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Congress of the United States
House of Representatives

COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY

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July 16, 2014

Mr. Todd J. Zinser
Inspector General
Office of Inspector General
Department of Commerce
1401 Constitution Avenue N.W.
Washington, DC 20230

Dear Mr. Zinser,

Inspectors General (IGs) are given enormous powers to act as eyes and ears for Congress within their agencies and to hold officials accountable for their compliance with the law. As a central cog in the broad accountability community that protects the taxpayers' interests and contributes to a vital and responsive government, an Inspector General must maintain the highest standards of legal conduct in their own office.

This Committee's expectations for Inspectors General go beyond simple adherence to the law to a broader expectation that an IG will have a sense of justice, fair play and manifest an ethical bearing that inspires others to remain cognizant that we all serve the people and we are all servants of the law. When an IG cannot effectively serve as a watchdog due to their own illegal conduct or lack of ethical grounding, that IG cannot maintain the trust and confidence of the Congress, agency employees, or the public. Your two immediate predecessors at the Department of Commerce (DOC) both learned this the hard way.

Prior written internal policy statements sent out by you suggest that you understand all of this. As the guidelines for disciplinary penalties created in your office and issued by you in June of 2011 points out:

> "Law enforcement and related personnel occupy positions of public trust and are held to a higher standard of conduct with respect to their offices. **The OIG may reasonably determine that the efficiency of its service to the public would deteriorate should it cast a blind eye on the malefactions of its own employees....**" [Emphasis added].[1]

Your response to our letter of April 1, 2014, suggests that misconduct will not just be ignored by you, it will be defended by you with vigor. The letter highlights that you have not

[1] "OIG Guide for Disciplinary Penalties," provided as attachment to MEMORANDUM for All OIG Employees, From: Todd J. Zinser, Inspector General, Subject: OIG Policies Announcement, U.S. Department of Commerce, Office of Inspector General, June 28, 2011; Hereinafter OIG Memo.**[Enclosure #1]**

established a high ethical and legal standard of conduct that would inspire your staff or your agency. The Office of Special Counsel (OSC) conducted an investigation into you and your two closest advisors in response to credible allegations that you engaged in prohibited personnel practices. While the OSC found no "documentary evidence" regarding your personal involvement, they did find strong and compelling evidence that your two top advisers retaliated against whistleblowers in your office in ways designed to gag them from seeking redress from OSC or Congress. Incredibly, these advisers were your chief legal counsel and head of whistleblower protection. Based on the conduct your senior managers engaged in, and unambiguously documented by the OSC investigative report,[2] your own internal disciplinary policies approved and endorsed by you call for their suspension and possible removal from office.[3] You have done neither.

Your response to our inquiry raises a question about whether OSC should have dug deeper into your personal involvement. Instead of expressing contrition, acknowledging the seriousness of your top advisors' conduct, and taking steps to clean your office of this ethical taint, you provided the Committee with further defamatory comments about the victims who sought relief from OSC. Their victimization, under your signature, continues as you try to save the careers of your senior managers.

Your lack of action to address this matter, coupled with your letter, led us to wonder about your own experiences with OSC, and your history of conduct towards whistleblowers. Consequently, we have begun to inquire into the nature of your relationship with your top aides since you seem willing to harm your own standing to protect them.

The Committee has learned that in 1996, when you were the Deputy Assistant Inspector General for Investigations (DAIGI) at the Department of Transportation (DOT), OSC found that you retaliated against a member of your staff, Mr. John Deans, a criminal investigator with the DOT IG's office and a former FBI agent. Mr. Deans had discovered potential misconduct within high levels of the Transportation Department and sought to bring it to light. You reacted to that by removing him, "not for legitimate reasons but for his whistleblower activities and for exercising his right to free speech."[4]

When ordered by the Merit Systems Protection Board (MSPB) to reinstate Deans in his previous post, you responded by ordering that he be placed on administrative leave for six weeks.[5] You also made what were found to be a series of false "unsupportable" allegations against him.[6] The OSC investigated and found: "The evidence does not support any of these allegations. On the other hand, it is clear that Deans' removal was ordered at the behest of

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[2] "Report of Prohibited Personnel Practices: OSC File Nos. MA-12-4640 and MA-13-1126," U.S. Office of Special Counsel (OSC), September 16, 2013. **[Enclosure #2]**

[3] OIG Memo, *supra*, note 1.

[4] Alan Prendergast, "Speak No Evil," *Denver Westword News*, June 20, 1996.

[5] Special Counsel, Ex rel. John L. Deans, Petitioner v. Department of Transportation, Office of Inspector General, Respondent, "Petition for Enforcement," before U.S. Merit Systems Protection Board, No. CB1208960027U1, June 6, 1996. **[Enclosure #3]**

[6] Special Counsel, Ex rel. John L. Deans Petitioner v. Department of Transportation, Office of Inspector General, Respondent, "Request for Stay of Personnel Action," before U.S. Merit Systems Protection Board, May 20, 1996. **[Enclosure #4]**

Deputy Assistant Inspector General (DAIG) for Investigations, Tod (sic) Zinser, who strongly objected to Deans' protected conduct." The OSC concluded, "Zinser's reaction to Deans' protected first amendment speech, as well as his protected whistleblowing, was draconian in nature."[7]

The OSC had to repeatedly petition the MSPB to force you to follow their direction to not retaliate against this agent. It took more than a year to get your compliance, during which time the OSC asked that you be denied pay until complying with the MSPB's order. In the end, as a result of your actions, the DOT was forced to return the agent to his previous post, pay him back wages and more than $10,000 to cover his attorney fees. The Department also agreed to remove any reference to the agent's illegal removal from his permanent personnel file.[8] Ironically, earlier this year your office agreed to remove the fabricated interim performance appraisals concocted by your two senior advisers in an effort to discredit the two Commerce OIG whistleblowers as part of your agreement with the OSC in this more recent case.

Even if there are no other examples of your personal involvement in retaliating against whistleblowers, this one example from 1996 is so shocking that it raises questions about the thoroughness of the review of your record when you were confirmed to your post as Inspector General at the Commerce Department. From a legal perspective, you and now your two closest advisers could all be considered "Giglio-impaired" having built an official record that casts doubt on your reliability, veracity, trustworthiness, and ethical conduct.[9] It is also striking how similar this 1996 case is to the recent conduct of your top advisers, and your reaction to OSC's findings in that case. At its heart, in both cases, we find an effort by senior IG officials to silence investigators by attempting to derail their careers. Your conduct in 1996 appears to be the model for the conduct of your closest advisors during their retaliatory actions in 2011.

Significantly, you failed to disclose your role in the 1996 case or the OSC's troubling findings against you during your October 23, 2007 confirmation hearing to become the Department of Commerce Inspector General.[10] You clearly were aware that Congress would have valued that disclosure. You chose to inform Congress of two anonymous complaints against you while you were at the Department of Transportation IG's office that were investigated and did not establish wrongdoing by you. In addition, you said: "I have never been disciplined or cited for a breach of ethics." Curiously, however, you failed to inform Congress of the 1996 OSC case that clearly did establish wrongdoing and whistleblower retaliation by you. There is no reasonable explanation for this lack of disclosure during your confirmation hearing and it raises serious questions as to your public candor and honesty with Congress.

In turning to the question of why you would be so adamant, and reckless, in your defense of the two senior officials OSC recently found had engaged in prohibited personnel practices, we

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[7] Ibid.

[8] Special Counsel, Ex rel. John L. Deans, Petitioner v. Department of Transportation, Office of Inspector General, Respondent, "Joint Motion for Approval of Settlement and Settlement Agreement," before U.S. Merit Systems Protection Board, No. CB1214960031T1. April 3, 1997. **[Enclosure #5]**

[9] OIG Memo, *supra*, note 1.

[10] "Nominations to the Department of Commerce, Federal Maritime Commission, and the Metropolitan Washington Airports Authority," Hearing before the Committee on Commerce, Science, and Transportation, United States Senate, One Hundred Tenth Congress, First Session, October 23, 2007 **[Enclosure #6]**

discovered that at least one of those officials, Richard ("Rick") C. Beitel, is a close personal friend. Mr. Beitel, the former Principal Assistant Inspector General for Investigations and Whistleblower Protection, whom the OSC found engaged in retaliation against whistleblowers, served with you at the Department of Transportation. That man was widely viewed to be your protégé by staff in the DOT IG's office. The two of you have worked together since 1992, when he joined the DOT IG staff. It turns out that he is far more than just your protégé.

A court document from a 2005 action find him affirming, as a witness for you, that he considered himself to be your "close friend and personal confidant." He also acknowledged that you "socialize with one another" outside of work and that your relationship with him was such that you would inform him of intimate details of your personal life. He further testified that he visited you on the day you moved into a new residence and that you spoke on an almost daily basis. While the matter before the court was not related to your official duties, this testimony shines a light into the nature of your relationship that may have been overlooked by the OSC.[11]

Mr. Beitel was hired by you at the Commerce OIG from the DOT IG's office in September, 2009. He was first brought on under a "detail" as he was under pressure to find a new job. He had recently been reassigned in the Transportation IG's office "for performance reasons" and had a history of managing his fellow DOT OIG employees by fear and intimidation.[12] In a performance review of his division, 56% of his employees said they did not trust him and 38% said they were afraid of the impact he could have on their careers.[13] It seems you hired him because of your personal relationship with him and so that he could maintain a Senior Executive Service (SES) level position that comes with high pay and benefits.

It is no wonder that Committee staff have been told time and again—in interviews with former staff from both the DOC IG's office and the DOT IG's office—that this man never does anything significant without knowing that it is what you want done. As evidenced by your response to our April 1 letter, it is clear he has your full support for his actions to retaliate against employees in your office for their protected actions.

It has come to our attention that this is not the only senior manager in your office who has been hired under a professional cloud. In 2010, one of your former Assistant IGs for Administration was hired on 24 hours' notice before she was to be terminated from another DOC office and denied her SES status. We understand that your decision to hire her was also based on your personal relationship with her and not her professional credentials. According to her former managers, you did not even inquire as to what had led them to conclude that she should be fired and denied SES status. Additionally, your former DAIG for Audits came out of Fannie Mae and witnessed the worst of the housing market credit bubble. She has been quoted to us by former OIG employees as saying to IG staff, "You don't know what a bad day is until you have watched the FBI carry your papers out of the office."

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[11] Todd J. Zinser, Complainant vs. Christine J. Zinser, Defendant, Circuit Court for Fairfax County, Virginia, No. 2005-3544, Ore Tenus Hearing, October 24, 2005.

[12] E-mail from Calvin L. Scovel, Department of Transportation Inspector General, to John Porcari, Deputy Secretary of Transportation, September 14, 2009. **[Enclosure #7]**

[13] E-mail regarding internal survey of Rick Beitel's management at DOT OIG, August 19, 2009. **[Enclosure #8]**

Some of your other senior-level officials seem to have similarly colorful backgrounds. Their backgrounds, which may be the result of bad luck as much as conscious misconduct, compromise their ability to be effective servants of the public trust. It also makes us suspect that their careers and pay are extraordinarily dependent upon your personal continued indulgence—undermining their ability to act with integrity.

The Congress, and this Committee in particular, requires a functioning Inspector General's office at the Department of Commerce to ensure that there is adequate oversight of the Department that houses several agencies under our jurisdiction outlined in House Rule X. Congress has a legitimate oversight role in ensuring the Commerce OIG is functional, efficient, and operating with the integrity required of an IG's office. As noted above, the Committee has uncovered evidence questioning whether the Commerce IG's office is functioning efficiently and with integrity. We must determine if these allegations are true, and if so, if they are the result of systemic issues that may require legislative action on behalf of the Congress.

To ensure you have copies of the records we reference in the details provided above, we are including them as separate attachments to this letter, including the OSC investigative reports of prohibited personnel practices by you and your senior aides from both 1996 and 2013.

All of these circumstances invite more scrutiny and, absent change in leadership of your office, the Committee intends to proceed in further examining these matters. As you are aware, we have been exploring these and other issues regarding your office since you testified to our Committee in September 2012.[14] The testimony of your Deputy to our Committee last year further solidified our efforts in this regard.[15] To that end, we ask that you provide the Committee all records (as defined in **Enclosure 9**) related to the following items:

1. All communications and materials that you or your office has sent to the Council for Inspectors General on Integrity and Efficiency (CIGIE) regarding the OSC case involving your Principle Assistant Inspector General for Investigations (PAIGI) and Counsel to the IG. This should include complete copies of all materials provided to CIGIE and all internal OIG communications and records related to whether and how to communicate to CIGIE on this matter. The search for records regarding this matter should include your personal e-mail account as well as your work journals.

2. All additional communications from, with or between your office and the CIGIE on any other matter regarding allegations of misconduct by you or other senior officials in your office during your term of service at the Commerce Department. This should include complete copies of all materials provided to CIGIE as well as all internal OIG communications and records related to responding to CIGIE and complete records

[14] House Science, Space, and Technology Subcommittee on Investigations and Oversight hearing, "Mismanagement of Funds at the National Weather Service and the Impact on the Future of Weather Forecasting," September 12, 2012, available at: http://science.house.gov/hearing/subcommittee-investigations-and-oversight-mismanagement-funds-national-weather-service-and

[15] House Science, Space, and Technology Subcommittee on Oversight hearing, "Top Challenges for Science Agencies: Reports to Congress from the Inspectors General – Part 1," February 28, 2013, available at: http://science.house.gov/hearing/subcommittee-oversight-top-challenges-science-agencies-reports-inspectors-general-part-1.

relating to the allegations at issue. The search for records regarding this matter should include your personal e-mail account as well as your work journals.

3. Complete resumes for Ms. Ann Eilers, Mr. Dave Smith, Ms. Morgan Kim, Mr. Rick Beitel, Ms. Kristine Leiphart, and yourself, showing full and accurate work histories.

4. All records from 2009-2010, maintained by the DOC OIG related to the detailing and hiring of Mr. Rick Beitel as well as the creation of his position and its status and pay level. The search for records regarding this matter should include your personal e-mail account as well as your work journals.

5. All records from 2010 regarding the detailing and subsequent hiring of Ms. Kristine Leiphart as well as the creation of her position and her status, pay and bonus. Please include her form CD-364, U.S. Department of Commerce "Career Senior Executive Service, Probationary Employee," and CD-364-B, "Completion of SES Probationary Period." The search of records regarding this matter should include your personal e-mail account as well as your work journals.

6. All records regarding submission of a "Victim Impact Statement" from your office to the U.S. District Court of Maryland in June 2013 as well as all internal OIG records regarding whether to submit such a statement and all drafts, editorial notes, and all other records in any form regarding this statement. The search for these records should include your personal e-mail account and work journals. (As you know, both the prosecution and defendants in this case requested that the Court not consider this statement at trial and the Court found that your office had no legal standing to file the "Victim Impact Statement.")

7. We also ask that you provide a complete record of employees hired, retained and departed from your office since December 1, 2007. Please provide data for each and every employee in the OIG when you arrived as well as every new hire, detailee or intern in your office that joined subsequent to your arrival. Please include their name, date of hire, title at hiring, current or last title, and date of departure if they have left. We ask that you provide this in the form of an Excel spread sheet.

Mr. Zinser, we are aware that you keep work journals to record notes and to provide direction to your staff. These journals represent official records and we remind you that such records should not be removed from the office nor tampered with in any way. The Committee intends to continue to examine the conduct and productivity of your office, and we consider your journals to be important evidence in that effort.

Please provide two copies of these materials (in both digital format and hard copy) by July 31, 2014. Your staff may contact Mr. Raj Bharwani of the Majority staff at (202) 225-6371, or Mr. Doug Pasternak of the Minority staff at (202) 225-6375, to make arrangements for delivery of these records.

Sincerely,

Rep. Lamar Smith
Chairman
Committee on Science, Space,
and Technology

Rep. Eddie Bernice Johnson
Ranking Member
Committee on Science, Space,
and Technology

Rep. Paul Broun, M.D.
Chairman
Subcommittee on Oversight

Rep. Dan Maffei
Ranking Member
Subcommittee on Oversight

Rep. F. James Sensenbrenner, Jr.
Subcommittee on Oversight

Rep. Eric Swalwell
Subcommittee on Oversight

Rep. Bill Posey
Subcommittee on Oversight

Rep. Scott Peters
Subcommittee on Oversight

Rep. Kevin Cramer
Subcommittee on Oversight

Rep. Bill Johnson
Subcommittee on Oversight

Attachments

cc: The Honorable Beth Cobert, Executive Chair,
Council of the Inspectors General on Integrity and Efficiency (CIGIE)
cc: The Honorable Penny Pritzker, Secretary, U.S. Department of Commerce
cc: The Honorable Carolyn Lerner, Special Counsel, Office of Special Counsel

ENCLOSURE 1

UNITED STATES DEPARTMENT OF COMMERCE
The Inspector General
Washington, D.C. 20230

June 28, 2011

MEMORANDUM FOR: All OIG Employees

FROM: Todd J. Zinser
Inspector General

SUBJECT: OIG Policies Announcement

Over the course of the past year, we have been developing a set of policies for the management and performance of OIG operations. We undertook this initiative to establish a set of written policies that would be readily available to all employees. These policies provide supervisors and other staff with accessible guidelines by which they can more effectively perform their duties as well as better understand their rights and responsibilities as OIG employees.

These policies are now in effect and available on the OIG intranet site at http://intranet-test.oignet/OIG_Intranet/SOP_Directives.htm. They cover a wide range of subjects. A complete inventory of the nearly fifty policies prepared as part of this initiative is available at the link above. I want to thank the Office of Counsel for coordinating this initiative as well as all the other OIG staff who were involved in the development, review and comment process. The Office of Counsel worked closely with stakeholders responsible for the subject matter to draft the specific policies. They also went through comment and review with the front office and other senior managers prior to final approval.

These policies are effective now, but are intended to be living documents that can be modified and updated as necessary. You can assist in that process. All employees must become familiar with these policies and I encourage you to provide suggestions and other feedback to IGCounsel@oig.doc.gov.

If you have questions about a particular policy, please reach out to the office responsible for the subject matter of that policy (as listed at the top of each policy) or the Office of Counsel. I appreciate your assistance in that process.

OIG Guide for Disciplinary Penalties

The following table is intended to be used as a guide for determining the most appropriate disciplinary action for a given offense. This is only a guide. The list of offenses is not all-inclusive and is not intended to address every possible disciplinary situation. It should, however, be used as a starting point for determining the most appropriate disciplinary action and to ensure that discipline is administered consistently throughout the organization. Supervisors and managers have the discretion to select the most appropriate method to remedy the offense based on the mitigating and aggravating circumstances surrounding the offense.

The OIG uses a progressive discipline approach. Progressive discipline is system of discipline where penalties gradually increase with repeated offenses. For example, when dealing with a first offense, supervisors and managers should consider the lowest level of discipline necessary to correct the behavior. For the second and subsequent offenses, the disciplinary action taken should progressively increase. All discipline must be

1. Constructive- designed to correct the behavior and ensure the efficiency of the service,
2. Consistent- similar offenses should be met with similar penalties regardless of the employee, and
3. Timely- disciplinary action should be taken as soon as practical after the offense.

Law enforcement and related personnel occupy positions of public trust and are held to a higher standard of conduct with respect to their offenses. The OIG may reasonably determine that the efficiency of its service to the public would deteriorate should it cast a blind eye on the malefactions of its own employees, and accordingly it may increase the level of penalty for various offenses. Further, in light of the oversight and enforcement elements of the OIG mission, any criminal activity could result in elevated disciplinary penalties, up to and including removal, even for a first offense. Finally, Special Agents should be particularly mindful of being characterized as "Giglio-impaired" under *Giglio v. United States*, 405 US 150 (1972), where substantiated violations of certain laws would render their testimony in criminal cases of minimal value, and their role in the OIG community potentially superfluous.

In light of the seriousness of these matters, no disciplinary action shall be taken without consulting the Office of Human Resources and the Office of Counsel.

