Plaintiff is not remotely similar. What the allegations in the Complaint suggest is that Plaintiff was under the mistaken impression that his job had been converted from contract employee to that of staff employee, when, in fact, it had not. 2AC ¶¶ 17, 31. There is nothing in the Sheehan case to suggest that Plaintiff has stated a tort under D.C. law.

Plaintiff does not even respond to the argument that any FTCA claim predicated on his conditions of employment (whether he was a staff or contract employee) is precluded by the CSRA. Defs.' Memo at 30-31. Thus, the Court should accept this argument as conceded and dismiss the FTCA claim.

VI. PLAINTIFF'S BREACH OF CONTRACT CLAIM FAILS.

Plaintiff has clearly alleged that he was not converted from a contract employee to a staff employee. There are two counts in the Complaint that allege that the conversion did not occur. 2AC ¶¶ 52-52, 60-63. Plaintiff cannot have it both ways. Because he was not converted, there is no basis for a breach of contract claim based on his being terminated without the procedures accorded to staff employees.

There is also no breach of contract claim for the failure to renew his contract as a contract employee. The Agency is free to not renew such contracts at any time, as Plaintiff essentially

concedes. Plaintiff argues that he is entitled to a name-clearing hearing, but that is not a claim under contract, so it is irrelevant to this count. Nor would Plaintiff be entitled to such a hearing, as a contract employee.

Further, the CSRA precludes Plaintiff's attempt to relitigate his personnel issues as contract actions. Although Plaintiff suggests that he has addressed this argument in his brief, Pl.'s Memo at 27 n.18, the portion of his brief to which he refers deals only with the CSRA preclusion of the Privacy Act claims, not with its preclusive effect on his contract claim.

VII. PLAINTIFF'S FAILURE TO CONVERT CLAIM FAILS.

Plaintiff seeks to bring a claim for failure to convert that is separate from his tort and contract claims. 2AC ¶¶ 52-53. Defendants pointed out that there is no waiver of sovereign immunity for such a free-standing claim. Defs.' Memo at 33-34. Plaintiff responds that this is covered by the law of contracts. To the extent that this claim is part of Plaintiff's contract or FTCA claims, those claims have been discussed above.

To the extent that Plaintiff seeks to assert that he had a contract with the CIA to convert his employment from that of a contract to a staff employee, there is no legal basis for such a claim. There is no legal requirement that the Agency convert a contractor into a staff employee. Even if someone told Plaintiff that such a conversion had occurred, that would still not constitute a contract with the Agency to make such a conversion. Woods v. Milner, 955 F.2d 436, 439 (6th Cir. 1992); Shaw v. United States, 640 F.2d 1254, 1260 (Ct. Cl. 1981) ("Federal officials who by act or word generate expectations in the persons they employ, and then disappoint them, do not ipso facto create a contract liability running from the Federal Government to the employee, as they might if the employer were not the government."). Cf. Crenshaw v. United States, 134 U.S.

99, 104 (1890) (discussing the effect on contract law when the federal government is the employer). Because Plaintiff had no right to have his employment converted to that of staff employee, and sovereign immunity for such a claim has not been waived, this claim should be dismissed.

CONCLUSION

For the foregoing reasons, Defendants respectfully request the dismissal with prejudice of all of Plaintiff's claims against them.

Respectfully submitted,

PETER D. KEISLER
Assistant Attorney General

KENNETH L. WAINSTEIN
U.S. Attorney for the District of Columbia

ELIZABETH J. SHAPIRO
Assistant Director, Federal Programs Branch

/s/
MARCIA N. TIERSKY, Ill. Bar 6270736
Trial Attorney
Federal Programs Branch
U.S. Department of Justice
20 Massachusetts Ave., N.W. Room 7206
Washington, D.C. 20530
(202) 514-1359
Fax (202) 318-0486
marcia.tiersky@usdoj.gov