TABLE OF OFFENSES AND PENALTIES

OFFENSES	FIRST OFFENSE	SECOND OFFENSE	SUBSEQUENT OFFENSES
1. Outside Interests			
a. Outside Employment – engaging in private business activities of a prohibited or unethical nature	Written reprimand to removal	5 days suspension to removal	30 days suspension to removal
b. Acceptance of a gratuity which might reasonably be interpreted as affecting the performance of official duties	Written reprimand to removal	5 days suspension to removal	30 days suspension to removal
c. Acceptance of foreign employment	5 days suspension to removal	30 days suspension to removal	Removal
d. Improper political activities	Suspension or removal	Removal	
2. Time and Attendance			
a. Repeated tardiness	Letter of warning to 3 days suspension	Written reprimand to 5 days suspension	5 days to removal
b. Absent Without Leave (AWOL) – unauthorized absence from the job during working hours or on any scheduled day of work.	Written reprimand to 5 days suspension	5 days suspension to removal	15 days suspension to removal

c. Improper use of leave	Written reprimand to 5 days suspension	5 days suspension to removal	15 days suspension to removal
d. Falsification of time and attendance	10 days suspension to 30 days suspension	30 days suspension to removal	Removal

OFFENSES	FIRST OFFENSE	SECOND OFFENSE	SUBSEQUENT OFFENSES
3. Drug and Alcohol Use			
a. Intoxication while on duty	15 days suspension to 30 days suspension	30 days suspension to removal	Removal
b. Possession or use of intoxicants in the workplace	3 days suspension to 30 days suspension	10 days suspension to removal	30 days suspension or removal
c. Selling intoxicants in the workplace	Removal		
d. Possession of illegal substance in the workplace	Removal		
4. Misuse of Government Property and Services			
a. Damaging or destroying government property	Written reprimand to removal	15 days suspension to removal	Removal
b. Unauthorized use of government motor vehicles	30 days suspension to removal (31 USC § 1349)	Removal	
c. Carrying unauthorized passengers in government motor vehicles	30 days suspension to removal	Removal	
d. Failure to obey safety requirements while operating a government motor vehicle	Written reprimand to15 days suspension	15 days suspension to removal	30 days suspension to removal
e. Misuse of government-provided Internet or phone services, including viewing of inappropriate websites	Letter of warning to 5 days suspension	5 days suspension to 30 days suspension	30 days suspension to removal
f. Misuse of government-issued travel, purchase or credit card	5 days suspension to removal	30 days suspension to removal	Removal

OFFENSES	FIRST OFFENSE	SECOND OFFENSE	SUBSEQUENT OFFENSES
5. Lending or Borrowing Money			
a. Borrowing money or obtaining co-signature on a loan from a subordinate	5 days suspension to 15 days suspension	15 days suspension to removal	30 days suspension to removal
b. Providing a loan or acting as co-signature on a loan for subordinates	5 days suspension to 15 days suspension	15 days suspension to removal	30 days suspension to removal
c. Providing a loan or acting as co-signature on a loan for other employees	Written reprimand to 5 days suspension	5 days suspension to removal	15 days suspension to removal
6. Neglect of Duty			
a. Loafing/wasting time	Letter of warning to 3 days suspension	Written reprimand to 5 days suspension	5 days suspension to removal
b. Sleeping on duty	Written reprimand to 5 days suspension	5 days suspension to 30 days suspension	30 days suspension to removal
c. Conducting personal affairs while on duty	Letter of warning to 3 days suspension	Written reprimand to 5 days suspension	5 days suspension to removal
7. Personal Conduct			
a. Fighting	30 days suspension to removal	Removal	
b. Harassing or threatening behavior	30 days suspension to removal	Removal	

OFFENSES	FIRST OFFENSE	SECOND OFFENSE	SUBSEQUENT OFFENSES
c. Taking reprisal action against an employee for a protected activity	30 days suspension to removal	Removal	
d. Unprofessional or discourteous conduct (e.g. angry outbursts, arguing, disrespectful comments)	Written reprimand to 10 days suspension	10 days suspension to removal	15 days suspension to removal
e. Use of foul or inappropriate language for the workplace	Letter of warning to 5 days suspension	5 days suspension to 15 days suspension	15 days suspension to removal
f. Creating a public disturbance in the workplace	3 days suspension to removal	10 days suspension to removal	30 days suspension to removal
8. Falsification			
a. Falsifying documents	15 days suspension to removal	Removal	
b. Falsification, misrepresentation, or omissions of a material fact	15 days suspension to removal	Removal	
9. Breach of Sensitive Personally Identifiable Information (PII)			
a. Breach of sensitive PII	Letter of warning to 5 days suspension	5 days suspension to 30 days suspension	30 days suspension to removal
b. Knowingly failing to report a breach of sensitive PII	Written reprimand to removal	10 days suspension to removal	30 days suspension to removal
10. Insubordination			
a. Knowingly and willfully disobeying a direct order from a supervisor or manager	Written reprimand to removal	15 days suspension to removal	Removal

OFFENSES	FIRST OFFENSE	SECOND OFFENSE	SUBSEQUENT OFFENSES
11. Failure to Follow Instructions			
a. Failing to follow the valid instructions of a supervisor or manager	Written reprimand to 5 days suspension	5 days suspension to removal	15 days suspension to removal
12. Improper Use of Authority			
a. Improper use of official authority or government information	Written reprimand to removal	Removal	
b. Improper use of credentials	5 days suspension to 15 days suspension	15 days suspension to removal	30 days suspension to removal
13. Ethical Violations			
a. Gifts – providing, accepting, soliciting gifts	Written reprimand to removal (5 U.S.C. § 7351)	Removal	
b. Voluntary services – improperly accepting voluntary services for the government	Removal (31 U.S.C. § 665)		
c. Unauthorized soliciting or peddling in the workplace	Letter of warning to written reprimand	Written reprimand to 5 days suspension	5 days suspension to removal
14. Prohibited Personnel Practices			
a. Deliberate or grossly negligent violations of merit principles or procedures	5 days suspension to removal	30 days suspension to removal	Removal
b. Discrimination – specific acts taken by an employee in the performance of their official duties which discriminate against others on the basis of race, sex, religion, color, age, national origin, disability, marital status, or political affiliation	5 days suspension to removal	30 days suspension to removal	Removal

OFFENSES	FIRST OFFENSE	SECOND OFFENSE	SUBSEQUENT OFFENSES
15. Miscellaneous			
a. Gambling or promotion of gambling while on duty	Written reprimand to 10 days suspension	10 days suspension to removal	30 days suspension to removal
b. Misappropriation of funds	Removal		
a. Theft of government property	5 days suspension to removal	Removal	
b. Failure to observe safety and health regulations or to perform duties in a safe manner	Letter of warning to 5 days suspension	5 days suspension to removal	15 days suspension to removal
c. Participating in a strike	Removal (5 U.S.C. § 7311)		
d. Criminal violations adversely impacting the OIG mission	Removal		

ENCLOSURE 2

UNITED STATES DEPARTMENT OF COMMERCE
Office of Inspector General
Washington, D.C. 20230

January 16, 2014

The Honorable Carolyn N. Lerner
Special Counsel
1730 M Street, N.W., Suite 300
Washington, DC 20036

Re: OSC File Nos. MA-12-4640 and MA-13-1126

Dear Ms. Lerner:

This letter responds to your correspondence to the United States Department of Commerce (Commerce) Inspector General, Todd J. Zinser, dated September 16, 2013, regarding the above-referenced Office of Special Counsel (OSC) Files. Inspector General Zinser has asked me to provide this response. The Commerce Office of Inspector General (OIG) would like to express its gratitude for the OSC's courtesies in providing us with several extensions to respond to your letter, and in conducting negotiations towards a mutually-agreeable resolution of the findings summarized in your letter and set forth in OSC's September 16, 2013 report regarding these Files. We are pleased that the OIG and OSC have been able to reach such an agreement based upon the corrective measures that the OIG has taken or intends to take to resolve the OSC's concerns, as discussed more fully below.

We appreciate the OSC's efforts in bringing its concerns to our attention. It is important to note, however, as I and OIG representatives have discussed with your staff, that there is disagreement with a number of the factual findings and legal positions set forth in OSC's report. Moreover, by taking the corrective measures discussed below, the OIG is not admitting that its employees committed any prohibited personnel practices. Nevertheless, we recognize that the OSC has raised serious concerns, and, accordingly, the OIG has taken or will undertake the following corrective measures, which we believe constitute meaningful and significant steps that will effectively address these concerns:

1. The OIG will employ an employee relations (ER) specialist in the Commerce OIG human resources office. The ER specialist will be responsible for counseling and advising OIG managers and supervisors on employee performance, employee appraisals, performance plans, EEO matters, EEO settlement and separation agreements, and other issues. This individual would report to the Director of Human Resources.

2. The OIG will recuse the Counsel to the IG from employee relations matters for two years. The OIG will appoint an OIG staff attorney for day-to-day routine employee relations matters and obtain an outside counsel to work on employee relations matters of a more serious nature requiring significant management actions. The attorney or outside counsel will report directly to the Deputy IG, without reporting to the Counsel for the IG.

3. The Commerce OIG will conduct performance counseling for both of the involved executives. The OIG will identify and ensure that the executives take relevant training over the next two years to improve their knowledge of employee relations matters and proper documentation of performance issues.

4. Wade Green's and Rick Beitel's performance appraisals will reflect their inappropriate judgment and inadequate performance in connection with the interim appraisals and separation agreements discussed in OSC's report. Their performance appraisals, which become part of their permanent performance record, will contain strongly worded language admonishing them for their lapses in judgment. Mr. Green and Mr. Beitel will not be awarded performance bonuses, resulting in a minimum loss of about $8,000 for each of the executives.

5. The Commerce OIG will establish a uniform separation/settlement policy and template agreement using best practices in the federal government sector, to include OSC and EEO. The Deputy IG's approval/signature will be required on all future agreements.

6. The Commerce OIG will establish greater independence in matters of day-to-day management and operations between the Office of Counsel and the Office of Investigations. OIG has hired attorney investigators to provide greater independence in legal reviews of investigative matters. The Office of Counsel will not conduct any internal investigations or management reviews of OI.

7. The Commerce OIG will establish a Memorandum of Understanding with another OIG to conduct internal investigations of special agents or investigative staff, as necessary.

8. The Commerce OIG will review best practices and Departmental policy regarding interim appraisals for departing employees, and develop an OIG policy that ensures that interim appraisals are given on a fair and consistent basis. The OIG will also ensure that supervisors and managers receive training developed from best practices and Departmental policy.

9. The Commerce OIG will make changes in executive assignments and responsibilities. This would include, at a minimum, taking Rick Beitel out of the chain of command over the OIG Whistleblower Protection Ombudsman, and removing "whistleblower protection" from Mr. Beitel's title. In addition, the OIG will issue a

written communication to its employees to let them know that if they have concerns that they would like to address in a discrete manner that they can go to the Ombudsman, confidentially to the Office of Special Counsel (OSC), or directly to the Deputy IG. OIG has established a separate mailbox, visible to the Deputy IG only, that employees can send e-mails with suggestions or concerns to and has notified OIG staff of the mailbox's availability for their use to communicate directly and privately with the Deputy IG.

10. The Commerce OIG will remove supervisory duties from Mr. Beitel for a period of no less than one year, due to his role as a supervisor in administering the failing interim performance rating. Mr. Green will be removed from supervisory duties over matters involving employee relations, EEO cases and settlement/separation agreements for a period of two years for his role in negotiating and issuing the settlement/separation agreements.

11. The Commerce OIG will destroy any copies of [redacted] 2011 interim performance appraisals in its possession.

12. The Commerce OIG will take all of the above-referenced actions within sixty (60) days of the date of this letter. Further, the OIG will report to OSC within seventy-five (75) days the dates upon which the above-referenced actions were taken.

Pursuant to the agreement between the OIG and the OSC, it is my understanding that as a result of the corrective measures described above, OSC will close out its case, end its investigation of the above-referenced Files, and will take no action to pursue the disciplinary actions recommended in the September 16, 2013 Report. If this understanding is in any way incorrect, I trust that you will notify me at your earliest opportunity.

Although the 12 numbered items above may be summarized in communications with third parties, the OIG does not authorize the release of a copy of this letter to any other party. If OSC receives a request under the Freedom of Information Act for disclosure of this letter, please forward the request to me for a response by the OIG.

Again, I want to express the OIG's appreciation for the OSC's willingness to negotiate this agreement and its courtesies throughout this process. Please contact me or Glenn Harris if there are any questions or concerns.

Sincerely,

David P. Smith
Deputy Inspector General

cc: Todd J. Zinser, Inspector General

U.S. OFFICE OF SPECIAL COUNSEL

Report of Prohibited Personnel Practices
OSC File Nos. MA-12-4640 and MA-13-1126

[redacted]
Investigation and Prosecution Division Attorney

[redacted]
Complaints Examining Unit Attorney

September 16, 2013

REPORT OF PROHIBITED PERSONNEL PRACTICES
OSC CASE NOS. MA-12-4640 and MA-13-1126

I. INTRODUCTION

This Prohibited Personnel Practices Report (Report) contains the investigative findings in Office of Special Counsel (OSC)[1] File Nos. MA-12-4640 and MA-13-1126. These complaints were filed on behalf of two former Department of Commerce, Office of Inspector General (OIG) employees, hereafter referred to as John Doe 1 and John Doe 2, or collectively, the whistleblowers.[2] The complaints allege that the whistleblowers were coerced into signing separation agreements containing non-disparagement provisions preventing them from going to OSC, Congress, or the media in retaliation for their perceived whistleblowing and engagement in the Equal Employment Opportunity (EEO) process. OSC's investigation uncovered strong evidence of retaliation warranting corrective and disciplinary action.

Pursuant to 5 U.S.C. §§ 1214 and 1215, OSC is charged with independently investigating prohibited personnel practice (PPP) retaliation cases and, if warranted, seeking appropriate corrective and disciplinary action. This investigation concerns three types of PPPs: whistleblower retaliation (5 U.S.C. § 2302(b)(8)), retaliation for the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation (5 U.S.C. § 2302(b)(9)), and taking a personnel action in violation of a law, rule, or regulation implementing a merit system principle (5 U.S.C. § 2302(b)(12)) (collectively, protected activity). The non-disparagement provisions at issue essentially functioned as "gag clauses" which prevented the whistleblowers from making protected disclosures to OSC, Members of Congress, or the media. The use of gag clauses to chill employees from engaging in further whistleblowing runs directly counter to the purpose and intent of the Whistleblower Protection Act. While the Department of Commerce, at OSC's request, ensured that going forward the gag provisions would not be enforced, the willful retaliation in this case warrants additional action to discipline the wrongdoers and to deter future retaliation. Agency officials must be held accountable for committing PPPs, especially retaliation for engaging in protected activity.

This Report summarizes OSC's investigative and legal findings in these cases. OSC provides this Report to assist the Department of Commerce and the Department of Commerce OIG in determining the appropriate corrective and disciplinary action in these matters. OSC is not waiving any protections or privileges that may apply to the information included in this Report or the sources of that information.

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[1] OSC investigates allegations of prohibited personnel practices and is authorized to seek corrective action from the Merit Systems Protection Board to remedy abuses of the merit system, and to initiate disciplinary action against civilian government officials who commit prohibited personnel practices. In establishing OSC, Congress emphasized OSC's mandate to protect whistleblowers. S. Rep. 95-969, at 24 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2723, 2746.

[2] John Doe 1 filed the complaint identified as OSC File No. MA-13-1126. John Doe 2 is considered a primary witness in this investigation. Due to the sensitivity of these cases, John Doe 1 and John Doe 2 have requested that they not be identified by name in this report.

The evidence demonstrates that the whistleblowers were coerced into signing the separation agreements at the heart of this case. Moreover, the record shows that OIG management knew that both employees had engaged in protected activity, and several witnesses described the employees as "perceived whistleblowers" who were trying "to report the abuse" within the OIG.

The two primary management officials involved in the separation agreements were Richard C. ("Rick") Beitel, Principal Assistant Inspector General for Investigation and Whistleblower Protection (PAIGI), and Wade Green, Chief Counsel to the OIG. PAIGI Beitel and Mr. Green engaged in retaliatory acts after being informed that the whistleblowers had obtained new positions outside of the OIG. In short, Wade Green and PAIGI Beitel worked together to ensure that the whistleblowers would leave the OIG on Mr. Green's and PAIGI Beitel's terms—quietly and with no recourse to make protected disclosures about the OIG. After the whistleblowers found jobs at other federal agencies, PAIGI Beitel drafted unfounded, failing performance appraisals as leverage to get the employees to sign separation agreements. While there were numerous departing OIG employees in 2011, only the whistleblowers were issued failing interim appraisals or presented with separation agreements containing non-disparagement clauses, indicating that these actions were taken because of protected activity and/or perceived whistleblowing.

Mr. Green drafted the separation agreements and negotiated the gag clauses. OIG management used its authority, including the threat of failing performance ratings and delayed release dates, to effect these separation agreements. In return, the employees gave up their right to make disclosures to OSC, Congress, or the media and they withdrew their pending EEO complaints and/or Freedom of Information Act (FOIA) requests. The whistleblowers would not have signed such agreements if not for the retaliatory and coercive acts by management.

Section II sets forth the relevant facts OSC gathered in its investigation. Section III provides a legal analysis of the alleged PPPs in this matter. Section IV sets forth OSC's recommendations regarding the respective culpability of the two subject officials. Finally, Section V concludes this report.

II. SUMMARY OF RELEVANT FACTS

A. Background

Todd Zinser was appointed Inspector General (IG) of the Department of Commerce (Commerce) on December 26, 2007, following Senate confirmation. His appointment succeeded Johnny Frasier, who resigned from the position after concerns of fiscal improprieties and whistleblower reprisal were raised by Congress and OSC.

Prior to IG Zinser's arrival, the OIG was fragmented between employees who supported IG Frasier and those who were involved in the investigations concerning his alleged wrongdoing. Several members of IG Frasier's senior staff, including his Chief

Counsel and Assistant Inspector General for Investigations (AIGI), left the OIG within the first two years of IG Zinser's tenure.

IG Zinser filled several of the OIG Senior Executive Service (SES) positions with former colleagues from the Department of Transportation, Office of Inspector General (DOT OIG), where he was employed from 1991 to 2007. Because these selections involved unusual circumstances and were effected with little transparency, many OIG employees and witnesses in OSC's investigation believed the selections violated the merit system principles. One of these selections was the hiring of Rick Beitel in October 2009 for a temporary detail from DOT OIG, and his later selection for the Principal Assistant Inspector General for Investigation and Whistleblower Protection (PAIGI) position in or around June 2010.[3]

[redacted]

B. Protected Activity and Adverse Actions

This section provides the significant facts relating to the reprisal allegations, arranged in approximate chronological order.

1. Protected Activity

a. John Doe 1

1. EEO:

John Doe 1 filed an EEO complaint with [redacted] on or around June 14, 2011. In his complaint, he alleged discrimination based on age and disability. [redacted] forwarded a summary of John Doe 1's allegations to IG Zinser, [redacted] PAIGI Beitel, and Mr. Green on or around June 30, 2011. In her e-mail, she explained that John Doe 1 was in the "informal or pre-complaint" EEO process.

On July 1, 2011, Mr. Green forwarded [redacted] June 30, 2011, e-mail to IG Zinser, [redacted] and PAIGI Beitel. He asked them to review John Doe 1's complaint and to provide him with their recollection of events so that he could formulate a response on behalf of the OIG.[4]

[3] Rick Beitel accepted a detail to Commerce OIG, in part because of an ongoing EEO complaint filed against him at the DOT OIG. During PAIGI Beitel's detail, IG Zinser petitioned OPM for another SES position. The request claimed that PAIGI Beitel would create a whistleblower protection division for the OIG. From 2009 to the present, no designated staff has been hired for whistleblower protection, and these duties are collateral to PAIGI Beitel's function as the PAIGI. Nevertheless, the hiring was a non-competitive transfer, and OSC did not find that this selection violated any of the PPPs.

[4] It is unusual for an agency to provide a written response at the informal stage of the EEO process.

[redacted] testified that IG Zinser "made disparaging comments" about John Doe 1 filing an EEO complaint and that he believed that IG Zinser was "angry" that John Doe 1 filed the complaint. PAIGI Beitel testified that "there was mutual consensus that the complaint had no merit." Filing an EEO complaint is protected activity under 5 U.S.C. § 2302(b)(9).

2. *FOIA Request:*

On August 9, 2011, John Doe 1 submitted a FOIA request to Mr. Green. In his request, John Doe 1 asked for copies of all documents relating to the hire of an independent computer forensics firm, which was tasked with identifying and searching the e-mail files of OIG employees in June or July 2011. John Doe 1 was concerned that the forensics firm was hired through a sole-source contract and believed that responsive documents to his FOIA request would potentially implicate IG Zinser, [redacted] PAIGI Beitel, and/or Mr. Green in Federal Acquisition Regulation (FAR) violations or violations of other laws, rules, or regulations.

b. John Doe 2

1. EEO:

In or around June 2011, John Doe 2 drafted an EEO complaint alleging discrimination based on age, race, and veteran status. In the draft complaint, he reported "a pattern of abusive conduct and hostile management practices directed towards [him] and other OI [Office of Investigation] managers." He specifically discussed hiring improprieties, mismanagement of PAIGI Beitel's Office of Special Investigations (OSI), and concerns about a firearms investigation.

Although John Doe 2 did not file his EEO complaint, Mr. Green testified that he knew that John Doe 2 "had an informal [EEO complaint] ... if not, he had a threatened one, I think." [redacted] additionally testified that he discussed a draft complaint with IG Zinser, Mr. Green, and possibly PAIGI Beitel. He was unsure if it was an EEO complaint or a complaint to the Council of the Inspectors General on Integrity and Efficiency (CIGIE).

2. *FOIA Request:*

John Doe 2 submitted a document request in or around July 2011 for documents related to an acquisition of MP5 fully-automatic submachine guns (MP5) and the OIG's Special Purpose Firearms (SPF) policy. The OIG Office of Counsel (OC) refused to comply with this request. The following month, through his attorney, John Doe 2 submitted a FOIA request for these documents, including various drafts of the SPF policy and e-mail communications between himself and several OIG supervisors and attorneys related to the drafting and supervisory/counsel review process for that policy. John Doe 2 requested documents that he believed would show that he did not unilaterally change the SPF policy to circumvent the prior OIG approval process. John Doe 2 testified that

he submitted the draft SPF policy to counsel in 2009 for review. John Doe 2 believed that it was an abuse of authority by OIG management to hold him responsible for changes to the SPF policy that were reviewed by OIG counsel and more senior OIG management officials, and that the requested documents would support this belief.

3. Draft CIGIE Complaint:

In or around May 2011, John Doe 2 drafted a CIGIE complaint and provided a copy to several co-workers for their review and comment. The complaint concerned his belief that IG Zinser, Mr. Green, PAIGI Beitel, and [redacted] were "engaged in a pattern of abusive conduct toward employees, favoritism and prohibited personnel practices in the discipline, hiring and selection of managers and other employees." Although this complaint was never submitted to CIGIE, [redacted] testified that he discussed John Doe 2's draft EEO complaint or draft CIGIE complaint with IG Zinser, Mr. Green, and possibly PAIGI Beitel.

c. John Doe 1 and John Doe 2 were Perceived Whistleblowers

John Doe 1's and John Doe 2's participation in the above activities led to the perception that they were whistleblowers. When asked whether he/she would describe John Doe 1 and John Doe 2 as perceived whistleblowers, a witness responded, "[Y]eah absolutely, yeah." The witness further testified that "everybody knew ... that there were all kinds of different avenues that they [John Doe 1 and John Doe 2] were trying to go down to report the abuse." The witness noted that these avenues included EEO complaints. The witness testified that he/she believed that PAIGI Beitel and others "went apoplectic" when John Doe 1 filed a FOIA request based on the office atmosphere the day the FOIA request was filed. [redacted] a Senior Analyst with the OIG, also testified that he would describe John Doe 1 and John Doe 2 as perceived whistleblowers and that non-disparagement language was added to their separation agreements to keep them quiet.

2. PAIGI Beitel and Wade Green Refused to Provide Timely Release Dates to the Whistleblowers

John Doe 1 and John Doe 2 both accepted positions outside of the OIG in August 2011. [redacted] OIG Senior Human Resources (HR) Specialist, e-mailed PAIGI Beitel on August 12, 2011, concerning John Doe 1's acceptance of a position at another federal agency. In his e-mail, he told PAIGI Beitel that the agency had requested an August 28, 2011, release date, and asked if PAIGI Beitel approved the release date or wanted to counter with a different date. PAIGI Beitel forwarded [redacted] e-mail to IG Zinser, [redacted] Assistant Inspector General for Administration (AIG), and Mr. Green later that day. Mr. Green immediately responded that OIG "invokes our 30 day right."

Several days later, on August 15, 2011, PAIGI Beitel e-mailed John Doe 1's first-level and second-level supervisors, [redacted] to inform them that John Doe 1 had accepted a position with another federal agency and that he would be "coordinating with HR and OC on the release date; same with John Doe 2." [redacted] responded that he had already spoken with John Doe 1 and [redacted] OIG HR Specialist, and had approved John Doe 1's request for an August 27, 2011, release date based on John Doe 1's minimal workload. PAIGI Beitel then replied that he "just asked [redacted] to hold off for the time being pending internal coordination." PAIGI Beitel later forwarded the e-mail chain to [redacted] supervisor.

[redacted] counseled [redacted] for providing John Doe 1 with a release date before obtaining PAIGI Beitel's approval. In her August 15, 2011, e-mail to AIG Leiphart, [redacted] explained that [redacted] had approved the August 27, 2011, release date, and that she was used to "calling the immediate supervisor for the release date." She additionally testified that, prior to John Doe 1, the release date process did not require SES approval or involvement.

On August 29, 2011, [redacted] e-mailed her staff, including [redacted] and [redacted] that "[i]f John Doe 2 gets a release date, HR staff needs to let Wade Green know ASAP before proceeding with further action."

[redacted] testified that she was relaying requests from the front office and that she assumed that they were considering some sort of action if OC was involved. However, other OIG employees being investigated by OC were given release dates without SES interference.

In fact, another OI supervisor was being investigated by OC for alleged Government Owned Vehicle (GOV) violations. This supervisor did not engage in any protected activity or make protected disclosures. His release date was not delayed by Mr. Green or PAIGI Beitel. The OC was also investigating an OI Special Agent for her alleged role in the acquisition of Glock handguns and shotguns. This employee did not engage in protected activity or make protected disclosures. Her release date was not delayed by Mr. Green or PAIGI Beitel

3. *The Whistleblowers Were Issued Failing Interim Performance Appraisals*

On August 24, 2011, almost two weeks after John Doe 1 informed the OIG that he had obtained a new position, PAIGI Beitel presented John Doe 1 with a failing interim performance appraisal. The regular performance cycle ended on September 30, 2011. PAIGI Beitel rated John Doe 1 as a "Level 1" performer, with a total score of 115/ 500 points.

The following month, again weeks after John Doe 2 informed the OIG that he had obtained new employment, PAIGI Beitel gave him a failing interim performance

[5] [redacted]

appraisal. He was also rated a "Level 1" performer with a total score of 100/500 points. Unacceptable performance, such as a "Level 1" rating can be cause for removal under 5 C.F.R. Part 752 or placement on a Performance Improvement Plan (PIP) under 5 C.F.R. Part 432.

The evidence indicated that in 2011, despite the high number of departing employees, only the whistleblowers were issued failing interim appraisals. In fact, no other departing employee received any appraisal at all, much less a career-threatening failing appraisal. Thus, issuing a rating to a departing employee outside of the regular rating cycle was highly unusual. As noted in section "c." below, PAIGI Beitel, who was aware of the whistleblowers protected activity, acknowledged that he was primarily responsible for coming up with the idea to issue failing interim ratings to the whistleblowers.

a. 2011 Interim Failing Rating is Unfounded

1. Summary Rating Narratives Did Not Accurately Describe Whistleblowers' Performance for the 2010 – 2011 Performance Period

a. *John Doe 1:*

In the interim failing appraisal, in his summary rating narrative for John Doe 1, PAIGI Beitel discussed alleged performance deficiencies that occurred "in the current and previous rating periods." The majority of these alleged deficiencies involved John Doe 1's failure to timely close four investigations. PAIGI Beitel stated that John Doe 1 kept these cases open "during current and previous rating periods" to justify his "robust staffing level and/or to avoid scrutiny from the upcoming CIGIE peer review." Even though John Doe 1 credibly denied that this was his intention, PAIGI Beitel included his theory in John Doe 1's appraisal.

PAIGI Beitel also cited John Doe 1's failure to "properly use OIG's authorized system of records for case management (IG CIRTS)." However, PAIGI Beitel knew that John Doe 1's unit's primary focus was providing assistance to open investigations and that IG CIRTS was not used to track investigation support. In fact, PAIGI Beitel directly received John Doe 1's weekly spreadsheet of work performed. This spreadsheet was created to track his work in lieu of IG CIRTS. PAIGI Beitel also cited John Doe 1 for not providing his spreadsheet to OC for legal review. However, PAIGI Beitel never instructed John Doe 1 to submit his spreadsheet to OC prior to his August 24, 2011, interim rating, even though he had received a copy of the weekly spreadsheet for several months.

Finally, PAIGI Beitel held John Doe 1 responsible for not being timely placed on a performance plan. He stated, "[I]f [John Doe 1] thought he was not on an approved plan, he should have asked his former supervisor to provide an approved plan and elevated the issue within OIG as necessary." The evidence indicates that John Doe 1 notified his previous supervisor, [redacted] on several occasions that he was not on an

approved performance plan, and reported to [redacted] on May 26, 2011, that he did not believe he was on a "signed plan despite asking for one several times." He further noted that, although he was not on an approved plan, [redacted] did give him a signed mid-year review. John Doe 1 forwarded this e-mail chain to PAIGI Beitel later that day, prior to PAIGI Beitel citing the lack of an approved performance plan as a basis for the failing interim appraisal.

Collectively, the evidence does not support any of the cited bases for the retaliatory interim appraisal issued to John Doe 1 after his announced departure from the OIG.

b. John Doe 2:

PAIGI Beitel similarly discussed alleged performance deficiencies that occurred outside of the performance period in his summary rating narrative for John Doe 2. His narrative concentrated on three areas: (1) the CIGIE peer review; (2) OIG policies; and (3) the acquisition of MP5 fully automatic submachine guns (MP5s).

Specifically, PAIGI Beitel held John Doe 2 responsible for his alleged failure to track recommendations from the 2008 CIGIE peer review. PAIGI Beitel wrote that John Doe 2 was "shirking what clearly were his responsibilities," even though the record demonstrates that OIG senior management never informed John Doe 2 that he was expected to track these recommendations. Accordingly, John Doe 2 was held responsible in a 2011 interim performance appraisal for a duty that he was never instructed to perform and that was not included in his performance plan in any year following the 2008 CIGIE peer review. Moreover, since PAIGI Beitel contended that John Doe 2 should have performed these tracking functions beginning in 2008, the majority of these alleged violations occurred outside of the 2010-2011 performance period, and should have not been included in the interim appraisal.

PAIGI Beitel further claimed that John Doe 2's Quality Assurance Review (QAR) report, drafted in preparation for the 2011 peer review, was deficient because it stated that OIG was "fully compliant" on several QAR entries without providing qualifying notations. When John Doe 2 was questioned about these entries, the record indicates that he agreed to provide qualifying notations. [redacted] a former Department of Justice SAC hired by OIG on a temporary basis to prepare for the 2011 peer review, testified that John Doe's QAR had identified deficiencies, but that the real problem was lack of direction from OIG management.

In addition, the interim failing performance appraisal cited John Doe 2 for failing to accurately report an OIG recovery. However, the recovery took place in a previous performance period, and John Doe 2's prior performance appraisals, which occurred prior to his protected activity, did not address this issue. The interim failing performance appraisal cited John Doe 2 for not conducting a revision of the OIG's Government Owned Vehicle (GOV) policy. The record indicates that he was never tasked with conducting such a revision by his chain of command, and PAIGI expected the revisions to be done *sua sponte* by John Doe 2.

PAIGI Beitel concentrated most of his critique in the failing interim appraisal on John Doe 2's role in the OIG's acquisition of MP5s and his revision of OIG policy related to that acquisition. Specifically, PAIGI Beitel cited John Doe 2 for acquiring the MP5s without IG approval, and for deleting the requirement for IG approval from the OIG policy. However, the evidence indicates that OIG management was aware that John Doe 2 informed his first-level supervisor about the acquisition, and thus reasonably assumed that his management appropriately notified IG Zinser. PAIGI Beitel attributed all responsibility for the MP5 acquisition and policy change to John Doe 2, even though several other employees were involved. In what became a highly charged matter in the OIG, the lowest level employee involved was held accountable in an interim failing appraisal for an issue that other managers knew of and for which they held greater responsibility. Finally, both of these events occurred in 2009, well outside of the 2010-2011 performance period.

Collectively, the evidence does not support any of the cited bases for the retaliatory, interim appraisal issued to John Doe 2 after his announced departure from the OIG.

c. Rick Beitel was Primarily Responsible for Interim Performance Appraisals

Although [redacted] signed the whistleblowers' interim performance appraisals, the weight of the evidence shows that PAIGI Beitel was primarily responsible for drafting and issuing the interim appraisals. [redacted] testified that PAIGI Beitel wrote the interim appraisals. Although he did not disagree with PAIGI Beitel's assessment of the whistleblowers' performance, he felt the ratings were "harsh." He further testified that he signed the appraisals as the approving official, and believed that, as the approving official, his role was to defer to the rating official's judgment. He testified that he "recognized that he had little to no power or authority to do anything" concerning the treatment of the whistleblowers, and that he was "actively looking for another job." [redacted] additionally testified that, in retrospect, he felt he could have "come out stronger" in disagreeing with PAIGI Beitel's interim performance ratings for the whistleblowers.

PAIGI Beitel testified that both he and [redacted] felt that the interim appraisals were appropriate, and that the issuance of the appraisals was "our idea, but I certainly take a measure of ownership of that." He further testified that "it was a decision obviously that I made ... you know, I prepared it, signed it."

2. The Summary Rating Narratives are not Based on the Whistleblowers' Performance During the 2010-2011 Performance Period

The Code of Federal Regulations provides that "a rating of record shall be based only on the evaluation of actual job performance for the designated appraisal period." *See* 5 C.F.R. § 430.208(a)(1). As mentioned above, the majority of the whistleblowers' alleged performance issues cited in PAIGI Beitel's summary narratives occurred outside of the 2010-2011 appraisal period. All of the cited cases in his summary narrative for

John Doe 1 were investigated and resolved during prior appraisal periods – some as early as 2006 – and were not reviewed and rated during those periods, prior to John Doe 1's protected activity. Similarly, many of the issues raised in PAIGI Beitel's summary narrative for John Doe 2 occurred in previous rating periods, including the MP5 acquisition and associated policy change, and were not reviewed and rated during those periods and prior to John Doe 2's protected activity.

A key witness familiar with the OIG rating process testified that OIG senior staff "constantly do performance appraisals for things that happen outside of the performance period ... particularly during this period when they're trying to nail people on stuff." The witness further testified that PAIGI Beitel did so in an effort to discourage employees from reapplying to the OIG or to deter legal action. The witness testified that PAIGI Beitel specifically told him/her that he would "write this really negative appraisal and we'll put it in our drop file so that ... if anything happens where [the employee] sues us or whatever the case may be, we can bring [it] out." OSC found this witness highly credible.

3. *There Was No Legitimate Basis to Issue the Whistleblowers Interim Performance Appraisals*

Although one witness estimated a seventy percent OIG employee attrition rate from May 2011 to December 2012, of the departing employees only the whistleblowers were given "interim" or "close-out" performance appraisals. PAIGI Beitel testified that he and [redacted] decided to write interim performance appraisals for the whistleblowers because the Office of Personnel Management (OPM) OIG peer review team was coming in and there were a "number of deficiencies that the various OIG senior management, senior leadership reviews had disclosed and identified" and that it was "something that we needed to memorialize appropriately."

This testimony appears disingenuous because several employees, including one manager, who were also described as poor performers were not given interim appraisals when they left OIG. More significantly, PAIGI Beitel drafted John Doe 1's and John Doe 2's failing performance appraisals *after* they gave notice that they were leaving the OIG. If there were legitimate concerns about the whistleblowers' performance, PAIGI Beitel and/or [redacted] should have addressed these deficiencies when they occurred, and/or should have taken steps to place John Doe 1 and John Doe 2 on PIPs. Moreover, since interim appraisals are not typically included in employees' Official Personnel Folders (OPFs), providing John Doe 1 and John Doe 2 with interim appraisals would not effectively warn new employers of their alleged performance deficiencies.

4. *The Whistleblowers Have Historically Been - and Currently Are - Highly Rated Federal Employees*

For the majority of their extensive government careers, the whistleblowers have received the highest numerical rating, "Level 5", or "Outstanding" performance reviews. John Doe 1 was consistently rated 500/500 – the highest rating possible under the OIG's

performance system. Under [redacted] John Doe 1's and John Doe 2's ratings dropped slightly, but never below a "Fully Successful" level.

Before departing the OIG in or around May 2011, [redacted] provided the whistleblowers and his other subordinates mid-year progress reviews. On April 26, 2011, [redacted] rated John Doe 1 as performing at Level 3 or higher on all critical elements, providing that he was performing his assigned duties well. [redacted] provided John Doe 2 with a mid-year progress review on or around April 26, 2011, also rating him as performing at Level 3 or higher on all critical elements. These mid-year progress reviews were issued only four months before PAIGI Beitel's interim appraisals, and prior to the whistleblowers' protected activity. PAIGI Beitel asserted that he did not endorse [redacted] reviews, but provided no credible basis for issuing the interim appraisals to the whistleblowers and no other departing OIG employees.

Since leaving OIG for other federal agencies, the whistleblowers have been again rated as "Level 5" or "Outstanding" employees, and have received 500/500 total performance points.

4. *The Whistleblowers Executed Separation Agreements in Order to Leave the OIG with Clean Performance Records*

Mr. Green placed undue pressure on the whistleblowers to sign separation agreements before they could be released from their OIG positions. Even though numerous employees left the OIG for positions with other federal agencies during this timeframe, the whistleblowers were the only OIG employees presented with separation agreements[6] and were coerced into signing the agreements under the threat of interim failing performance appraisals.

The separation agreements, which Mr. Green and his staff drafted, reviewed, edited, and negotiated , required John Doe 1 and John Doe 2 to withdraw their FOIA requests and John Doe 1's EEO complaint and to agree to release their rights to future administrative relief before the EEO, Merit Systems Protection Board (Board), and Congress. The separation agreements additionally contained the non-disparagement provisions/gag clauses at issue. These provisions provided that John Doe 1 and John Doe 2 could not:

> *[D]isparage the Agency in any communications to any person or entity, including but not limited to* ***Members of Congress*** *and their staff, the* ***Office of Special Counsel,*** *and the* ***media.*** *However, nothing in this Agreement shall prevent, prohibit or impair [John Doe 1 and John Doe 2] from responding truthfully to direct questions posed to him in writing or in the course of a formal hearing before any legislative, executive, or judicial body. (Emphasis added).*

[6] An OC employee, Employee X, executed a 'settlement agreement' containing similar non-disparagement language in 2011. A discussion of this agreement is located on page 14 of this Report.

In exchange for withdrawing their EEO complaints and/or FOIA requests, releasing their rights for any future administrative relief, and waiving their rights to contact Members of Congress and/or the media or file complaints with OSC, John Doe 1 and John Doe 2 received release dates to leave the OIG and guarantees that their new agencies would not see their failing interim performance appraisals. PAIGI Beitel and Mr. Green made it clear that if they did not execute separation agreements, their new agencies would be provided with copies of the failing interim appraisals, which could potentially devastate their careers as federal employees.

a. The Non-Disparagement Provisions Prevented the Whistleblowers From Making Protected Disclosures to OSC, Congress, or the Media

Both John Doe 1 and John Doe 2 testified that they interpreted the non-disparagement provisions in their separation agreements as prohibiting them from filing complaints with OSC, Congress, or the media. John Doe 1 testified that his separation agreement "says that I'm not allowed to file any complaints or anything like this." As reason for not filing a complaint with OSC, he testified, "even though I firmly believe that I had grounds to do so, [I didn't file a complaint] because I believe and I still, and I still do to some extent, that my hands are tied and I could not come to [OSC] and file a complaint because of that stupid separation agreement." John Doe 2 testified that "the day I went in to sign that separation agreement I had never been more scared in my life." He explained that he believed the separation agreement prevented him from filing complaints and that "it wasn't worth the risk of bringing [complaints to OSC or Congress]... I just saw them coming after me."

Wade Green testified that the non-disparagement provisions did not interfere with the employees' whistleblowing rights because those rights are something that "everybody knows you have and that can't be interfered with." He further testified that disparagement is "different from whistleblowing," because it is "about truthfulness, veracity," and stated that this definition of disparage is "common in the IG community." Mr. Green did not define disparage in the separation agreements, however, and made no effort to explain to John Doe 1, John Doe 2, or their respective counsels, that it was not the OIG's intention to prevent them from blowing the whistle.

In contrast, the evidence indicates that Mr. Green intended to prevent the whistleblowers from contacting Congress or the media, or from filing complaints with OSC. Mr. Green's stated understanding of the scope of the non-disparagement language is not supported by the text of the provision when read in its entirety. The second half of the non-disparagement provision, states:

> *However, nothing in this Agreement shall prevent, prohibit or impair [John Doe 1 and John Doe 2] from responding truthfully to direct questions posed to him in writing or in the course of a formal hearing before any legislative, executive, or judicial body.*

This section carves out instances when John Doe 1 and John Doe 2 would be allowed to contact Congress, OSC, or the media under the terms of the agreement. By specifically listing parameters for permissible contact with these bodies, it indicates that all other contact, including making protected disclosures, is prohibited under the agreement.

Second, Mr. Green provided no evidence to suggest that his stated definition of "disparage" was commonly used within the OIG, or necessary to include in the whistleblowers' separation agreements. In fact, a former OC employee directly contradicted the definition put forth by Mr. Green, testifying that "disparage" is a "negative statement" that "does not have to be false." Moreover, Mr. Green offered no credible basis to conclude that either John Doe 1 or John Doe 2 had made any false accusations against the OIG. To the contrary, witnesses consistently described the whistleblowers as men of integrity. Mr. Green presented no evidence suggesting a need to insert the non-disparagement provision into the agreement, even if it was limited to untrue statements.[7] In contrast, as described above, the whistleblowers had engaged in protected activity. The weight of the evidence suggests that Mr. Green's intent was to prohibit further protected activity, rather than inaccurate statements.

Third, the non-disparagement provision was extremely important to Mr. Green. Indeed, the evidence shows that he insisted that the non-disparagement provisions remain in the separation agreements. The non-disparagement language was initially drafted for use in a settlement agreement between the OIG and another employee who engaged in protected activity (Employee X).[8] This agreement was negotiated between Mr. Green and Employee X's attorney. Employee X's attorney removed the non-disparagement language twice, and both times, Mr. Green reinserted it. Mr. Green testified that he "certainly put [the non-disparagement provision] in there" and "probably required that it stay in there as a negotiation point." Significantly, Mr. Green also removed a provision drafted by Employee X's attorney, which would have allowed for his client "to file an EEO or Special Counsel complaint." Accordingly, the weight of the evidence suggests that the scope of the agreement precluded protected activity, such as an EEO or Special Counsel complaint, and not only untruthful statements.

Finally, Mr. Green demonstrated a motive to chill protected communications by whistleblowers. To illustrate, in an e-mail to [redacted] dated November 17, 2010, Mr.

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[7] It is worth noting that under 5 U.S.C. § 2302(b)(8), a disclosure does not need to be accurate in order to be protected. This subsection of the statute provides that, for a disclosure to be protected, an employee or applicant must "reasonably believe" that he or she is disclosing a violation of law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. Accordingly, a false or incorrect disclosure could be protected if the employee or applicant had a reasonable belief that the disclosure was true, based on their professional opinion or experience. Therefore, even if "disparage" is defined as a false, untruthful or inaccurate statement, the non-disparagement provisions in the whistleblowers' separation agreements would still prevent them from making lawful protected disclosures to OSC and others.

[8] This settlement agreement is not specifically discussed herein because it differs greatly from those in the separation agreements at issue. For example, Employee X agreed to a $25,000 buy-out payment and was allowed to retire early with a clean record. In addition, the OIG produced substantial evidence going back several years that Employee X had legitimate performance problems.

Green stated the importance of protecting IG Zinser's and the OIG's reputations, and provided advice on how to manage OI employees. He told [redacted]

> *If there is one thing you can fix in your first year it would be to improve how OI plays with others. It would be one thing if they just self-destructed—but it won't be that clean. When they hit that wall at 100 MPH it will splash on [Todd Zinser] the OIG as an agency, and all our reputations—and we never would have had an opportunity to stop or mitigate the damage because we have no visibility into OI. It is my job to safeguard the Client from these events—and I will.*

The evidence indicates that Mr. Green inserted non-disparagement provisions into the whistleblowers' separation agreements because, as OI employees, he was concerned that they would damage IG Zinser's reputation, his reputation, and the OIG.

b. The Whistleblowers Were Given Separation Agreements Because They Engaged in Protected Activity

Three OI managers were identified as having performance deficiencies in 2011. Each of these managers was being investigated by the OC for alleged violations of the SPF and/or GOV policies. Nevertheless, only two managers—John Doe 1 and John Doe 2— engaged in protected activity. Unlike the whistleblowers, the third manager, who did not engage in protected activity or whistleblowing, was not required to execute a separation agreement containing a non-disparagement provision and was not given a failing interim performance appraisal before his departure from the agency. Because all three of these managers had alleged performance issues and were being investigated for purported infractions, the only difference between them was that the third manager was not a perceived whistleblower and did not engage in any protected activity.

The fact that the non-disparagement provisions specifically list Congress, the media, and OSC, further shows that Mr. Green intended to prevent John Doe 1 and John Doe 2 from whistleblowing. In addition to an OIG, the main avenues for federal employees to make protected disclosures are through OSC, Congress, or the media. By preventing the whistleblowers from initiating contact with these bodies, it appears that Mr. Green intended to interfere with the whistleblowers' ability to make disclosures against the OIG.

c. PAIGI Beitel and Wade Green Appear to Have Coordinated on the Provisions of the Separation Agreements

PAIGI Beitel provided John Doe 1 with John Doe 1's failing interim performance appraisal on August 24, 2011, the same day that Mr. Green presented him with the separation agreement. As discussed above, PAIGI Beitel decided to give John Doe 1 an interim performance appraisal after he learned that John Doe 1 had accepted a position with another federal agency. PAIGI Beitel presented John Doe 2 with his failing interim

performance appraisal on September 16, 2011, the same day that John Doe 2 left the OIG for a position with another agency.

Section 3 of John Doe 1's separation agreement provides that, in consideration for agreeing to the non-disparagement provision and allowing the OIG to advertise to fill his position, the OIG agrees "to refrain from placing any copies of the close out appraisal completed upon [John Doe 1's] separation from the OIG in his Official Personnel File." The OIG further agreed to "effectuate [John Doe 1's] transfer from his position in OIG on August 28, 2011 to permit him to enter onto duty in a new federal position on that day." Without these provisions, John Doe 1 would have little to no incentive to sign the separation agreement.

John Doe 2's separation agreement, executed on September 6, 2011, mirrored John Doe 1's. Like John Doe 1, John Doe 2 agreed to the non-disparagement provision in exchange for an earlier release date and a guarantee that the OIG would not take adverse action against him. John Doe 2's agreement also contained an additional term in Section (3)(d), that the OIG would "reflect that any transfer by [John Doe 2] from the Agency to another agency will be reflected as voluntary and for personal reasons and to process all relevant personnel actions so that [John Doe 2's] transfer out of the Agency is reflected as 'voluntary and for personal reasons' or its equivalent." Although John Doe 2 received his failing interim appraisal after he had executed his separation agreement, these terms reveal PAIGI Beitel's and Mr. Green's intention to take action against John Doe 2 if he refused to sign the agreement. These actions could not be taken without coordination between Mr. Green and PAIGI Beitel.

PAIGI Beitel denied coordination between himself and Mr. Green. However, he testified, "OC and Wade knew that we were ... planning to do these appraisals," and that "[the appraisals] went through our Office of Counsel" for review and comment. PAIGI Beitel testified, "Wade [Mr. Green] did ask ... that we get him a copy of ... the interim rating. Actually his office had ... reviewed it [the interim rating] along with, later, subsequently, [John Doe 2's]." He further testified, "he [Mr. Green] did ask to have a copy of it [John Doe 1's interim appraisal] once it was done." Mr. Beitel additionally acknowledged that John Doe 1's interim appraisal and the separation agreement work together and were "contemporaneous." The fact that the separation agreements and failing interim performance appraisals were issued contemporaneously indicates that the appraisals were used to compel the whistleblowers to sign the separation agreements containing the non-disparagement provisions.

d. Wade Green Did Not Provide the Whistleblowers' Separation Agreements to the Office of General Counsel for Legal Review

[redacted] Commerce Employment and Labor Law Division, Office of General Counsel (OGC), and [redacted] OGC, testified that, prior to December 2012, their office reviewed and approved every settlement agreement

entered into on behalf of Commerce, including settlement agreements involving the OIG.[9]

Both [redacted] and [redacted] testified that Mr. Green did not submit John Doe 1's and John Doe 2's separation agreements to OGC for legal review per standard practice. In fact, [redacted] and [redacted] testified that they first received John Doe 1's separation agreement from the Commerce Office of Civil Rights in or around November 2012, and learned of John Doe 2's separation agreement during OSC's investigation. To their knowledge, John Doe 1's and John Doe 2's separation agreements were the first legal agreements entered into by the OIG without OGC approval or concurrence.

Mr. Green testified that John Doe 1's and John Doe 2's separation agreements were not routed through OGC "because it was based on the template that OGC had approved for [a previous settlement agreement], and I felt that was good enough." The referenced settlement agreement had key differences with those signed by the whistleblowers. It involved an employee who was already on a PIP, and received fair consideration for entering into the agreement, to include a $25,000 voluntary buy-out and early retirement. In contrast, as discussed, the whistleblowers only received timely release dates and notice that their new employers would not be given copies of their failing interim performance appraisals. The only similarity between the agreements was the non-disparagement provision, which, as previously discussed, was originally drafted by Mr. Green for inclusion in Employee X's settlement agreement. In addition, the non-disparagement provision in Employee X's settlement agreement differed from the provisions in John Doe 1's and John Doe 2's separation agreements, because it also prohibited the OIG from "disparaging" the employee.

Although [redacted] and [redacted] both reviewed and signed Employee X's settlement agreement, they both testified that, to their knowledge, OGC had never in its practice included such non-disparagement provisions in any Commerce settlement agreement. Both testified to their belief that such provisions could chill whistleblowing. They further testified that Mr. Green did not use the OGC settlement agreement template. [redacted] testified that he was "dumbfounded" that the non-disparagement provision was in Employee X's settlement agreement and that he signed it as an OGC department representative. He believed it was an oversight and should not have been included in any Commerce settlement agreement.

[9] OGC derives its authority to review all settlement agreements on behalf of the agency from Department of Commerce Department Organization Order 10-6, which describes the Office of General Counsel. Mr. Guenther testified that he has always relied on Section 4.01.b, which delegates to the General Counsel responsibility for "[t]he preparation, or examination for legal form and effect, of all legal instruments, such as contracts, cooperative agreements, leases, licenses, and bonds, entered into by the Department," to support the requirement that his office must concur in settlement agreements and resolution agreements.

e. PAIGI Beitel and Wade Green Signed John Doe 1's and John Doe 2's Separation Agreements

PAIGI Beitel signed the whistleblowers' separation agreements as "Management Official," and Mr. Green signed the agreements as "Counsel to the Inspector General." By signing the agreements, PAIGI Beitel and Mr. Green represented that they reviewed the agreements and agreed to the terms.

[redacted] and IG Zinser did not sign the agreements. IG Zinser testified that, prior to OSC's investigation, he had not reviewed the whistleblowers' separation agreements and was unaware of the non-disparagement provisions contained within them. [redacted] testified that he first learned of the whistleblowers' separation agreements during OSC's investigation. Both Mr. Green and PAIGI Beitel testified that they neither discussed the terms of the separation agreements with IG Zinser, nor showed him a copy of the agreements.

III. LEGAL ANALYSIS

There is compelling evidence of whistleblower retaliation warranting corrective action for John Doe 1 and disciplinary action against PAIGI Beitel and Mr. Green.[10]

A. Legal Standard: 5 U.S.C. §§ 2302(b)(8) and (b)(9):

It is a prohibited personnel practice to take or threaten to take a personnel action against an employee because of any disclosure of information that the employee "reasonably believes" evidences a violation of law, rule or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. 5 U.S.C. § 2302(b)(8). It is also a prohibited personnel practice to take or threaten to take a personnel action against any employee or applicant for employment because of: (1) the filing of an appeal, complaint, or grievance right granted by law, rule, or regulation; (2) testifying for or otherwise lawfully assisting any individual in filing an appeal, complaint, or grievance right granted by law, rule, or regulation; or (3) cooperating with or disclosing information to the Inspector General of an agency or the Special Counsel. 5 U.S.C. § 2302(b)(9).

B. Burden of Proof for Corrective and Disciplinary Action

1. Corrective Action

To prove violations of 5 U.S.C. §§ 2302(b)(8) or (b)(9) of the Whistleblower Protection Act (WPA) warranting corrective action, OSC must demonstrate with preponderant evidence that: (1) a protected disclosure of information was made or the employee engaged in protected activity; (2) the proposing or deciding officials had actual or constructive knowledge of the protected activity; (3) official(s) with authority to take,

[10] Although OSC's investigation demonstrated evidence of whistleblower retaliation against John Doe 2, he did not formally file a complaint with OSC, and therefore, OSC cannot seek corrective action on his behalf.

recommend, or approve a personnel action took or threatened to take personnel actions;[11] and (4) the protected disclosure or protected activity was a contributing factor in the personnel action at issue. *See Eidmann v. Merit Sys. Prot. Bd.*, 976 F.2d 1400, 1407 (Fed Cir. 1992) (explains (b)(8)) and Section 101(b)(1) of S. 743, the Whistleblower Protection Enhancement Act of 2012 (Pub. L. 112-199) (amending 5 U.S.C. § 1221(e)(1) to apply to cases involving protected activity under (b)(9)).[12]

Once OSC establishes a *prima facie* case of whistleblower reprisal, the burden shifts to the agency to prove by clear and convincing evidence that it would have taken the same action absent the disclosure. *Whitmore v. Dep't of Labor*, 680 F.3d 1353, 1364 (Fed. Cir. 2012). Clear and convincing evidence is that measure or degree of proof that produces in the mind of the trier of fact a firm belief as to the allegations sought to be established. It is a higher standard of proof than preponderance of the evidence, and as the Federal Circuit pointed out in *Whitmore*, "is reserved to protect particularly important interests in a limited number of cases." 5 C.F.R. § 1209.4(d), *Whitmore*, 680 F.3d at 1367.

2. *Disciplinary Action*

In any case in which the Board finds that an employee has committed a PPP under 5 U.S.C. §§ 2302(b)(8) or (b)(9)(A)(i), (B), (C), or (D), the Board may impose disciplinary action if it finds that the activity protected under these sections was a significant motivating factor, even if other factors also motivated the decision, for the employee's decision to take, fail to take, or threaten to take or fail to take a personnel action, unless that employee demonstrates by a preponderance of the evidence that the employee would have taken, failed to take, or threatened to take or fail to take the same personnel action in the absence of such protected activity. Section 106 of S. 743, the Whistleblower Protection Enhancement Act of 2012 (Pub. L. 112-199) (amending 5 U.S.C. § 1215(a)(3)).

C. Establishment of *Prima Facie* Cases of Reprisal

1. *Protected Activity*

John Doe 1 filed an EEO complaint on or around June 14, 2011, which constitutes protected activity under 5 U.S.C. § 2302(b)(9). He also submitted a FOIA request on or around August 9, 2011, for documents concerning alleged computer surveillance in possible violation of FAR regulations. The evidence also shows that PAIGI Beitel and Mr. Green viewed John Doe 1 as a possible or perceived whistleblower under 5 U.S.C. § 2302(b)(8) because the FOIA requested information could potentially implicate

[11] PAIGI Beitel and Mr. Green both exercised the personnel action authority required under 5 U.S.C. §§ 2302(b)(8) and (b)(9).

[12] The Board has held that, if the evidence establishes that subject officials would have taken the personnel action in the absence of the protected disclosures, the significant factor test cannot be met. *See generally Special Counsel v. Costello*, 75 M.S.P.R. 562, 611 (1997).

IG Zinser, PAIGI Beitel, and/or Mr. Green in wrongdoing if, for example, regulations were not followed, as the whistleblowers reasonably believed.

John Doe 2 submitted a document request in July 2011 and a FOIA request in August 2011for documents or other information concerning the MP5 acquisition and SPF policy. As with John Doe 1's FOIA request, these requests concerned sensitive issues that John Doe 2 reasonably believed could inculpate IG Zinser, PAIGI Beitel and/or Mr. Green in misconduct. John Doe 2 also drafted an EEO complaint and a CIGIE complaint in or around June 2011. These FOIA requests and draft complaints gave the appearance that John Doe 2 was concerned about issues at the OIG and had either engaged in, or was considering engaging in, protected activity.

The perception of whether an employee is a whistleblower is sufficient to establish engagement in protected activity. *King v. Dep't of the Army*, 116 M.S.P.R. 689, 695-696 (2011). The Board found that whether a perceived whistleblower "made a protected disclosure is immaterial," and focused instead on whether the agency *perceived* the employee to be a whistleblower, *i.e.*, whether agency officials appeared to believe that the employee engaged or intended to engage in whistleblowing activity. *Id.*

Here, the record is replete with evidence showing that Mr. Green, PAIGI Beitel, IG Zinser, and [redacted] perceived John Doe 1 and John Doe 2 as whistleblowers based on the substance of their FOIA requests and EEO complaints. As discussed above, several witnesses described them as "perceived whistleblowers." This perception is further demonstrated by the inclusion of the gag clauses in their separation agreements and the requirements that they withdraw their FOIA requests and EEO complaints.

*2. **Knowledge***

Shortly after receiving John Doe 1's EEO complaint, [redacted] contacted Mr. Green on June 30, 2011, to notify him of the complaint and to invite him to provide a written response. Even though John Doe 1's EEO complaint was in the informal stage, Mr. Green forwarded [redacted] e-mail to IG Zinser, [redacted] and PAIGI Beitel—the named subject officials in the complaint—and asked them to "formulate [their] recollection of the events described" in order to "respond on behalf of the Agency." Accordingly, Mr. Green, PAIGI Beitel, IG Zinser, and [redacted] all had knowledge of John Doe 1's engagement in protected activity.

Although John Doe 2 did not file his draft EEO complaint or submit his draft CIGIE complaint, [redacted] testified that he discussed a draft complaint of John Doe 2's with Mr. Green, IG Zinser, and PAIGI Beitel. Mr. Green further testified that he believed that John Doe 2 had either filed an informal EEO complaint or had threatened to do so. This testimony indicates that, even though he did not actually file his EEO complaint or submit his CIGIE complaint, OIG management viewed him as a perceived whistleblower.

In addition, as OIG Chief Counsel, Mr. Green processed all agency FOIA requests. He testified that he had knowledge of John Doe 1's and John Doe 2's FOIA requests, and

that his office sent out FOIA search requests to individuals identified as potentially having responsive documents or information. A key witness testified that PAIGI Beitel and others "went apoplectic" when John Doe 1 filed a FOIA request. Thus, the evidence indicates that Mr. Green and PAIGI Beitel had knowledge of the FOIA requests.

3. ***Personnel Actions Were Taken Against John Doe 1 and John Doe 2 Because of Their Perceived Whistleblowing and/or Engagement in Protected Activity***

The evidence clearly shows that John Doe 1's and John Doe 2's EEO complaints and/or perceived whistleblowing significantly factored into the personnel actions OIG management took or threatened.

a. Failing Interim Performance Appraisals

The failing interim performance appraisals, as chapter 43 performance evaluations, constitute personnel actions under 5 U.S.C. § 2302(a)(2)(A)(viii), or at a minimum, threatened personnel actions.

As discussed above, PAIGI Beitel issued John Doe 1 and John Doe 2 failing interim performance appraisals in conjunction with their separation agreements. These appraisals were drafted and issued after OIG management learned that John Doe 1 and John Doe 2 had accepted positions with other federal agencies. The timing and content of these appraisals shows that they did not reflect PAIGI Beitel's honest assessment of their performance. Both employees had received outstanding performance evaluations in previous years, and had recently received satisfactory appraisals. Neither had been placed on a PIP. The failing appraisals were issued neither at the usual time nor in the usual manner. The unfounded failing appraisals reflected that, despite recent satisfactory performance, John Doe 1's and John Doe 2's performance had suddenly dropped to failure in every element.

PAIGI Beitel issued the whistleblowers failing interim performance appraisals approximately one month after they engaged in protected activity, *i.e.*. engaging in the EEO process and/or submitting FOIA requests potentially implicating OIG management in wrongdoing. The law presumes that a disclosure is a contributing factor in a personnel action when the official who took or recommended the action had knowledge of the protected disclosure and took the personnel action within a period of time that would lead a reasonable person to conclude that the disclosure was a contributing factor. *Reid v. Merit Sys. Prot. Bd.*, 508 F.3d 674, 678-79 (Fed. Cir. 2007). The Board has held that a connection exists between a disclosure and a personnel action even in cases where the personnel action occurs more than a year after the disclosure. *See e.g., Inman v. Dep't of Veterans Affairs,* 112 M.S.P.R. 280, 283-4 (2009) (personnel action occurred 15 months after disclosure); *Redschlag v. Dept of Army,* 89 M.S.P.R. 589, 626-27 (2001) (personnel action occurred 18 months after disclosure).

Here, based on the knowledge-timing test, the whistleblowers meet the contributing factor standard. The failing performance ratings were issued approximately one month

after John Doe 1 and John Doe 2 filed EEO complaints and/or submitted FOIA requests. Accordingly, the protected activity was a contributing factor in the retaliatory ratings. 5 U.S.C. § 1221(e)(1).

b. Non-Disparagement Provision/Gag Clauses

The separation agreements' non-disparagement provisions constitute a personnel action under 5 U.S.C. 2302(a)(2)(A)(xi). As set forth below, the provision significantly changed the whistleblowers' "duties, responsibilities, or working conditions."

Specifically, it is a fundamental condition of federal employment that an employee has a right, and an ethical duty, to report wrongdoing to appropriate authorities. *See* Whistleblower Protection Act of 1989, Pub. L. No. 101-12, Sec. 2(b) (1989) (purpose of the WPA is "to strengthen and improve protection for *the rights of Federal employees,* to prevent reprisals, and to help eliminate wrongdoing within the Government[.]") (emphasis added); 5 C.F.R. § 2635.101(b)(11) (2012) ("Employees *shall disclose* waste, fraud, abuse, and corruption to appropriate authorities.") (emphasis added); *see also* E.O. 12674, Sec. 101(k)(1989)(same).[13]

Contractually requiring an employee to give up that fundamental right, or not to perform that required duty, constitutes a "significant change in duties, responsibilities, or working conditions" within the meaning of 5 U.S.C. § 2302(a)(2)(A) (defining "personnel action"). The legislative history of the 1994 WPA amendments indicates that the term "any other significant change in duties, responsibilities, or working conditions" should be interpreted broadly, to include "any harassment or discrimination that could have a chilling effect on whistleblowing or otherwise undermine the merit system." *Covarrubias v. Social Sec. Admin.*, 113 M.S.P.R. 583, ¶ 15 n.4 (citing 140 Cong. Rec. H11, 421 (daily ed. Oct. 7, 1994) (statement of Rep. McCloskey); *Roach v. Department of the Army*, 82 M.S.P.R. 464, ¶ 24 (1999)). The non-disparagement provisions in John Doe 1's and John Doe 2's separation agreements have a chilling effect on whistleblowing.

Under the *per se* knowledge/timing test, the whistleblower's perceived whistleblowing was a contributing factor in Mr. Green's issuance of the separation agreements. Mr. Green, who coerced the whistleblowers into signing the separation agreements, had knowledge of their protected activity and presented the separation agreements in close temporal proximity to their protected activity.

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[13] Federal employees also have a statutory obligation to report criminal wrongdoing by other employees to the Attorney General. 28 U.S.C. § 535(b) (2012). In addition, there are a variety of other statutes and regulations that mandate particular types of reporting and/or reporting by certain categories of employees. *See, e.g.*, 48 C.F.R. § 3.104-7 (2011) (violations of the Federal Acquisition Regulation); 31 U.S.C. §§ 1351, 1517(b) (2012) (violations of the Antideficiency Act); 38 C.F.R. § 1.201 (2011) (employee's duty to report violations of Veterans Affairs laws or regulations); 45 C.F.R. §§ 73.735-1301, -1302 (2011) (employee's duty to report violations of fraud, waste or abuse in programs of the Department of Health and Human Services); 40 U.S.C. § 611 (2006) (General Services Administration).

c. *Per-se Retaliation*

Non-disparagement provisions/ gag clauses have been deemed *per se* retaliation in analogous circumstances. For example, as discussed in "Enforcement Guidance on non-waivable employee rights under Equal Employment Opportunity Commission (EEOC) enforced statutes":

> *Agreements that attempt to bar individuals from filing a charge or assisting in a Commission investigation run afoul of the anti-retaliation provisions because they impose a penalty upon those who are entitled to engage in protected activity under one or more of the statutes enforced by the Commission. By their very existence, such agreements have a chilling effect on the willingness and ability of individuals to come forward with information that may be of critical import to the Commission as it seeks to advance the public interest in the elimination of unlawful employment discrimination.*

Enforcement Guidance, EEOC Notice No. 915.002 (April 10, 1997), *available at* http://www.eeoc.gov/policy/docs/waiver.html (emphasis added).

EEOC has consistently recognized in federal sector cases that an agency's restraint of or interference with the EEO process, including attempts to chill EEO activity through prior restraint, constitutes *per se* retaliation for protected EEO activity – ***even though no personnel action has been taken and no protected activity has occurred.*** For example, in *Jasper v. Runyon*, the Postmaster stated generally at a supervisors' meeting that too many managers were filing EEO complaints and that these filings would do the managers no good. The Commission found that such a statement would have a potentially chilling effect on the filing of EEO complaints. Based on its duty to insure the integrity of the EEO process, the Commission found that the Postmaster's statement constituted *per se* retaliation. *Jasper v. Runyon*, EEOC Request No. 05920370, 1992 WL 1374793, at *4 (Aug. 7, 1992).[14]

OSC reasonably believes that an agency's prior restraint or interference with whistleblowing and/or going to OSC constitutes *per se* retaliation under 5 U.S.C. § 2302(b)(8) and/or (b)(9), and thus a prohibited personnel practice. The non-disparagement provisions in the separation agreements on their faces constitute a prior restraint against a signing employee's whistleblowing and/or going to OSC. Moreover,

[14] *See also Donahue v. Holder*, EEOC Appeal No. 0120073680, 2009 WL 591068, *1 (Feb. 26, 2009) (finding *per se* reprisal where manager made statements at meeting that employees had the right to challenge his recent assignments and "could file grievances or EEO complaints, but they will lose"); *Bensing v. Danzig*, EEOC Appeal No. 01970742, 2000 WL 33541925, *3-4 (Oct. 3, 2000) (supervisor's objections to employee's contacts with EEO office and union representatives constituted *per se* reprisal); *Simpson v. Rubin*, EEOC Request No. 05930570, 1994 WL 1841189, *5 (March 11, 1994) (agency policy that precluded employee from serving in acting supervisory capacity solely because employee was an EEO counselor constituted *per se* reprisal); *Marr v. Widnall*, EEOC Appeal No. 01941344, 1996 EEOPUB LEXIS 2637, *18 (June 27, 1996) (finding unlawful interference where supervisor attempted to dissuade witness from testifying in EEO matter by calling her to private meeting in smoking area and stating that it was "in [her] best interest not to get involved.").

since the non-disparagement provisions also restrain or interfere with a signing employee's exercise of the right to petition Congress, the agreements also constitute a *per se* violation of 5 U.S.C. § 2302(b)(12), and thus a prohibited personnel practice. As the Second Circuit reasoned in similar circumstances: "Although the act of inducing an employee to relinquish his rights as provided by the [Energy Reorganization Act] through means of a settlement agreement is less obvious than more direct action, such as termination, it is certainly aimed at the same objective: keeping an employee quiet." *Connecticut Light & Power v. Secretary of Labor*, 85 F.3d 89, 95-96 & n.5 (2d Cir. 1996) (affirming Dep't of Labor ruling that act of offering settlement agreement which would restrict individual from reporting unlawful conduct to the government violated anti-retaliation provision of Energy Reorganization Act of 1974).

Here, the evidence demonstrates that Mr. Green included the non-disparagement provisions in the whistleblowers' separation agreements with the specific intention of keeping the whistleblowers quiet. He drafted the separation agreements that clearly provided that the whistleblowers' new employers would receive copies of their failing interim performance appraisals unless they agreed to waive their rights to make disclosures to OSC, Congress, and the media.

D. OIG Cannot Meet its Rebuttal Burden

In order to rebut a *prima facie* case of reprisal under 5 U.S.C. § 2302(b)(8), the OIG must show by "clear and convincing" evidence that it would have issued John Doe 1's and John Doe 2's failing interim performance appraisals and executed separation agreements containing non-disparagement provisions even if they had not engaged in protected activity.

The "clear and convincing" evidentiary standard imposes a high burden on the agency that is difficult to satisfy. In *Whitmore*, the Federal Circuit quoted the following from the WPA legislative history:

> *"Clear and convincing evidence" is a high burden of proof for the Government to bear. It is intended as such for two reasons. First, this burden of proof comes into play only if the employee has established by a preponderance of the evidence that the whistleblowing was a contributing factor in the action – in other words, that the agency action was "tainted." Second, this heightened burden of proof required of the agency also recognizes that when it comes to proving the basis for an agency's decision, the agency controls most of the cards – the drafting of the documents supporting the decision, the testimony of witnesses who participated in the decision, and the records that could document whether similar personnel actions have been taken in other cases. In these circumstances, it is entirely appropriate that the agency bear a heavy burden to justify its actions.*

The evidence demonstrates that the OIG will not be able to meet this high burden. First, the OIG will not be able to show that John Doe 1's and John Doe 2's interim performance appraisals were justified. As discussed in section II(b)(6) above, PAIGI Beitel decided to draft and issue the interim performance appraisals after John Doe 1 and

John Doe 2 gave notice that they had accepted positions with other federal agencies. They were the only departing OIG employees given "interim" or "close-out" appraisals, despite the fact that numerous employees left the OIG in 2011. The appraisals were, in part, based on events that occurred outside of the performance period, and the ratings do not appear to be based on their actual performance, especially considering the fact that they were given satisfactory progress reviews less than four months earlier. Moreover, PAIGI Beitel's testimony that the interim appraisals were drafted to explain the OI's alleged issues to the peer review committee is not credible, in that several reports had already been drafted by himself and [redacted] to address these alleged concerns.

The OIG has also asserted that John Doe 1 and John Doe 2 were represented by counsel when they executed their separation agreements and that they willingly entered into the agreements. Whether John Doe 1 and John Doe 2 were represented by counsel, however, does not by itself establish that the agreements were not coercive.

To prove coercion, John Doe 1 and John Doe 2 must show that: (1) they involuntarily accepted the terms of the agreements; (2) circumstances permitted no other alternative; and (3) such circumstances were the result of coercive acts. *See Kent v. Dep't of the Air Force,* 2013-3034, 2013 WL 1352582, *2 (Fed. Cir. April 5, 2013); *Candelaria v. U.S. Postal Service,* 31 M.S.P.R. 412, 413 (1986). Here, there is sufficient evidence to establish that the OIG coerced John Doe 1 and John Doe 2 into signing the separation agreements.

First, the evidence indicates that John Doe 1 and John Doe 2 involuntarily accepted the terms of the separation agreements. The Federal Circuit has noted that the most probative evidence of involuntariness is the length of time between the employer's alleged coercive act and the action. *Terban v. Department of Energy,* 216 F.3d 1021, 1024 (Fed. Cir. 2000).[15] Here, Mr. Green provided John Doe 1 with his separation agreement—the same day PAIGI Beitel gave him his failing interim performance appraisal—just four days before he was expected to begin his new position at a different federal agency. John Doe 2 received his separation agreement before receiving his failing interim performance appraisal; however, the terms of his agreement denote that he would not be given a timely release date, that OIG would potentially tell his future employer that his departure from OIG was not voluntary, and that some adverse action would likely be taken against him if he failed to sign the separation agreement. He received his failing interim performance evaluation on his last day with OIG.

Next, the complainants had no alternative but to sign the agreements. If they did not sign them immediately, their release dates to their new employers would be postponed, and their new employers would receive the failing performance appraisals. Potentially, the new employers had the option of rescinding the employment offers. Additionally, if the whistleblowers chose not to sign the agreements and instead challenged the failing appraisals, the agency made clear its intent to postpone the release dates and issue the failing appraisals. Unlike in *Kent,* where the employee remained free

[15] While *Terban* involves retirement, it has also been cited in cases involving settlement agreements. *See Parrott v. Merit Sys. Prot. Bd.,* 519 F.3d 1328, 1334 (Fed. Cir. 2008).

to refuse to sign a settlement agreement and insist on a ruling by the administrative judge on his removal, John Doe 1 and John Doe 2 would have suffered immediate, negative consequences if they refused to sign the agreements. *Id* at *3.

Finally, the failing interim performance appraisals and the separation agreements were the result of coercive acts. In *Bowie v. U.S. Postal Serv.*, the Board held that "a threatened action by an agency is 'purely coercive' if an employee can show that the agency knew or should have known that the reason for the threatened action could not be substantiated." *Bowie*, 72 M.S.P.R. 42, 44 (1996) (threatened removal in settlement discussion before the Board) (citing *Schultz v. United States Navy*, 810 F.2d 1133, 1136-37 (Fed.Cir.1987) (employee's resignation was involuntary where agency improperly denied leave and threatened adverse action for AWOL).[16]

In this case, Mr. Green told John Doe 1 and John Doe 2 that if they entered into the separation agreements, the OIG would agree not to provide their new employers with copies of their failing interim performance appraisals. He further threatened that if they refused to sign the separation agreements, the OIG would not provide their requested release dates, and would instead hold them at OIG for the maximum time allowed, despite the fact that they had minimal work to perform and no outstanding projects.

Equally significant, the failing interim performance appraisals were unfounded. Prior to these appraisals, John Doe 1 and John Doe 2 worked at the agency for many years and had never received appraisals below "Fully Successful". Their performance at the time these failing appraisals were issued was at least at the "Fully Successful" level. The OIG knew that it could not substantiate the failing interim appraisals. In addition, the ratings were issued out of cycle. It is not the OIG's common practice to issue "interim" or "close-out" ratings before an employee leaves the agency. In fact, no employee, with the exception of John Doe 1 and John Doe 2, has received a close-out appraisal. The evidence shows that the failing performance appraisals were presented to John Doe 1 and John Doe 2 solely to coerce them into signing the separation agreements, and thus, prevent them from engaging in further protected activity.

In addition, the OIG did not have a legitimate reason to threaten to postpone John Doe 1's and John Doe 2's release dates. The evidence shows that there was no reason to require John Doe 1 and John Doe 2 to remain at the agency. They no longer had work to complete and would be lingering at the agency with nothing to do. PAIGI Beitel did not assert that he or anyone at the OIG was considering postponing the release dates for some legitimate reason, such as the need for John Doe 1 and John Doe 2 to complete an assignment. Where an agency's action does not have a solid or substantial basis in personnel practice or principle it is an unjustifiable coercive act. *See Michael Roskos v. the United States*, 549 F.2d 1386 (Fed. Cir. 1977) (where there was no acceptable good-of-the-service rationale for employee's reassignment, the reassignment was a coercive act

[16] The Board has applied *Schultz* in the context of a settlement agreement. See *Merriweather v. Department of Transportation*, 64 M.S.P.R. 365, 371 (1994), *aff'd*, 56 F.3d 83 (Fed.Cir.1995) (last chance agreement).

and employee's subsequent retirement was involuntary); *Caveney v. Office of Administration*, 57 M.S.P.R. 667 (1993) (employee's retirement was involuntary where the reassignment preceding retirement had no solid or substantial basis in personnel management or management principles). The failing interim performance appraisals and threats to postpone the whistleblowers' release dates have no substantial basis in personnel practice or principle, and are thus coercive acts. Lastly, the whistleblowers were targeted for disparate treatment. A similarly situated employee who did not engage in protected activity was not issued a failing interim performance appraisal or a separation agreement when he departed the OIG during the same time period.

Accordingly, for all of these reasons, the OIG cannot meet its burden of showing by "clear and convincing" evidence that it would have issued John Doe 1 and John Doe 2 failing interim performance appraisals and separation agreements, absent their perceived whistleblowing or participation in protected activity.

E. Significant Factor Burden-Mosaic of Retaliation

OSC's investigation uncovered compelling evidence of a pattern of retaliation against the complainants for whistleblowing, perceived whistleblowing, and engaging in protected activity. Evidence showing a pattern or "convincing mosaic" of retaliation can be used to prove the significant factor element in a retaliation case. Such mosaic includes pieces of evidence that "[w]hen taken as a whole, provide strong support if all [pieces] point in the same direction...." *Crump v. Dep't of Veterans Affairs*, 114 M.S.P.R. 224, 229-230 (2010). As a general rule, this mosaic has been defined to include three general types of evidence: (1) evidence of suspicious timing, ambiguous oral or written statements, behavior toward or comments directed at other employees in the protected group, and other bits and pieces from which an inference of retaliatory intent might be drawn; (2) evidence that employees similarly situated to the appellant have been better treated; and (3) evidence that the employer's stated reason for its actions is pretextual. *Rhee v. Dep't of Treasury*, 117 M.S.P.R. 640, 653 (2012) (quoting *Kohler v. Department of the Navy*, 108 M.S.P.R. 510, 515 (2008)).

There is strong evidence of suspiciously close timing between John Doe 1's and John Doe 2's protected activity and the interim failing appraisals and separation agreements. John Doe 1 and John Doe 2 engaged in protected activity over a period of several months from May through September 2011. The whistleblowers were issued "Level 1" interim appraisals and presented with separation agreements containing non-disparagement language in August and September 2011. The proximity between the protected activity and the agency's actions is very close—including actions taken within just days or weeks of the protected activity—giving rise to a strong inference of retaliation.

In addition, John Doe 1 and John Doe 2 were treated less favorably than a similarly situated employee. Like John Doe 1 and John Doe 2, another OI manager was identified as having performance deficiencies in 2011 and was being investigated by the OC for alleged violations of agency policy. This manager, however, was not required to execute a separation agreement containing a non-disparagement provision and was not given a

failing interim performance appraisal before his departure from the agency. Unlike John Doe 1 and John Doe 2, this manager did not engage in protected activity. The only difference between these three OI managers was that John Doe 1 and John Doe 2 engaged in protected activity.

Moreover, there is evidence that the agency's stated reasons for its actions are pretextual. The interim appraisals do not accurately describe John Doe 1's and John Doe 2's performance and primarily address issues outside of the 2010-2011 appraisal period. In addition, PAIGI Beitel's reasons for issuing the appraisals are pretextual. He testified that one reason for issuing the failing interim appraisals was to explain deficiencies to the OPM OIG peer review team. However, this explanation also seems disingenuous considering there were several other employees who were not similarly given interim appraisals when they left OIG, despite their poor performance. In sum, PAIGI Beitel did not find it necessary to document the poor performance of other departing employees who were not whistleblowers.

The agency's stated reasons for executing separation agreements containing non-disparagement language was also pretextual. Mr. Green testified that he inserted the non-disparagement language to prevent John Doe 1 and John Doe 2 from being untruthful about the OIG, not to prevent them from blowing the whistle. As noted above, there is no evidence that John Doe 1 or John Doe 2 were dishonest or deceitful; rather, witnesses consistently described them as men of integrity. In addition, while numerous employees left the OIG for employment with other agencies, John Doe 1 and John Doe 2 were the only employees presented with separation agreements. It is suspect that Mr. Green was not concerned with preventing other allegedly poor performing employees from "disparaging" the OIG. Here, the suspicious timing, evidence that similarly situated employees were treated more favorably, and evidence that the agency's stated reasons for its actions were pretextual demonstrates a convincing mosaic of retaliation.

F. The Separation Agreements Violate 5 U.S.C. § 2302(b)(12) as Violations of the Lloyd-LaFolette Act

It is also a prohibited personnel practice to take a personnel action if taking such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles. 5 U.S.C. § 2302(b)(12). An employee's right to petition Congress is protected under the Lloyd-LaFollette Act of 1912, 5 U.S.C. § 7211. Several legislators explicitly cited "gag rules" that forbade federal employees to communicate directly with Congress on pain of dismissal as the reason for enacting the Lloyd-LaFollette Act. *Bush v. Lucas*, 462 U.S. 367, 382-84 & nn.19-24 (1983). The non-disparagement provisions in the separation agreements, on their face, violate the Lloyd-LaFollette Act, and thereby 5 U.S.C. § 2302(b)(12).[17] *See* 5 U.S.C. § 2302(b) ("This subsection shall not be construed to authorize the withholding of information from Congress or the taking of any personnel action against an employee who discloses information to the Congress.").

[17] The Lloyd-LaFollette Act implements 5 U.S.C. § 2301(b)(9).

IV. CULPABILITY OF RESPONSIBLE OFFICIALS AND RECOMMENDATIONS

There is compelling evidence that OIG management engaged in a series of adverse actions against the complainants in retaliation for their protected activity and/or perceived whistleblowing and to chill future whistleblowing. The evidence shows that Mr. Green drafted and/or reviewed, negotiated, and insisted on the inclusion of the non-disparagement language in the separation agreements. However, he did not, and could not, act alone. Without PAIGI Beitel's failing interim performance appraisals, the agency would have lacked leverage to coerce the whistleblowers into signing the separation agreements, in which they waived their rights to make protected disclosures to OSC, Members of Congress, and the media.

Although there is inconsistent testimony regarding the involvement of Mr. Green, PAIGI Beitel, and other members of OIG senior management, the weight of the testimony and documentary evidence demonstrates that Mr. Green and PAIGI Beitel were the key players in drafting the separation agreements, signing the agreements, and issuing the failing interim performance appraisals. More significantly, the evidence shows that Mr. Green and PAIGI Beitel manifested the strongest motive to retaliate against John Doe 1 and John Doe 2.

A. Wade Green

The record is replete with evidence establishing that Wade Green retaliated against the whistleblowers. He admitted to drafting or directing that an OC attorney draft the whistleblowers' separation agreements, and signing the agreements. He testified that he drafted and/or reviewed the non-disparagement provisions, and that he insisted that they remain in the agreements. Importantly, in negotiating Employee X's settlement agreement—the agreement upon which the non-disparagement provisions in the whistleblowers' separation agreements were based—he removed a provision drafted by Employee X's attorney, which would have allowed for his client "to file an EEO or Special Counsel complaint."

The evidence also shows that Mr. Green reviewed John Doe 1's and John Doe 2's failing interim performance appraisals before drafting the separation agreements, and included the provisions that the failing appraisals would not be provided to John Doe 1's and John Doe 2's future employers if they agreed to the terms of the agreements. Mr. Green also made clear to John Doe 1 and John Doe 2 that the OIG would hold them for 30 days if they refused to sign the agreements—despite the fact that their workloads were minimal and there was no justification to delay their release dates.

The evidence demonstrates that Mr. Green was motivated to retaliate against the whistleblowers for two reasons: (1) he wanted to protect IG Zinser, himself, and the OIG from potential damaging statements and (2) he wanted the whistleblowers to withdraw their EEO and FOIA requests. The documents sought from the requests could potentially implicate him and/or IG Zinser or PAIGI Beitel in wrongdoing.

Mr. Green testified that if OSC found a violation based on the separation agreements, he accepted responsibility for the violation due to his position as "Chief Legal Officer." As such, particularly for an Inspector General's office, Mr. Green would have been familiar with the WPA and should have prevented violations of the Act by the OIG. Instead, the evidence shows that he used his position to draft separation agreements containing non-disparagement provisions aimed at keeping whistleblowers quiet, and used retaliatory failing performance appraisals as leverage to compel the whistleblowers to sign the agreements.

Based on the preceding, OSC recommends that Commerce take substantial disciplinary action against Wade Green.

B. PAIGI Beitel

The record is also replete with evidence establishing that PAIGI Beitel retaliated against the whistleblowers by drafting their unfounded failing interim performance appraisals. The evidence indicates that he coordinated with Mr. Green on the separation agreements. Specifically, he drafted and provided Mr. Green with copies of their failing interim performance appraisals. In addition, he testified that the interim appraisals and the separation agreements work together and are "contemporaneous." Finally, in his capacity as an OIG management official, he signed the separation agreements containing the non-disparagement provisions.

The evidence demonstrates that PAIGI Beitel was motivated to retaliate against the whistleblowers for their engagement in protected activity and/or their perceived whistleblowing. In particular, he was named as a subject official in John Doe 1's EEO complaint, and, according to a key witness, went "apoplectic" when John Doe 1 submitted a FOIA request concerning sensitive documents that could potentially implicate him in wrongdoing.

PAIGI Beitel's behavior is particularly egregious based on his position as the OIG's expert on whistleblower protection. He has worked on whistleblower issues for well over a decade, has received training on prohibited personnel practices, and was allegedly selected for an SES position at OIG in order to establish a whistleblower protection unit. Based on this knowledge and experience, PAIGI Beitel was clearly familiar with the WPA and should have taken steps to prevent retaliatory actions.

As to the appropriate penalty for PAIGI Beitel, because he neither drafted nor was consulted on the non-disparagement provision, his involvement in the separation agreements was less than Mr. Green's. Thus, OSC recommends that a lower level of discipline be taken against PAIGI Beitel.

C. Todd Zinser and [redacted]

There is insufficient evidence to establish that IG Zinser reviewed the separation agreements prior to OSC's investigation or was informed about the non-disparagement

clauses. Wade Green testified that he neither provided IG Zinser with a copy of the separation agreements, nor informed him that the separation agreements contained non-disparagement provisions. PAIGI Beitel additionally testified that IG Zinser was not involved with the drafting or issuance of the whistleblowers' failing interim performance appraisals. IG Zinser did not sign any of these documents, and OSC found no documentary evidence showing IG Zinser's knowledge or involvement with the whistleblowers' interim performance appraisals or separation agreements. Accordingly, OSC has insufficient evidence to seek disciplinary action against IG Zinser for a violation of 5 U.S.C. §§ 2302(b)(8), (b)(9), or (b)(12).

Similarly, OSC has insufficient evidence to establish that [redacted] committed a prohibited personnel practice. Although [redacted] signed the whistleblowers' interim performance appraisals, the evidence indicates that his role in these appraisals was minor as compared to PAIGI Beitel's. Further, [redacted] credibly testified that he was unaware of the whistleblowers' separation agreements prior to OSC's investigation. Although [redacted] failed to protect the whistleblowers from retaliatory actions, there is insufficient evidence to seek disciplinary action against him for a violation of 5 U.S.C. §§ 2302(b)(8), (b)(9) or (b)(12).

V. CONCLUSION

Congress included protection for whistleblowers in the Civil Service Reform Act to assure federal employees "will not suffer if they help uncover and correct administrative abuses." S. Rep. No. 95-969, at 8 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2723, 2730. In this matter, OSC's investigation uncovered willful, concerted acts of retaliation that necessitate disciplinary action. Holding management accountable for engaging in prohibited personnel practices is essential to assuring employees that they can blow the whistle or engage in other protected activity without fear of reprisal.

Accordingly, and for the reasons set forth herein, the Department of Commerce should take appropriate disciplinary action against PAIGI Beitel and Mr. Green for their retaliatory actions in violation of 5 U.S.C. §§ 2302(b)(8), (b)(9), and (b)(12).

ENCLOSURE 3

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

No. CB1208960027U1

SPECIAL COUNSEL,
ex rel. John L. Deans

v.

DEPARTMENT OF TRANSPORTATION,
OFFICE OF INSPECTOR GENERAL

PETITION FOR ENFORCEMENT

The Special Counsel (OSC) hereby files this Petition for Enforcement of the Board's stay Opinion and Order issued in this matter on May 23, 1996, under the provisions of 5 C.F.R. § 1201.182(b).

I. Background

On May 23, 1996, Board Vice Chair Beth S. Slavet stayed the removal of special agent, criminal investigator, John L. Deans for 45 days, i.e., through and including July 7, 1996. Vice Chair Slavet ordered the Department of Transportation Office of Inspector General (hereinafter "the agency") to place Deans back into a GS-1811-12, Special Agent, Criminal Investigator, position in Denver, Colorado.

II. The Noncompliance

On June 4, 1996, Deans informed OSC that he has not been returned to his former GS-12 special agent, criminal investigator, position in Denver, Colorado. Instead, on June 3, 1996, Deans was informed telephonically by agency San Francisco office Special Agent in Charge James Baldwin that Deputy Assistant Inspector General (DAIG) for Investigations Todd Zinser had directed that Deans be placed on administrative leave from May 23 through July 7, 1996. Baldwin also reported to Deans that Zinser wanted Deans to remain on standby so that he could be subjected to a drug test, physical examination, and security clearance update. See affidavit at Attachment 1.

This agency action, placing Deans on administrative leave for the duration of the 45-day stay, does not conform to the Board's order which mandates that Deans be returned to a GS-12 special agent, criminal investigator, position in Denver. Placing Deans on administrative leave contravenes the purpose of the stay which is to preserve the status quo ante and minimize the adverse consequences of the prohibited personnel practice while the matter is being resolved. Thus, Deans must be returned to active duty status, not placed on administrative leave, to preserve the status quo. Special Counsel v. I.R.S., 65 M.S.P.R. 146, 148-149 (1994).

III. Conclusion

The agency's DAIG for Investigations, Todd Zinser, is averse to returning Deans to his GS-12 special agent, criminal investigator, position in Denver. The Board should order Zinser to immediately assign Deans the duties of his former GS-12 special agent, criminal investigator, position. 5 U.S.C. § 1204(a)(2). Moreover, under the provisions of 5 U.S.C. § 1204(e)(2)(A), the Board should order that Todd Zinser not receive payment for service as an employee from May 23, 1996, until Deans is returned to his former position, i.e., until the agency complies with the Board's May 23, 1996, Opinion and Order.

Respectfully submitted,

Kathleen Day Koch
Special Counsel

William E. Reukauf
Associate Special Counsel
for Prosecution

Anthony T. Cardillo
Attorney

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Suite 7C30
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(214) 767-8871
FAX (214) 767-2764

Dallas, Texas
June 6, 1996

Affidavit

I, Anthony T. Cardillo, Attorney, Dallas Field Office, U.S. Office of Special Counsel (OSC), 1100 Commerce Street, Suite 7C30, Dallas, Texas 75242, make the following statement under oath:

I am the Prosecution Division attorney assigned to Special Counsel, ex rel. John L. Deans, v. Department of Transportation (CB-1208-96-0027-U-1). On Tuesday morning, June 4, 1996, I spoke with John Deans by telephone. Mr. Deans advised me that he had spoken with James Baldwin, the Department of Transportation Office of Inspector General Special Agent in Charge of the San Francisco Field Office. Mr. Baldwin informed Mr. Deans that Deputy Assistant Inspector General for Investigations Todd Zinser had telephoned him on Sunday evening, June 2, 1996. Mr. Zinser told Mr. Baldwin to inform Mr. Deans that he would be placed on administrative leave from May 23 through July 7, 1996. Mr. Zinser also directed Mr. Baldwin to inform Mr. Deans to remain on standby during this 45-day period so that he could be subjected to drug testing, a physical examination, and a security clearance update. Mr. Baldwin conveyed Mr. Zinser's orders to Mr. Deans in a telephone conversation on June 3, 1996.

On the afternoon of June 4, 1996, I telephoned agency representative Roger P. Williams to inform him that I would be filing a Petition for Enforcement because Mr. Zinser had not complied with the Board's order to put Mr. Deans back into his former GS-12 special agent, criminal investigator, position. The secretary who answered the phone indicated that Mr. Williams was unavailable. I told her that I

ATC

would like Mr. Williams to return my call, and if he did not return my call by close of business on Wednesday, June 5, 1996, I would be filing this petition.

Mr. Williams did not telephone me on June 5, 1996.

I, Anthony T. Cardillo, have read this statement consisting of two pages. I fully understand the contents of the entire statement made by me. The statement is true and complete to the best of my knowledge and belief. I have made this statement freely without hope or promise of benefit or reward, without threat of punishment, and without coercion.

Anthony T. Cardillo

Subscribed and sworn before me, a person authorized by law to administer oaths, this 7th day of June 1996 at Dallas, Texas.

Harley L. McIlroy

Harley L. McIlroy

ENCLOSURE 4

U.S. OFFICE OF SPECIAL COUNSEL
1730 M Street, N.W., Suite 300
Washington, D.C. 20036-4505

The Special Counsel

May 20, 1996

The Honorable A. Mary Schiavo
Inspector General
Department of Transportation
400 Seventh Street, S.W.
Room 9210
Washington, DC 20590

Re: *OSC File No. MA-95-1615*

Dear Ms. Schiavo:

Pursuant to 5 U.S.C. § 1214(a)(1)(A), the Office of Special Counsel (OSC) conducted an investigation into allegations that John L. Deans, a GS-12 Criminal Investigator with the Department of Transportation, Office of Inspector General, Lakewood, Colorado was removed from federal service because he made protected disclosures and exercised his first amendment freedom of speech rights.

Upon review of the information obtained during our investigation, I have determined that there are reasonable grounds to believe that Mr. Deans was removed from federal service because of his protected activity in violation of 5 U.S.C. § 2302(b)(8) and (b)(11). Accordingly, as required by 5 U.S.C. § 1214(b)(2)(A), and in keeping with your responsibilities under 5 U.S.C. § 2302(c) to prevent such violations within your agency, I am reporting my findings to you and hereby recommend that you take corrective action to return Mr. Deans permanently to the position from which he was removed and to otherwise make him whole. Today, I am also asking the Merit Systems Protection Board to order a stay of Mr. Deans' removal for 45 days under the provisions of 5 U.S.C. § 1214(b)(1)(A). Enclosed is a report of prohibited personnel practices which sets forth OSC's factual and legal determinations in this matter.

ATTACHMENT

Please respond to this recommendation no later than 30 days from receipt of this letter. See 5 U.S.C. § 1214(b)(2)(B). If you do not take corrective action within a reasonable time, I may request the Merit Systems Protection Board to order such action. Thank you in advance for your personal attention to this matter. Your designee may contact Anthony Cardillo, an attorney on my staff at (214) 767-8871.

Sincerely,

Kathleen Day Koch

Enclosure

cc: The Honorable Ben L. Erdreich
The Honorable James B. King

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

No.

SPECIAL COUNSEL,
ex rel. John L. Deans

v.

DEPARTMENT OF TRANSPORTATION
OFFICE OF INSPECTOR GENERAL

CERTIFICATE OF SERVICE

I, David J. Gorman, an attorney with the Office of Special Counsel, hereby certify that on this day I served the Special Counsel's Request for Stay of Personnel Action on the following in the manner indicated:

Federal Express Overnight Delivery
Roger P. Williams, Esquire
Department of Transportation
Office of Inspector General
400 Seventh Street, S.W.
Suite 9210
Washington, D.C. 20590

Regular Mail
Mr. John L. Deans
c/o Jerre Dixon, Esquire
Dixon and Snow, P.C.
425 South Cherry Street
Suite 1000
Denver, Colorado 80222

David J. Gorman
Attorney

Office of Special Counsel
1730 M Street, N.W.
Suite 300
Washington, DC 20036-4505

May 20, 1996

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

No.

SPECIAL COUNSEL,
ex rel. John L. Deans

v.

DEPARTMENT OF TRANSPORTATION
OFFICE OF INSPECTOR GENERAL

Request for Stay of Personnel Action

I. INTRODUCTION

Pursuant to 5 U.S.C. § 1214(b)(1)(A), the Special Counsel (OSC) hereby requests that the Merit Systems Protection Board (the Board) stay for a period of 45 days the Chapter 75 removal of John L. Deans, a GS-1811-12 Special Agent in the Department of Transportation (DOT), Office of Inspector General (OIG), in Denver, Colorado. Based upon the facts and arguments set forth herein, OSC has reasonable grounds to believe that Deans was removed from his criminal investigator position because he made protected disclosures and exercised his first amendment right of free speech. More specifically, Deans uncovered and reported to his superiors information about possible diversions of funds from the Denver airports which had the potential to be politically embarrassing to high level government and community leaders, and he commented on what he believed to be a suspicious temporal link between Denver

U.S. Attorney Henry Solano's trip to Washington, D.C. and the release of grant funds to the City of Denver by the Federal Aviation Administration (FAA). Deans was detailed to San Francisco in March 1995, and removed from his position on June 26, 1995.

As addressed in detail below, the evidence establishes that the specific charges that formed the basis for Deans' removal are unsupportable. Deans was charged with improperly referring matters to the OIG audit staff. In fact, the referral was made by another OIG employee. Deans was accused of making improper comments in a public forum. In fact, the comments were made during a private conversation, and there is nothing to indicate that the comments were improper. Deans was also charged with "tracking" other OIG employees, concealing information from his supervisors, engaging in willful insubordination and acting so as to create a conflict of interest. The evidence does not support any of these allegations. On the other hand, it is clear that Deans' removal was ordered at the behest of Deputy Assistant Inspector General (DAIG) for Investigations, Tod Zinser, who strongly objected to Deans' protected conduct.

Deans filed a request for OSC action on June 26, 1995. On July 26, 1995, the matter was referred to the OSC Dallas Field Office (DFO) for investigation. From October 1995 through the present, DFO Investigator John Coates conducted on-site interviews in and around Fort Worth, Texas, Denver, Colorado, and Washington, D.C. Based on the results of the investigation, OSC has a reasonable basis to believe that Deans was removed from federal service because of his protected activity and

that a stay of the termination of his employment is warranted. Furthermore, on May 20, 1996, pursuant to 5 U.S.C. § 1214(b)(2)(A), the Special Counsel filed a report of investigative findings and recommendations with the DOT OIG, the Board, and the Office of Personnel Management. (See Attachment).

II. STATEMENT OF FACTS

A. Background

Deans had been employed as a GS-12 Criminal Investigator with the DOT OIG in Lakewood, Colorado, since March 1990. He is an experienced criminal investigator with previous employment in federal agencies, including the Federal Bureau of Investigation.

During 1994 and early 1995, Deans developed information on diversions of funds from Stapleton and Denver International Airports (DIA) to unauthorized expenditures by the City of Denver during the mayoralties of DOT Secretary Frederico Pena and Wellington Webb, the current mayor of Denver. Deans provided information on his findings orally and in writing to his supervisors, Special Agent in Charge (SAC) Glynn Snee, Assistant SAC Daniel Truxal, Deputy Assistant IG (DAIG) for Investigations Todd Zinser and DAIG for Audit Lawrence Weintrob. On January 26, 1995, he met with Snee, Zinser and Weintrob to discuss the diversion issues and Deans provided a draft list of potential subjects to his superiors. Deans stated that this list was a compilation of his investigative notes. Also present at this meeting, at Weintrob's request, was Scott Macey, a DOT auditor with experience in

airport revenue issues. Weintrob decided to refer Dean's list of subjects to the Audit Division, and he immediately briefed Cynthia Rich, Assistant Administrator of the FAA on the issues because the FAA was about to approve a $35 million grant to DIA, and she might want to withhold the funds until Dean's information could be substantiated. Snee stated that it was the consensus of the group at the meeting that the issues would be referred for audit. On February 16, 1995, at Snee's request, Deans sent an updated list of potential subjects to Snee. On February 20, 1995, Snee referred Dean's list of airport diversion issues to the Audit Division.

In 1994, Deans had developed information about the construction of a road for the Utah Sports Authority Olympic Park which was intended to support the Olympic Park, but enhanced the property values of wealthy, politically connected landowners near the road. Another road had to be built to service the Olympic Park. Deans and Snee met with Denver Assistant U.S. Attorney (AUSA) Paul Johns in September 1994 to discuss the investigation. Snee and Truxal had concerns about Deans working cases in Utah because in January 1994, Deans had been indicted in Utah for alleged violation of the federal wiretap laws. The case was dismissed in April 1994 for insufficient evidence after the prosecution presented its case-in-chief. At the September meeting, Snee and Johns agreed that Deans could investigate the Utah case because it could be handled by the Denver U.S. Attorney's Office (USAO), and Deans would not have to work with the Utah USAO. Johns opened a file on the matter.

In December 1994, Deans sent letters requesting information to a number of Utah State officials in which he stated that the USAO was interested in the matter and provided Johns' name and telephone number if they had any questions. He sent copies of all but two of these letters to Johns. In late January 1995, when Deans learned that the money for the road had come from state, not federal funds, he informed Johns of that fact and Johns decided to close the file. An attorney from the Utah Attorney General's office contacted Johns about the letters, stating that he thought it was a conflict of interest for Deans to send investigative requests to persons against whom he had filed a claim for civil damages in connection with the 1994 indictment. Another person to whom Deans had sent an investigative request told Johns that he thought that Deans had leaked information about the investigation to the press. Johns told both individuals that the case was probably going to be closed.

On February 3 and 8, 1995, Denver U.S. Attorney's Office (USAO) Civil Division Chief Linda Surbaugh and AUSAs Ken Buck and Johns met with Deans to discuss several issues related to his investigations. At one of these meetings Johns told Deans that he should not use the name of the USAO or Johns in his requests for information. Deans said that he had made reference to AUSAs in requests for information on other occasions, and he had never been told it was improper. He agreed not to do it again. He also told Johns that his failure to provide two of the letters was an oversight, and that he would send them. Johns also told Deans about the allegations of conflict of interest; Deans was surprised that such a charge would be made because the matters were unrelated. Johns stated that the issue was moot

because the case was going to be closed. Johns wrote a memorandum dated January 25, 1995, about the contacts with the Utah State officials.

Surbaugh and Johns also told Deans that he was suspected of leaking information to the press. They informed him that Denver City Attorney Dan Muse complained to Solano in early February 1995 about the investigative requests and told him that on the same day he received Dean's request, newspaper reporters had inquired about similar matters. This caused Muse to believe that Deans leaked information about the investigation to the press. Deans denied leaking information to the media. Deans believed that Solano was concerned that he was getting too close to DOT Secretary Pena, who was the mayor of Denver when some of the Stapleton Airport diversions occurred. Deans and other witnesses stated that Solano and Pena are political allies, and that Pena's brother was Solano's personal attorney. Deans stated that he developed information about the diversions from reading articles in the newspapers. He said that allegations about diversions had been made the previous fall in the context of the Denver mayoral campaign, and that reporters had been asking questions about diversions during that time.

The last issue addressed in the meeting was AUSA Buck's investigation into public integrity matters involving Construction Management Technical Services (CMTS). CMTS was included on the list of airport diversion issues Deans had provided to Weintrob, Zinser and Snee which were to be referred to the DOT Audit Division. In developing information about the issue, Deans had interviewed a witness in the Denver Mayor's office who was a target of Buck's public integrity

investigation. Buck informed Deans that the witness was a target, briefed Deans generally on the scope of the criminal investigation, and told him not to interview any of the witnesses who were involved in the criminal aspect of the case or continue any investigative activity which had the potential to jeopardize the USAO's case. Deans agreed to refrain from interviewing possible witnesses, and to coordinate with Bucks on any information related to the case. Deans informed Snee and Truxal that he had been instructed not to interview certain members of the current and former mayors' staffs on issues related to the public corruption matter in his February 16, 1995, case status update. Truxal confirmed to OSC that Deans told him that he was not to work on the case involving a public corruption subject. Johns wrote a memorandum on the February 3 and 8, 1995, meetings.

Solano and Buck met with DOT IG A. Mary Schiavo and Deputy DOT IG Mario Lauro while attending an Attorney General's Advisory Committee meeting in Washington, D.C. from February 14-16, 1995. Solano asked Schiavo for a team of auditors and special agents to assist Buck's public corruption investigation. However, he specifically asked that Deans not be appointed to the team. Solano told Schiavo and Lauro that he suspected Deans of leaking information to the media, that Deans had mentioned the U.S. Attorney in requests for information, and that Deans was involved in conflict of interest issues. Schiavo agreed to provide assistance on the case. However, Deans was not informed that the OIG was providing audit and investigative assistance to the USAO. Solano stated that at this point the USAO's problems with Deans were under control; he had been excluded from Buck's

investigation and he understood the USAO's criminal and civil investigations procedures.

On February 16, 1995, Johns informed Deans that he had a conversation with an FAA attorney who informed him that the FAA considered the money involved in the diversion issues to be state money, and the USAO could not act on the cases unless the FAA sent a request for judicial intervention. The FAA would send such a request only after an audit had disclosed improper use of airport funds and the sponsor refused to repay the money. The FAA advised that Deans refer the matters for audit. Johns told Deans that the USAO had determined that the matters which he identified fell within the administrative resolution as interpreted by the FAA. Deans told Johns that he did not agree with the FAA, and that the issues related to the use of what he believed to be federal monies were not for the FAA to decide. Deans told Johns that he was going to issue his report to the DOT IG when it was completed. Johns told him that it was within the authority of the USAO to decide interpretive issues, and that the USAO would not proceed further until they received a referral from DOT or the FAA along with guidance from the FAA. Johns stated that he told Deans that he should do whatever he felt that he was required to do, and to send him a copy of his report. Johns wrote a memorandum on the issue dated February 16, 1995. Deans said that he did not disagree with Johns' view of the issues, but that he told Johns that he needed to continue investigating the matter so it could be referred for audit if appropriate. He said that diversion of funds could be a civil matter

appropriate for OIG audit even if it was not under the purview of the USAO, and that he had a responsibility to express his opinion to Johns.

On February 23, 1995, Deans spoke to Johns at a youth coaches meeting, commenting on the fact that the FAA, which previously was not going to release $35 million in funds to the City of Denver, did release the funds after Solano went to Washington. Johns believed that Deans was suggesting that Solano, Schiavo, and DOT Secretary Pena somehow improperly conspired to persuade the FAA to release the funds. Johns stated that other people were within five or six feet of them, that he was uncomfortable with Deans' comments and he thought that Deans might say something about the public integrity investigation, so he changed the subject. Johns memorialized the incident in a memorandum which he gave to Surbaugh. Deans denies that the comments were made within the hearing distance of anyone else.

On March 6 or 7, 1995, Deans met with James Kram and Alvin Schenkelberg, DOT auditors who were in Denver, and discussed with them some of the cases which had been referred for audit. Dean expressed some concern that the audit would interfere with his investigations, and was assured that there would be no interference.

On or about March 10, 1995, the Denver USAO faxed to the DOT OIG the four memoranda, dated January 25, February 8, 16, and 24, 1995, written by Johns about Deans. The memoranda were reviewed by Lauro and Zinser. Solano said he wanted to alert Lauro to the fact that the USAO continued to have problems with Deans. On March 14, 1995, Zinser traveled to the Denver USAO to meet with Solano, Surbaugh, Johns, and Buck to determine the extent of the problems with

Deans. These Denver USAO officials told Zinser they were interested only in excluding Deans from working on the public corruption case which was being handled by Buck's project team.

On March 15, 1995, Zinser met with the DOT OIG Audit staff in Denver and discovered that one of the issues in their revenue diversion audit plan involved CMTS. Zinser recognized this issue as part of the public corruption investigation that Deans was told not to work on, and told the auditors to delete it from the plan. Auditor Kerry Barras told Zinser that it was Deans who had referred the CMTS issue to the auditors. Based on his meeting with Solano and the AUSAs the previous day, Zinser understood that Deans was not to be reviewing issues pertaining to CMTS. Zinser viewed Deans' purported inclusion of CMTS as an effort to continue his inquiry into a public corruption matter he had been told by the Denver USAO to avoid. Zinser instructed Kram and Schenkelberg not to talk to Deans about the diversion issues. Zinser did not provide any explanation for his instruction, and told them not to ask any questions. On the same day, Deans talked to Kram and Schenkelberg and mentioned that he had heard that OIG personnel were in Denver asking about his cases and asked them if they knew anything about other investigators. Pursuant to Zinser's instructions, the auditors did not give Deans any information. Deans told them that if other investigators were involved, they might be obstructing his investigation, and if he thought that was the case, he would not hesitate to refer the matter to the FBI. Kram told Zinser about the conversation and Zinser asked him to write a memorandum on it. In the memorandum, Kram and

Schenkelberg reported their conversation with Deans and stated that they felt intimidated by the idea of being charged with obstruction of justice. Kram and Schenkelberg both stated that they felt they were caught in the middle of a conflict and felt vulnerable, but that Deans had not intended to intimidate them.

On March 15, 1995, Zinser told Solano that Deans had referred the public integrity case issue to the DOT auditors on or about February 16, 1995. Solano told Zinser that he did not want Deans working on Denver USAO cases, and Zinser told Solano that the OIG would do nothing to exclude Deans from USAO matters until the OIG received a letter from Solano. Solano denied that the OIG had asked him to write a letter. Solano did write a letter to Schiavo on March 20, 1995, in which he stated that Deans would no longer be permitted to participate in the investigation of any cases which could possibly be prosecuted by the District of Colorado. Solano stated that he concluded that his office could no longer work with Deans after Zinser told him that Deans had referred the CMTS matter to the auditors after being told by the Denver USAO not to participate in the public corruption case. Solano referred to the alleged CMTS audit referral as a "last straw" incident which influenced him to write the March 20, 1995, letter to Schiavo.

During the weekend of March 18, 1995, Lauro and Zinser traveled to San Francisco to discuss Deans with Mike Gottlieb, the OIG SAC in the San Francisco Office. Lauro and Zinser wanted to detail Deans to San Francisco for 90 days to see how he performed there. Lauro also said they wanted to give Deans a second chance, and that they would not remove him from federal service unless the charges in the

four memoranda by Johns could be proven. Gottlieb advised Lauro and Zinser to assign an impartial investigator to look into the Denver USAO accusations against Deans, but Zinser decided to investigate the Deans matter himself. On March 20, 1995, Gottlieb notified Deans in writing that he was being detailed to the San Francisco Regional Office. Deans was ordered not to contact anyone in the Utah, Wyoming, or Colorado USAOs. Gottlieb, after supervising Deans for a couple of months, described him as a good worker and seasoned investigator. Gottlieb indicated that he would be pleased if the DOT OIG wanted to reassign Deans to San Francisco permanently.

On May 17, 1995, Zinser proposed to remove Deans from his position for conduct unbecoming a criminal investigator (Reason 1), insubordinate action in pursuing unauthorized investigations (Reason 2), and conflict of interest through use of his official position for personal gain (Reason 3).

B. The Charges

Reason 1. Conduct Unbecoming a Criminal Investigator

Specification 1. The specification states that Deans was directed by the USAO not to pursue investigative activity concerning a specific public corruption investigation and that he referred the subject to the OIG audit staff, thereby potentially compromising an ongoing criminal investigation. The notice further stated that Deans continued to actively pursue the investigation after being instructed to cease investigative activity. In addition the notice referenced the fact that Deans had annotated the CMTS issue on his February 16, 1995, list with the words "Federal

Grand Jury" and "Audit Assistance required" and stated that the USAO did not require audit assistance in the grand jury matter.

The evidence shows that Deans discussed the airport diversion issues with Snee, Weintrob and Zinser in January 1995, that he gave them a draft list of subjects, that Weintrob, with the concurrence of the others, referred the matters to audit, that on February 16, 1995, Deans prepared an updated list of subjects and faxed it to Snee at Snee's request, and that it was Snee, not Deans, who gave the list to the OIG audit staff. Moreover, even if Deans had referred the matter to the auditors, he would have been acting in accordance with directions given to him by Johns, who told him to refer all revenue diversion issues to audit. Johns told OSC that he found nothing improper with the referral of the CMTS issue to the DOT auditors. Snee told OSC he believed that referring a matter for audit is not investigative activity and the auditors were not under Deans' direction. In addition, the evidence shows that Solano had requested audit assistance from the OIG in connection with Buck's case, of which CMTS was a part.

Specification 2. Zinser charged Deans with disagreeing with a USAO's decision that airport revenue diversion issues should be referred to the FAA. Zinser also accused Deans of suggesting in a public forum that Solano, Schiavo, and Secretary Pena had conspired to induce the FAA to release grant funds to the city of Denver. The notice stated that Deans exhibited a lack of judgment with respect to these two incidents.

The evidence shows that Deans disagreed with Johns and advised him that they needed to continue investigating the funds diversion issues so that they could be referred within the OIG as an administrative matter. The evidence does not show that this conduct was unbecoming a criminal investigator. With regard to the charge of suggesting conspiracy in a public forum, the evidence establishes that Deans did make comments to Johns about Solano, Schiavo and Pena. It also shows that Johns and the agency interpreted Deans' comments as inferring that Deans believed that there was some impropriety with respect to the release of federal money to the airport.

Specification 3. Zinser charged that Deans had failed to inform his supervisors about the true extent of his problems with the USAO. The notice stated that he failed to advise his supervisors that: (1) he made investigative demands on Utah State officials by improperly mentioning the U.S. Attorney in the letters, (2) he was advised by the USAO that they had concerns that he was the source of press leaks, (3) he had effectively been removed from an on-going public corruption investigation, and (4) he had been advised to provide all copies of his demands for information to the USAO. The notice stated that Deans' requests for information to the Utah State officials could have been construed as a Department of Justice civil investigative demand (CID), which only the Attorney General may authorize.

The evidence shows that Snee thought that Deans should have been more diligent in informing him about the meetings with the USAO, but that he thought none of the matters were of great importance. Truxal stated that there was nothing wrong

with Deans' letters because the USAO had opened a case on the Utah matter. Snee stated that Deans should have sent the letters through him for approval, but that his failure to do so was not a basis for disciplinary action. He stated that he would have approved the letters if they had been sent through him. Deans stated that he had made similar references to USAOs in the past and no one had told him it was improper.

Nor does the evidence establish that Deans concealed from his supervisors the fact that the USAO had asked him to refrain from investigating the CMTS matter. Truxal stated that Deans told him that he had been removed from a public integrity investigation, and Deans informed Snee and Truxal in writing in his February 16, 1995, update that he had been instructed not to interview certain members of the current and former mayors' staffs. Deans did not feel that Linda Surbaugh's questions about media leaks were important enough to tell Truxal or Snee. He stated that if he had been accused of leaking information he would have notified his superiors. Snee stated that he did not think the allegations were important enough to report to him, and that the Denver USAO should have contacted him if they truly believed that Deans was leaking information to the press.

Specification 4. Zinser charged Deans with tracking his movements and those of Weintrob, and with threatening the two DOT OIG auditors, Kram and Alvin Schenkelberg. The notice stated that it was unacceptable for a law enforcement officer to spend official time tracking the movements of DAIGs and threatening other OIG employees with criminal sanctions.

The evidence shows that Zinser had instructed Kram and Schenkelberg not to discuss the audits with Deans, even though Deans was the investigator who developed the case. Deans questioned them about a rumor that other DOT OIG representatives were in the Denver area looking into the same funds diversion issues he was investigating. Deans felt that he had a right to know if they had uncovered something pertinent to his investigation. Truxal too believed that Deans had a right to know if other OIG officials had uncovered any information germane to his investigation. Kram and Schenkelberg stated that they were uncomfortable with Deans' questions because they had been placed in the middle and Zinser had told them not to discuss the matter with Deans. They stated that they were intimidated by the prospect that Deans might accuse them of obstruction of justice for not talking to them about the audit, but that Deans had not intended to intimidate them. Both auditors denied making any statements to the effect that Deans was tracking Zinser or Weintrob and they had no reason to believe that Deans was "tracking" them. Deans denied tracking Zinser and Weintrob; he did not know that they were in Denver.

Reason 2. Insubordination

Zinser accused Deans of "willful insubordination" by concealing from his superiors the fact that he was conducting unauthorized investigations in Utah after he had been directed by his supervisors not to conduct investigations in that jurisdiction. In addition, the notice stated that Deans' supervisors did not know that he had sent the letters and stated that he did not have signature authority for letters to outside parties and such letters must be cleared through them.

The evidence shows that Snee felt that Deans should minimize his activities in Utah since he had recently been acquitted of alleged criminal activity there. However, he denied that Deans had been instructed not to conduct investigations there. In fact, Snee met with Deans and Johns in September 1994 to discuss the Olympic Park case. Johns agreed to open a file on the matter since it could be prosecuted out of the USAO in Denver. Snee and Johns agreed that Deans could investigate the matter since he would not have to work with the Utah USAO. Truxal stated that he suggested to Deans that he stay out of Utah because he had been unfairly prosecuted there, but he did not order him to stay out of Utah. He denied that Deans' investigation in Utah was unauthorized.

While Snee agreed that Deans should have coordinated the request letters with him, he stated that if he had learned about the letters, he would have counseled Deans to clear them with him in the future, but he did not consider the matter a basis for disciplinary action. Truxal disputed the charge that Deans lacked the authority to sign the letters. He stated that while it is the practice for the agents to sign the requests for Snee, there is no prohibition against an agent signing his own request, and that other agents have signed their own requests with impunity.

Reason 3. Conflict of Interest

Specification 1. Zinser charged that Deans had initiated an unauthorized investigation against Utah State officials while intending to file a claim against the State, that this was a clear conflict of interest, and that Deans' requests for

information concerning the Olympic Park were in support of his claim for damages and were not related to official government business.

The evidence shows that Deans' investigation was neither concealed nor unauthorized, and that Snee and Johns agreed that he should investigate the matter. It also shows that Deans did file a notice of claim to preserve his right to claim damages incurred by the unsubstantiated indictment. Neither Snee, Truxal, nor Deans could comprehend how this could be a conflict since Deans' claim against Utah State officials involved his wrongful prosecution for alleged wiretap violations. More importantly, Deans began the Olympic Sports Park road investigation before he was indicted. As soon as Deans discovered that the road was not built with federal funds, he recommended to Johns that the investigation be terminated. Johns stated that Deans was surprised that his investigative requests would be construed as a conflict of interest. As stated *supra,* neither of Deans' supervisors thought there was anything wrong with the request letters and they were aware of both the investigation and the indictment. There was no evidence that Deans was using this investigation to promote his notice of claim against the State of Utah.

Specification 2. Zinser charged Deans with inappropriate use of a government fax machine because he transmitted his notice of claim for damages to the state of Utah on a DOT OIG fax machine.

The evidence shows that Deans admitted faxing his notice of claim on the OIG fax machine. However, both Truxal and Snee felt that it was appropriate for Deans

to use the DOT OIG fax machine because he was trying to recover losses from an unfair indictment which resulted from the performance of official duties.

In the notice of proposed removal, Zinser referenced Deans' disagreement with Johns and stated that insubordination with respect to the authority of the USAO could not be tolerated. Both Snee and Truxal noted that Deans could not have been insubordinate to Johns because Johns had no supervisory authority over him, and that the OIG was not required to agree with the USAO. Furthermore, the evidence does not show that Deans was insubordinate.

Zinser also stated in the notice that in considering the penalty, he took into consideration the fact that Deans had on one occasion disregarded his instructions because Deans had contacted him about a matter on which Zinser had instructed him to contact Snee. The evidence shows that Snee told Deans to contact Zinser because he did not know the answer on a matter that was being decided at headquarters. Snee stated that it was inappropriate for Zinser to reference that situation.

The notice also stated that Deans had been counseled regarding his attitude and lack of appropriate respect for authority and he had failed to heed his supervisors' warning. Deans, Snee and Truxal all stated that Deans had not been counseled or warned.

Deans always received annual ratings of "fully successful" or better during his time as a DOT OIG employee. Truxal stated that he would have rated Deans "outstanding" on performance for the year if he had not been removed. Snee was shocked that Zinser and Schiavo dismissed Deans without consulting him or Truxal,

and stated that if the USAO had problems with Deans, they should have reported to them. Snee and Truxal also stated that Deans had done nothing to warrant removal, and that they were not consulted in the matter. Johns felt that Solano had over-reacted to the problems they were having with Deans. Johns also stated that he thought his problems with Deans had been resolved, and he knew of nothing which warranted Deans' removal from federal service. He said that Deans was a good investigator and he would have no problem in working with him again. Gottlieb stated that he was shocked that Deans was removed without an internal review which gave Deans an opportunity to present his side of the story. He said that Deans was a good agent and a seasoned investigator and he should have been reassigned to San Francisco. Solano and Surbaugh stated that they never thought that the DOT IG would remove Deans. Solano opined that progressive discipline would have been more appropriate. Solano stated that it was unusual for employees to be removed without prior serious disciplinary action.

III. ARGUMENT

Under the Whistleblower Protection Act of 1989 (WPA), the Special Counsel may request any member of the Board to stay any personnel action for a period of 45 days if the Special Counsel determines that there are reasonable grounds to believe that a personnel action was taken, or is to be taken, as a result of a prohibited personnel practice. The Board member shall order the stay unless the member determines that a stay would be inappropriate. 5 U.S.C. § 1214(b)(1)(A)(ii).

Moreover, the Board should rely on the judgment of the Special Counsel and grant a request for a stay as long as it "falls within the range of rationality." *In re Kass*, 2 M.S.P.R. 79, 86 (1980). In making this determination, the Board is to view the Special Counsel's request for an initial stay in the most favorable light. *Special Counsel v. Dept. of Air Force*, 61 M.S.P.R. 229, 230-231 (1994); *Special Counsel v. Federal Emergency Management Agency,* 44 M.S.P.R. 544, 545-546 (1990). Although Deans has already been removed, the Board has the authority to stay a removal action after its effective date. *Special Counsel v. Dept. of Transportation*, 59 M.S.P.R. 552, 555 (1993); *Special Counsel v. Dept. of Veterans Affairs*, 58 M.S.P.R. 225 (1993).

Federal employees are protected from adverse personnel actions that are taken because they engage in certain protected activities, including making protected whistleblower disclosures and exercising their first amendment rights. To establish a *prima facie* violation of reprisal for whistleblowing under 5 U.S.C. § 2302(b)(8), OSC must demonstrate that: (1) Deans made protected disclosures; (2) he was subjected to a personnel action; (3) the supervisor(s) who recommended or took the personnel actions had actual or constructive knowledge of his protected disclosures, and (4) the protected disclosures were a contributing factor in the adverse personnel decision. *Caddell v. Dept. of Justice,* 52 M.S.P.R. 529, 533 (1992); *Rychen v. Dept. of Army*, 51 M.S.P.R. 179, 183 (1991); *McDaid v. Dept. of Housing and Urban Development,* 46 M.S.P.R. 416, 421-423 (1991); *see also* 5 U.S.C. §§ 1214(b)(4), 1221(e); 5 C.F.R. § 1209.7.

Deans engaged in protected activity under section 2302(b)(8) when he reported to his supervisors, Snee and Zinser, on January 26 and February 16, 1995, that the Denver Airport funding diversion case he was investigating involved seventeen investigative issues, some which had potential for criminal prosecution. As the assigned investigator, Deans was in a unique position to observe and appreciate the potential seriousness and illegality of the purported revenue diversions. *See Geyer v. Dept. of Justice*, 63 M.S.P.R. 13 (1994).

Zinser was aware of Deans' protected disclosures, as they were either made to Zinser or cited in Zinser's May 17, 1995, letter of proposed removal. The references to Deans' protected disclosures in the proposed removal letter and the fact that most of the charges in the notice were unsubstantiated are evidence that Deans' protected activity was a contributing factor in the decision to remove Deans. *See Marano v. Dept. of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993), *citing* 135 Cong. Rec. 5032-33 (1988)(explanatory statement on S.20). In addition, the disparity between Deans' actions and the penalty is so great that it supports a finding that the decision was motivated by animus. Ordinarily, employees, like Deans, with no prior disciplinary record are subjected to progressive discipline. They are not removed from the federal service for a first offense, as was the case with Deans. Thus, there are reasonable grounds for believing that Deans was removed from his position because of his protected whistleblowing.

The first amendment rights of federal employees are protected by OSC under 5 U.S.C. § 2302(b)(11), which prohibits taking or failing to take a personnel action

which violates a law rule or regulation which implements or directly concerns one of the merit system principles at 5 U.S.C. § 2301. Section 2301(b)(2) states that employees should receive fair and equitable treatment in all aspects of personnel management with proper regard for their constitutional rights. The first amendment implements and directly concerns the merit system principle at 5 U.S.C. § 2301(b)(2), which states: "All employees and applicants for employment should receive fair and equitable treatment in all aspects of personnel management ... with proper regard for their privacy and constitutional rights." To establish a claim of reprisal for exercise of first amendment rights, OSC must prove (1) the employee's speech was protected by the first amendment, and (2) the speech was a substantial or motivating factor in the action taken against the employee. The agency can use the defense set forth in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 287 (1977), which held that an agency may prevail in a first amendment case if it can show that the adverse action would have been taken absent the employee's protected activity. The leading cases on speech rights of public employees are *Pickering v. Board of Education*, 391 U.S. 563 (1968) and *Connick v. Meyers*, 461 U.S. 138 (1983). In these cases the Court set forth a number of tests for balancing the rights of employees to comment on matters of public concern and the rights of a public employer in promoting the efficiency of government. The factors which weigh in favor of finding a federal employee's speech protected include:

> Whether the speech concerned a matter of general public interest, *Pickering*, 391 U.S. at 571.

The degree to which the public interest is served by encouraging such speech, *id.*

Whether the agency had other alternatives available to protect its interests which would have intruded less on the employee's first amendment rights. *id.*, at 572.

On the other hand, the factors which weigh against finding speech protected include:

Whether the speech interfered with maintaining discipline by supervisors or harmony among co-workers, *Pickering*, 391 U.S. at 579.

Whether the speech undermined a close working relationship in which personal loyalty and confidence are essential to the effective functioning of government, *id.*

Whether the speech damaged the professional reputations of the government officials, *id.*

Whether the speech fomented controversy or conflict within the agency or between the agency and the public, *id.*

Whether the speech impeded the employee's proper performance of his daily duties, *id.*, at 572.

Whether the speech interfered with the regular operation of the agency generally. *id.*

Deans' comments to Johns about his suspicion that there was a connection between Solano's trip to Washington and the release of the federal grant money by the FAA is protected speech because it was perceived by Johns and agency officials as an inference that Solano, Schiavo, and Pena had engaged in improper behavior. The issue of whether high public officials had engaged in improper conduct is clearly a matter of public interest. In addition, none of the factors which would weigh in favor

of the agency's actions are present in this case. Furthermore, the timing of actions by Solano and Zinser is persuasive evidence that Deans' was removed because of his protected speech. Solano's transmittal of Johns' memoranda, including the one in which he described Deans' comments related to the release of the FAA funds, occurred soon after Deans made the statements, and Zinser's trip to Denver followed a few days after he learned of Deans' comments. It should also be noted that apart from the issue of whether Deans' statement to Johns was protected speech, the comments were made in a private conversation, and there is no indication that anyone overheard them. Finally, as noted earlier, Zinser's reaction to Deans' protected first amendment speech, as well as his protected whistleblowing, was draconian in nature. Indeed, the last event leading to Deans' removal from federal service was his private conversation with Johns. The animus displayed by Zinser's severe overreaction could only have been engendered by Deans' protected activity, and not by the other transparent reasons offered by Zinser.

Based on the foregoing, the evidence obtained to date supports a reasonable belief that Deans was removed from his position because he made whistleblower disclosures protected by 5 U.S.C. § 2302(b)(8) and because of his exercise of his first amendment rights.

IV. CONCLUSION

In summary, this request for stay clearly falls within the "range of rationality" test articulated in *Kass*, 2 M.S.P.R. at 96. As stated, on May 20, 1996, the Special

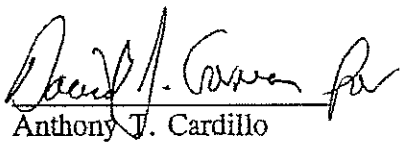
Counsel filed her report of investigative findings and recommendations with the DOT OIG, the Board, and the Office of Personnel Management. The granting of a stay would permit OSC additional time to receive a response to the report and recommendations.

Accordingly, the Special Counsel respectfully requests the Board grant a 45-day stay of the removal of John L. Deans, and return him to duty as a criminal investigator in Denver, Colorado.

Respectfully submitted,

Kathleen Day Koch
Special Counsel

William E. Reukauf
Associate Special Counsel
for Prosecution



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FAX: 214/653-2764

May 20, 1996
Washington, D.C.

ENCLOSURE 5

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

No. CB1214960031T1

SPECIAL COUNSEL,
Ex rel. John L. Deans
Petitioner,

v.

DEPARTMENT OF TRANSPORTATION
OFFICE OF INSPECTOR GENERAL,
Respondent.

JOINT MOTION FOR APPROVAL OF SETTLEMENT AND SETTLEMENT AGREEMENT

The Petitioner, the Office of Special Counsel (OSC), on behalf of John L. Deans, by one of its attorneys, Anthony T. Cardillo, Esq., and the Respondent, Department of Transportation (DOT) Office of Inspector General (OIG), by its attorney, Roger P. Williams, Esq., jointly move the Chief Administrative Law Judge to enter an order recommending that the Merit Systems Protection Board (the Board) approve the settlement and stipulations jointly agreed upon by the parties.

In support of this motion, Respondent, OSC, and John L. Deans stipulate and agree as follows:

SETTLEMENT AGREEMENT

1. All parties admit that the Board has jurisdiction over this matter pursuant to 5 U.S.C. §§ 1204(a) and 1214(b).

2. Respondent will provide back pay to John L. Deans within 45 days of the date of execution of this agreement in accordance with the Back Pay Act, 5 U.S.C. § 5596, to include regular and availability pay plus interest, accrued leave, and other benefit entitlements, including Thrift Savings Plan contributions, for the period of June 25, 1995, through May 22, 1996.

3. Respondent agrees to return Mr. Deans to a GS-1811-12 Criminal Investigator position in the Denver, Colorado, metropolitan area and leave him there as long as he remains with the DOT OIG. Respondent further agrees to find Mr. Deans an office or permit him to telecommute from within the Denver metropolitan area. Mr. Deans will be supervised by the Special Agent in Charge of the San Francisco Regional Office. Mr. Deans will not claim noncompliance with this paragraph of the Agreement as long as he is assigned in the Denver area to duties and responsibilities consistent with Position Description No. 09I-95-009.

4. Respondent agrees to pay Mr. Deans the sum of Ten thousand Three hundred Ninety-three dollars and Thirteen cents ($10,393.13) for attorney's fees within 45 days of the date of execution of this agreement. The parties agree that such payment constitutes a full and final resolution of the matter of reasonable attorney fees and costs.

5. Respondent agrees to remove from Mr. Deans' Official Personnel Folder and any other agency files any and all references to his proposed removal and removal from federal service effective June 24, 1995. This includes but is not limited to the May 17, 1995, Notice of

Proposed Removal and the June 19, 1995, Decision to Remove.

6. Respondent agrees not to provide any negative information, i.e., only neutral or positive information, to any and all prospective employers regarding Mr. Deans. This includes but is not limited to his dates of employment, position title, duties, and salary information.

7. Respondent agrees to use its best efforts to retrieve the 1995 United States Attorney Public Service Award given to Mr. Deans by the U.S. Attorney for the Eastern District of Virginia on April 6, 1996, and present it to him no later than 45 days after the date of execution of this agreement.

8. Mr. Deans agrees to voluntarily retire from federal service no later than 3 months after he becomes eligible for optional retirement, as determined by the Office of Personnel Management, provided that he is still employed by the DOT OIG at that time.

9. Mr. Deans agrees not to litigate or relitigate in any forum, judicial or administrative, any claims arising from the personnel actions involved in this Petition for Corrective Action, including his Claim for Damage, Injury or Death against the Department of Transportation. This agreement does not preclude Mr. Deans from pursuing his Claim for Damage, Injury, or Death filed with the Department of Justice on September 25, 1996, concerning claims unrelated to this matter.

10. This agreement does not constitute an admission of guilt, fault, or wrongdoing by either the Respondent or Mr. Deans.

11. The terms of this agreement shall not serve as a precedent to seek or justify similar terms in any subsequent cases.

12. All parties have entered into this agreement freely and with full knowledge of its terms and absent any coercion or duress.

13. The parties agree that should either the Chief Administrative Law Judge or the Merit Systems Protection Board refuse to approve this agreement in full, either party may unilaterally void all or any part of the agreement.

14. This document contains the entire agreement between the parties.

Accordingly, in the interests of justice and judicial economy, the parties move for approval of the Settlement Agreement as set forth herein, and request that the agreement be accepted and that the Board enter an order consistent with the terms of the agreement.

Respectfully submitted,

Kathleen Day Koch
Special Counsel

William E. Reukauf
Associate Special Counsel
for Prosecution

Roger P. Williams
Counsel for Respondent
Date: 4/3/97

Anthony T. Cardillo
Attorney

Date: _____

Office of Special Counsel
Dallas Field Office
1100 Commerce Street
Suite 7C30
Dallas, Texas 75242

John L. Deans
Criminal Investigator

Date: _____

ENCLOSURE 6

S. HRG. 110–1116

NOMINATIONS TO THE DEPARTMENT OF COMMERCE, FEDERAL MARITIME COMMISSION, AND THE METROPOLITAN WASHINGTON AIRPORTS AUTHORITY

HEARING

BEFORE THE

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION UNITED STATES SENATE

ONE HUNDRED TENTH CONGRESS

FIRST SESSION

OCTOBER 23, 2007

Printed for the use of the Committee on Commerce, Science, and Transportation

U.S. GOVERNMENT PRINTING OFFICE

73–668 PDF WASHINGTON : 2012

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SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

ONE HUNDRED TENTH CONGRESS

FIRST SESSION

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CHRISTINE D. KURTH, *Republican Staff Director and General Counsel*
PAUL NAGLE, *Republican Chief Counsel*

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Senator STEVENS. Do you think Congress should give the Boards of Directors that control airports, such as these two, further powers, with regard to TSA?

Mr. BROWN. Well, you know, that is—I'm sure that's a difficult question that you all wrestle with. We certainly, as an airport operator, would like to feel we had some authority with TSA. As you say, we really don't pay them for the service that they provide. They don't really feel that they are obligated to respond to us. I think they try to be good partners, but I think we would like to have some authority, with respect to the way TSA screeners are deployed, what times of the day, how many lanes are open, and so on and so forth. And I think the Authority would—I'm speaking only for myself, the Board has not discussed this—but I think you would find some support among directors of the Airports Authority to give us additional powers to have some oversight on the way TSA deploys its resources. Yes.

Senator STEVENS. Thank you very much and thanks for your willingness to serve another term. It's not an easy task. I'm sure it's a burden coming in from Ohio to deal with this. So, we thank you for what you're doing. We appreciate it very much.

Mr. BROWN. Thank you very much, Senator. I very much enjoyed my service on this Board. It has been a privilege.

The CHAIRMAN. Mr. Brown, I thank you very much, and congratulations.

Mr. BROWN. Thank you, Mr. Chairman.

The CHAIRMAN. Our next witness is the Inspector General-Designate, United States Department of Commerce, Mr. Todd J. Zinser.

Mr. Zinser, welcome, sir.

STATEMENT OF TODD J. ZINSER, NOMINATED TO BE INSPECTOR GENERAL, U.S. DEPARTMENT OF COMMERCE

Mr. ZINSER. Thank you, Mr. Chairman, Vice Chairman Stevens. I prepared a written statement and would like to have it submitted for the record if I could.

The CHAIRMAN. Without objection, so ordered.

Mr. ZINSER. I'd like to summarize that statement briefly.

I'm honored to appear before you today as the President's nominee to be Inspector General of the Department of Commerce. I have been privileged to testify before this Committee and its Subcommittees as Acting Inspector General of the Department of Transportation, and to have contributed to the important oversight work of this Committee. I would like to thank Secretary Gutiérrez for his expression of confidence and the Committee, for considering my nomination expeditiously.

Mr. Chairman, as you and your staff know, public service is an honor. For the past 24 years, I have been honored to be a career civil servant. I began as an investigator with the Department of Labor in 1983, transferred to the Department of Transportation Office of Inspector General 16 years ago, in 1991, and for the past 7 years, I have served as Deputy Inspector General, including 8 months as Acting Inspector General.

It is my firm belief, that throughout my Federal service, I have demonstrated integrity, objectivity, commitment to good govern-

ment, and leadership, characteristics essential to being an effective Inspector General. The Department of Commerce, like the other major departments of government, requires an objective, independent Inspector General, who will make fair but tough, fact-based calls and report to the Secretary and the Congress fully and forthrightly.

The Inspector General should work constructively with the Department and stakeholders, as a force for positive change and all parties should constantly strive for a relationship built upon mutual respect and trust. However, the Inspector General is under an absolute obligation to report to the Congress about significant problems.

I know that Secretary Gutiérrez shares this view, and I am confident that, if confirmed, the Office of Inspector General staff and I, would have a good and open working relationship with the Secretary and the Congress.

My experience at the Department of Transportation OIG in working with the Secretary and Congress, certainly this very Committee, has been entirely positive. This experience has taught me how to conduct investigations and audits in a credible and constructive way. It has helped me appreciate the importance of providing policymakers with current, relevant, factual, and objective information.

I have learned many other lessons, but would like to stress three in particular. First, that the hallmarks of independence, objectivity, and nonpartisanship strengthen an IG's credibility, especially when the findings of an audit or investigation run counter to what may have been expected. Second, the importance of Congress in providing oversight and making progress and leading reform. And third, that government leaders want to get ahead of problems and expect to hear from their Inspectors General and GAO about risks and vulnerabilities and their best recommendations for solutions.

If confirmed, I am committed to applying these lessons and my experience to the audits and investigations performed by the Office of Inspector General at the Department of Commerce. As you noted, Mr. Chairman, in your oversight hearing for the Department in August, the business of the Department of Commerce is complex and demanding. Its mission includes conserving and managing the oceans, taking care of the census, providing economic opportunities, predicting the weather, and promoting commerce and innovation and good stewardship of the resources that contribute to our economic prosperity.

Secretary Gutiérrez, similarly, emphasized that the roots of the Department are firmly grounded in promoting commerce and economic growth, and exercising stewardship of our oceans and waterways.

I want to assure the Committee that, if confirmed, those issues will have the highest priority for the Office of Inspector General as well.

Mr. Chairman, that concludes my statement. I would be pleased to respond to any questions you or Vice Chairman Stevens may have.

[The prepared statement and biographical information of Mr. Zinser follow:]

PREPARED STATEMENT OF TODD J. ZINSER, NOMINATED TO BE INSPECTOR GENERAL, U.S. DEPARTMENT OF COMMERCE

Chairman Inouye, Vice Chairman Stevens and Members of the Committee:

I am honored to appear before you today as President Bush's nominee to be Inspector General of the Department of Commerce. I have been privileged to testify before this Committee and its Subcommittees as Acting Inspector General of the Department of Transportation (DOT), and to have contributed to the Committee's vital oversight work while leading the talented staff at the DOT Office of Inspector General (OIG).

The Inspector General position in a large Federal agency such as the Department of Commerce is a very important and challenging one. I would like to thank Secretary Gutiérrez for his expression of confidence and the Committee for considering my nomination expeditiously. I would also like to express my appreciation to Inspector General Calvin Scovel, and former Inspector General Kenneth Mead, for their support over the past 10 years at DOT. I would also like to extend my thanks to the staff at the DOT Office of Inspector General, with whom I have had the privilege of serving for the past 16 years. Finally, but not least, I want to thank my children, Ken, Philipp, and Corinne, for their love and support, especially at this time as I seek the Committee's approval for becoming Inspector General at the Department of Commerce.

For the past 24 years, I have been a career civil servant. I began as an investigator with the Department of Labor in 1983 and transferred to the Department of Transportation, Office of Inspector General, in 1991 where, for the past 7 years, I have served as Deputy Inspector General. From February 2006 to October 2006, I also served as DOT's Acting Inspector General. It is my firm belief that throughout my Federal service I have demonstrated integrity, objectivity, commitment to good government, and leadership—characteristics essential to being an Inspector General.

I am most proud of my 16 years conducting audits and investigations of transportation issues and programs at the Department of Transportation. I believe the OIG staff and I truly made a difference in helping Congress and DOT in their efforts to provide for the economic well-being and competitiveness of the country and ensure a safer, more secure, efficient, and affordable transportation system. If confirmed, I would strive to make the same contributions in support of the important mission of the Department of Commerce.

It is against this backdrop that I would first like to express my view of the Inspector General's role in the Federal Government.

The Inspector General Act was passed in 1978 and provides that the Inspector General will conduct audits and investigations to improve the economy, efficiency, and effectiveness of government programs and to detect and prevent fraud, waste, and mismanagement. My view is that the Department of Commerce, like the other major departments of government, requires an independent, objective Inspector General, who will make fair but tough, fact-based calls and report to the Secretary and the Congress fully and forthrightly. Further, the Inspector General should work with the Secretary, senior departmental managers, and Congress as a force for positive change.

The Secretary, Deputy Secretary, and Inspector General must also have a two-way open line of communication and it should be used on a regular, ongoing basis. I understand full well that the same is true for the relationship between the Inspector General and the Congress. The Inspector General should work constructively with the Department and should constantly strive for a relationship built upon mutual respect and trust. However, the Inspector General also is under an absolute obligation to report to the Congress about significant problems. I know that Secretary Gutiérrez fully shares this view and I am confident that, if confirmed, the Office of Inspector General staff and I would work hard to have a good and open working relationship with the Secretary and the Congress.

My experience at the DOT OIG in working with the Secretary and Congress has been entirely positive. I consider myself fortunate to have worked with DOT and its modal administrations, the House and Senate, Members of both parties, and various transportation constituencies. This experience helped me learn about the implementation and impact of national programs; understand how decisions are made; appreciate the importance of providing policy-makers with current, relevant, factual and objective information; and conduct investigations and audits in a credible and constructive way.

I have learned that the hallmarks of independence, objectivity, and nonpartisanship strengthen an IG's credibility, especially when the findings of an audit or investigation run counter to what may have been expected. I have also learned about the

importance of Congressional oversight in making progress and leading reform. My experience at the DOT OIG has also taught me that government leaders want to get ahead of problems and expect the Inspectors General and GAO to tell them about risks and vulnerabilities and to provide their best recommendations for solutions.

As Deputy Inspector General for the past 7 years, I managed a talented staff of about 430 in directing audits and investigations. Our work since 2000 has resulted in more than 700 reports covering a broad range of audit findings in the transportation modes and approximately 140 testimonies to Congressional committees. The basic standards of objectivity, independence, and high quality were fundamental in all our work, reports, and testimony. Much of this work was undertaken in response to requests from this Committee, and other Senate and House authorization and appropriation committees.

I know first-hand the importance of the Inspector General function and how a large Department and its subordinate agencies operate. The audit and investigative functions of the Inspector General, under the umbrella of independence and objectivity are directed toward identifying and preventing fraud, waste, and inefficiency. If confirmed, I am committed to applying this base of experience to the audits and investigations performed by the Office of Inspector General at the Department of Commerce. I am equally committed, if confirmed, to providing the strong leadership necessary to address the current challenges facing the Office of Inspector General. I will work with this Committee and the Congress to address these challenges head on.

Mr. Chairman, the work of the Inspectors General covers a broad front and in recent years the Inspector General community has been required by Congress to issue annual reports on the top challenges facing their respective departments. Those reports are intended to focus attention on the most pressing issues and serve to aid both Congress and the Administration in serving the American people.

This seems particularly important for the Department of Commerce. As you noted, Mr. Chairman, in your oversight hearing for the Department in August of this year, the business of the Department of Commerce is complex and demanding. Its mission includes conserving and managing the oceans, ensuring the accuracy of standards of measurement, taking care of the census, providing economic opportunities, predicting the weather, promoting commerce and innovation and good stewardship of the resources that contribute to our economic prosperity. Secretary Gutiérrez similarly emphasized that the roots of the Department are firmly grounded in promoting commerce and economic growth, and exercising stewardship over our oceans and waterways. I want to assure the Committee that, if confirmed, these issues will have the highest priority for the Office of Inspector General as well.

Mr. Chairman, this concludes my statement. I will be pleased to respond to any questions you or the other members of the Committee may have.

A. BIOGRAPHICAL INFORMATION

1. Name (Include any former names or nicknames used): Todd J. Zinser.
2. Position to which nominated: Inspector General, U.S. Department of Commerce.
3. Date of Nomination: September 7, 2007.
4. Address:

Residence: Information not released to the public.

Office: U.S. Department of Transportation, West Wing, 7th Floor, 1200 New Jersey Avenue, SE, Washington, DC 20590.

5. Date and Place of Birth: September 6, 1957; Cincinnati, OH.
6. Provide the name, position, and place of employment for your spouse (if married) and the names and ages of your children (including stepchildren and children by a previous marriage).

Spouse: None (Divorced); Children: Kenneth Zinser, 18; Philipp Zinser, 14; Corinne Zinser, 12.

7. List all college and graduate degrees. Provide year and school attended.

Miami University, Oxford, OH, Master of Arts, Political Science, 1980.
Northern Kentucky University, Bachelor of Arts, Political Science, 1979.

8. List all post-undergraduate employment, and highlight all management-level jobs held and any non-managerial jobs that relate to the position for which you are nominated.

U.S. Department of Transportation.
Deputy Inspector General, 2001–present.
Acting Inspector General, February–October 2006.
Assistant Inspector General for Investigations, 1996–2001.
Deputy Assistant Inspector General, 1994–1996.
Special Agent-in-Charge, New York, NY, 1991–1994.

U.S. Department of Labor, Office of Labor-Management Standards.
Deputy Regional Administrator, New York, NY, 1989–1991.
District Director, New Haven, CT, 1987–1989.
Labor Investigator, Cincinnati, OH, 1983–1987 (non-management).

Campbell County Kentucky Fiscal Court.
Director of Administration, 1983.
Executive Assistant, 1982–1983.

Austin Community College, Austin, TX, Instructor (Part-Time), 1981.

Texas House of Representatives, Research Assistant, 1981.

White House Intern, 1980.

9. Attach a copy of your résumé. A copy is attached.

10. List any advisory, consultative, honorary, or other part-time service or positions with Federal, State, or local governments, other than those listed above, within the last 5 years: None.

11. List all positions held as an officer, director, trustee, partner, proprietor, agent, representative, or consultant of any corporation, company, firm, partnership, or other business, enterprise, educational, or other institution within the last 5 years: None.

12. Please list each membership you have had during the past 10 years or currently hold with any civic, social, charitable, educational, political, professional, fraternal, benevolent or religious organization, private club, or other membership organization. Include dates of membership and any positions you have held with any organization. Please note whether any such club or organization restricts membership on the basis of sex, race, color, religion, national origin, age, or handicap.

Senior Executive Association, 2002–present.
Robinson Ice Hockey Club, Fairfax, VA, President, 2006.
Boy Scouts of America, Troop 1847, Burke VA, 2002–Present.
Terra Centre Elementary PTA, Treasurer, 1999–2000.

13. Have you ever been a candidate for and/or held a public office (elected, nonelected, or appointed)? If so, indicate whether any campaign has any outstanding debt, the amount, and whether you are personally liable for that debt. No.

14. Itemize all political contributions to any individual, campaign organization, political party, political action committee, or similar entity of $500 or more for the past 10 years. Also list all offices you have held with, and services rendered to, a state or national political party or election committee during the same period: None.

15. List all scholarships, fellowships, honorary degrees, honorary society memberships, military medals, and any other special recognition for outstanding service or achievements.

Secretary's Gold Medal—Katrina Task Force.
Secretary's 9/11 Medal.

16. Please list each book, article, column, or publication you have authored, individually or with others. Also list any speeches that you have given on topics relevant to the position for which you have been nominated. Do not attach copies of these publications unless otherwise instructed.

"Tool Time," *Journal of Public Inquiry,* Fall/Winter 1998.

17. Please identify each instance in which you have testified orally or in writing before Congress in a governmental or nongovernmental capacity and specify the date and subject matter of each testimony.

Date	Subject	Cmte/Subcmte
9–20–2006	Observations on FAA's Oversight of Aviation Safety	House Cmte on T&I Subcmte on Aviation

Date	Subject	Cmte/Subcmte
7–13–2006	Lower Manhattan Reconstruction: Lessons Learned from Large Transportation Projects	House Cmte on Homeland Security Subcmte on Management, Integration, and Oversight
6–21–2006	Observations on Current and Future Efforts to Modernize the National Airspace System	House Cmte on T&I Subcmte on Aviation
5–4–2006	Household Goods Moving Fraud	Senate Cmte on Commerce, Science, and Transportation Subcmte on Transportation and Merchant Marine
3–28–2006	Perspectives on FAA's FY 2007 Budget Request and the Aviation Trust Fund	Senate Cmte on Commerce, Science, and Transportation Subcmte on Aviation
3–16–2006	Pipeline Safety: Progress and Remaining Challenges	House Cmte on Trans. and Infra. Subcmte on Highways, Transit, and Pipelines
5–11–2005	Background Checks for Holders of Commercial Drivers Licenses with Hazardous Materials Endorsement	House Cmte on Trans. and Infra. Subcmte on Highways, Transit and Pipelines
3–30–1995	FAA Training Programs	House Cmte on Appropriations Subcmte on Transportation

18. Given the current mission, major programs, and major operational objectives of the department/agency to which you have been nominated, what in your background or employment experience do you believe affirmatively qualifies you for appointment to the position for which you have been nominated, and why do you wish to serve in that position?

My experience as Deputy Inspector General at the Department of Transportation for the past 6 years, including 8 months as Acting Inspector General, and my other executive and managerial experience with the DOT OIG and the Department of Labor gained during my 24 years of Federal service, affirmatively qualifies me for this appointment.

I wish to serve as Inspector General at the U.S. Department of Commerce because of the importance of the Inspector General in preventing and detecting fraud, waste and abuse and promoting economy and efficiency in Departmental programs and operations. I believe my appointment could benefit the Department and the Office of Inspector General at this critical time for the OIG. The important mission and programs of the Department of Commerce require an Inspector General focused on integrity, stewardship and getting the most for the taxpayers' dollars.

19.What do you believe are your responsibilities, if confirmed, to ensure that the department/agency has proper management and accounting controls, and what experience do you have in managing a large organization?

The operations of the Office of Inspector General should be held to a higher standard within a Department since the OIG must, in turn, audit and investigate the operations of the Department. If an OIG does not have proper management and accounting controls for its own operation, it diminishes the OIG's standing to make recommendations with respect to the operations of other agencies of the Department. As Deputy Inspector General at DOT, I directly supervise the operations of the OIG, with total budgetary resources of approximately $70 million and a staffing level of approximately 430 located throughout the United States, including 12 Senior Executives.

20. What do you believe to be the top three challenges facing the department/agency, and why?

Promptly resolve ongoing investigations by the Congress and the Office of Special Counsel concerning the operations of the OIG.

Address organizational and workforce issues resulting from those investigations.

Plan and implement oversight of the Department of Commerce, concentrating on those programs and operations of most importance to the Administration and the Congress.

B. POTENTIAL CONFLICTS OF INTEREST

1. Describe all financial arrangements, deferred compensation agreements, and other continuing dealings with business associates, clients, or customers. Please include information related to retirement accounts.

I have no financial arrangements, deferred compensation agreements or other continuing dealings with business associates, clients, or customers. Retirement accounts

consist of retirement coverage under the Civil Service Retirement System and annuity and IRA accounts disclosed on my Public Financial Disclosure Report, SF278.

2. Do you have any commitments or agreements, formal or informal, to maintain employment, affiliation, or practice with any business, association or other organization during your appointment? If so, please explain: None.

3. Indicate any investments, obligations, liabilities, or other relationships which could involve potential conflicts of interest in the position to which you have been nominated.

My three children and I hold stock in a company with a wholly-owned subsidiary in the broadcasting industry. Ethics Counsel for the Department of Commerce has determined that I do not have to divest these holdings, but if a matter arises in the Inspector General's Office that could affect the financial interests of this wholly owned subsidiary (or the parent company), it would be necessary that I recuse myself from participating in the matter. In the event my participation in a matter from which I am disqualified is important to the government, I will seek advice from an ethics official on means to resolve any conflict of interest, such as by divestiture or by obtaining a conflict of interest waiver.

4. Describe any business relationship, dealing, or financial transaction which you have had during the last 10 years, whether for yourself, on behalf of a client, or acting as an agent, that could in any way constitute or result in a possible conflict of interest in the position to which you have been nominated: None.

5. Describe any activity during the past 10 years in which you have been engaged for the purpose of directly or indirectly influencing the passage, defeat, or modification of any legislation or affecting the administration and execution of law or public policy: None.

6. Explain how you will resolve any potential conflict of interest, including any that may be disclosed by your responses to the above items.

I will seek and closely follow the advice of the Department's Ethics Counsel in accordance with my Ethics Agreement with the Department of Commerce, which is documented by memorandum dated August 2, 2007, to Barbara S. Fredericks, Assistant General Counsel for Administration.

C. LEGAL MATTERS

1. Have you ever been disciplined or cited for a breach of ethics by, or been the subject of a complaint to any court, administrative agency, professional association, disciplinary committee, or other professional group? If so, please explain.

I have never been disciplined or cited for a breach of ethics. However, within weeks of my becoming Acting Inspector General at DOT in February 2006, I self-reported to the President's Council on Integrity and Efficiency (PCIE), an anonymous complaint that I received. The letter asserted that with the departure of the former DOT IG, I would be "unchecked" in my "misconduct and mismanagement." The six allegations contained in the letter all related to my management during the tenure of the former IG but provided no explanation why these allegations were not raised with the former IG during the 6 years I served as his Deputy. After review by the PCIE Integrity Committee, the PCIE determined that the complaint did not establish specific wrongdoing and referred the complaint back to me and the Department.

The PCIE also received an anonymous complaint in September 2006, alleging that I was "covering up" an internal investigation into a stolen DOT OIG laptop computer. In response, the Acting Deputy Inspector General wrote to the PCIE and informed them that he had been assigned by me, weeks before the date of the complaint, to conduct the investigation and that I was not involved in managing the investigation. The PCIE also closed its file on this allegation.

2. Have you ever been investigated, arrested, charged, or held by any Federal, State, or other law enforcement authority of any Federal, State, county, or municipal entity, other than for a minor traffic offense? If so, please explain: No.

3. Have you or any business of which you are or were an officer ever been involved as a party in an administrative agency proceeding or civil litigation? If so, please explain: No

4. Have you ever been convicted (including pleas of guilty or *nolo contendere*) of any criminal violation other than a minor traffic offense? If so, please explain: No.

5. Have you ever been accused, formally or informally, of sexual harassment or discrimination on the basis of sex, race, religion, or any other basis? If so, please explain: No.

6. Please advise the Committee of any additional information, favorable or unfavorable, which you feel should be disclosed in connection with your nomination: None.

D. RELATIONSHIP WITH COMMITTEE

1. Will you ensure that your department/agency complies with deadlines for information set by Congressional committees? Yes.
2. Will you ensure that your department/agency does whatever it can to protect Congressional witnesses and whistleblowers from reprisal for their testimony and disclosures? Yes.
3. Will you cooperate in providing the Committee with requested witnesses, including technical experts and career employees, with firsthand knowledge of matters of interest to the Committee? Yes.
4. Are you willing to appear and testify before any duly constituted committee of the Congress on such occasions as you may be reasonably requested to do so? Yes.

RÉSUMÉ OF TODD J. ZINSER

Professional Experience

U.S. Department of Transportation, Office of Inspector General, Washington, D.C. Deputy Inspector General, Career Senior Executive Service (August 2001 to Present)

Duties: Lead the Office of Inspector General oversight of all Departmental programs and operations. Manage the daily operations of the OIG—Fiscal Year 06 budgetary resources of $70 million and authorized staffing level of 430. Supervise 12 members of the Senior Executive Service responsible for audits, investigations, legal and economic analysis. Served as Acting Inspector General from February 11, 2006 to October 26, 2006.

Examples of Fiscal Year 06 accomplishments include:

- Presented testimony before Congress 11 times (personally testified 6 times);
- Issued audit reports which contained over 200 recommendations which identified more than $890 million in questioned costs and funds for better use; and recovery of approximately $71 million; and
- Conducted investigations resulting in 169 indictments; 177 convictions; fines, restitution and recoveries of approximately $48 million, and 210 administrative actions and debarments.

U.S. Department of Transportation, Office of Inspector General

- Assistant Inspector General for Investigations—SES—(January 1996 to August 2001).
- Deputy Assistant Inspector General for Investigations (October 1994 to January 1996).
- Special Agent-in-Charge, New York, NY (October 1991 to September 1994).

U.S. Department of Labor, Office of Labor Management Standards

- Deputy Regional Administrator, New York, NY (May 1989 to October 1991).
- District Director, New Haven, CT (October 1987 to May 1989).
- Labor Investigator, Cincinnati, OH (December 1983 to October 1987).

Education

Miami University, Oxford, Ohio, Masters of Art, Political Science, 1980.

Northern Kentucky University, Bachelor of Arts, Political Science, 1979.

Honors and Awards

Secretary's Gold Medal—Katrina Task Force (2006); Secretary's 9/11 Medal.

References

Available upon request.

The CHAIRMAN. I thank you very much, sir. Your previous two Department Inspectors General resigned in the midst of controversy. What do you intend to do to restore confidence in your Department, and also on this Committee?

Mr. ZINSER. Thank you, Senator. I am more familiar with the circumstances involving the immediately preceding Inspector General at the Department of Commerce. I am also aware that there are a number of Inspectors General that are facing scrutiny in the government. I think it's unfortunate. I think my plan is to first resolve

whatever outstanding investigations are ongoing at the Department of Commerce.

I would also address the workforce issues that have been created by those investigations. I would also like to prepare an effective oversight plan for the office and begin again working with the Congress and the Department to oversee the important programs that the Department is responsible for. In my experience, sir, I think we have to let the work of the office rebuild its reputation and contribute to the oversight that is necessary for the Department of Commerce.

The CHAIRMAN. How would you rate the morale in your Department?

Mr. ZINSER. I don't have any firsthand knowledge at this point, sir, but my understanding is that morale is low.

The CHAIRMAN. I thank you very much for your candor.

Mr. Vice Chairman?

Senator STEVENS. Thank you very much.

You have indicated in your written statement that you want to increase communication between your office and Congress. You just mentioned that here. What do you have in mind?

Mr. ZINSER. Sir, I can only respond based on the experience that I have had at my current employment at the Department of Transportation Office of Inspector General.

Senator STEVENS. You are not intending to send up lobbyists or something for the IG's Office are you?

Mr. ZINSER. No sir, I want to have an open communication with the staff of the committees of jurisdiction, make sure that we are aware of the issues that they view as important, and determine whether or not there is any work that the Department of Commerce Office of Inspector General could do to contribute to that. That is what I would have in mind by opening communications more, in terms of building an oversight agenda for our office.

Senator STEVENS. The Chairman asked about the morale of the Department. Now, do you think morale is something the Inspector General should be concerned with?

Mr. ZINSER. Sir, I took the question to mean the morale of the Office of Inspector General at the Department of Commerce. I do think that would be an important issue to address straight away, sir.

Senator STEVENS. I misunderstood. I thought the Chairman was speaking about the whole Department.

The CHAIRMAN. No, just——

Senator STEVENS. Just your own office.

Mr. ZINSER. Yes, sir.

Senator STEVENS. What's your opinion about the morale of the whole Department?

Mr. ZINSER. Well, again sir, I don't have any firsthand experience, but from those who I've spoken to about the Department of Commerce, I've heard nothing but good things about the people that work there and they are very good to work with. In my meetings with Secretary Gutiérrez and former Deputy Secretary Sampson, I did get a good feeling that they understand the role of the Inspector General, they appreciate it, and that they are looking forward to having a confirmed Inspector General.

Senator STEVENS. And you have been the acting Inspector General at one time, right?

Mr. ZINSER. Yes, sir, with the Department of Transportation.

Senator STEVENS. Oh, you have not been acting in this Department?

Mr. ZINSER. No, sir.

Senator STEVENS. Well, thank you, thank you very much for your service. I think this has got to be one of the toughest jobs, to be within the Department, yet be the critic of it. So, I wish you well.

Mr. ZINSER. Thank you, sir.

The CHAIRMAN. And I wish you well, sir. Thank you.

Mr. ZINSER. Thank you, Mr. Chairman.

The CHAIRMAN. Our next witness is the Commissioner-Designate of the Federal Maritime Commission, Mr. Carl B. Kress.

Mr. Kress, welcome, sir.

STATEMENT OF CARL B. KRESS, NOMINATED TO BE COMMISSIONER, FEDERAL MARITIME COMMISSION

Mr. KRESS. Thank you, Mr. Chairman, Mr. Vice Chairman, Members of the Committee. Thank you for this opportunity to appear before you today. I have submitted a statement as well, and would like to summarize those remarks here.

The CHAIRMAN. Without objection, so ordered.

Mr. KRESS. Thank you. I'm honored to have been nominated by the President to serve as Commissioner on the Federal Maritime Commission and to be considered by this Committee.

Before I get started with my comments, I would like to take a moment to express particular thanks to my parents, retired U.S. Army Corps of Engineers Colonel Carl Franklin, and Mrs. Roswitha Kress who, unfortunately, were not able to make it today, but I think due to the wonders of the World Wide Web, may be watching from California and Germany respectively at this time.

I, also would like to thank for her support my wonderful fiancée, Molly Gower, who is here, as well as her family who I would like to introduce: her parents, Mr. and Mrs. John and Mary Gower, and Cathy Muha, her sister, and Richard Muha, her nephew, who is a star lacrosse player at Richard Montgomery High School in Rockville, I wanted to get that on the record.

And, of course, many thanks to all of my friends and colleagues who have been with me over the years, many of whom are here today, as well.

Ensuring both the efficiency and security of our Nation's trade flows is a complex and challenging task in this post-9/11 environment, and I seek the opportunity to contribute to that vital goal as a Commissioner.

The Federal Maritime Commission's role as the independent body responsible for regulating ocean-borne transportation in the foreign commerce of the United States, places the Agency in a key position in America's commerce.

The Commission fosters a fair, efficient and secure maritime transportation system through its policies and regulations, protects U.S. maritime commerce from unfair trade practices, works with shippers to ensure compliance with U.S. shipping laws, and assists in dispute resolution.

ENCLOSURE 7

From: Scovel, Calvin L. [mailto:Calvin.Scovel@oig.dot.gov]
Sent: Monday, September 14, 2009 9:27 AM
To: Porcari, John (OST)
Cc: Dobbs, David (OIG); Calvaresi-Barr, Ann (OIG); Barry, Timothy M (OIG)
Subject: Additional matters (Close Hold, pls)

John—

My apologies, but I overlooked 2 "FYI" items that I wanted to bring to your attention when we met this morning. [redacted]

I also decided to reassign Rick Beitel, Asst IG for Special Investigations and Analysis, for performance reasons. I have not yet announced this move, which will be effective Sep 27, but will do so shortly before that date. Rick's group works with OGC and FAA on whistle blower cases and I want to ensure we can continue that important work with the least possible disruption.

Vr/Cal

ENCLOSURE 8

From: [redacted]
Sent: Wednesday, August 19, 2009 10:40 PM
To: Barry, Timothy M; Scovel, Calvin L.; Dailey, Susan
Subject: FW: Number breakdowns in JI-3...

HI. Rick wanted these numbers and I thought you might be interested as well.

[redacted]

From: [redacted]
Sent: Wednesday, August 19, 2009 10:39 PM
To: 'Beitel, Rick'
Subject: Number breakdowns...

Rick – per your request....of the 16 people interviewed (not including you), 9/16 (56%) said that they don't trust you; 6/16 or 38% said they are afraid of you (in terms of the impact you could have on their careers); and 5/16 (32%) consider you part of the "Old Guard".

I hope this meets your needs.

[redacted]

ENCLOSURE 9

ATTACHMENT

1. The term "records" is to be construed in the broadest sense and shall mean any written or graphic material, however produced or reproduced, of any kind or description, consisting of the original and any non-identical copy (whether different from the original because of notes made on or attached to such copy or otherwise) and drafts and both sides thereof, whether printed or recorded electronically or magnetically or stored in any type of data bank, including, but not limited to , the following: correspondence, memoranda, records, summaries of personal conversations or interviews, minutes or records of meetings or conferences, opinions or reports of consultants, projections, statistical statements, drafts, contracts, agreements, purchase orders, invoices, confirmations, telegraphs, telexes, agendas, books, notes, pamphlets, periodicals, reports, studies, evaluations, opinions, logs, diaries, desk calendars, appointment books, tape recordings, video recordings, e-mails, voice mails, computer tapes, or other computer stored matter, magnetic tapes, microfilm, microfiche, punch cards, all other records kept by electronic, photographic, or mechanical means, charts, photographs, notebooks, drawings, plans, inter-office communications, intra-office and intra-departmental communications, transcripts, checks and canceled checks, bank statements, ledgers, books, records or statements of accounts, and papers and things similar to any of the foregoing, however denominated.

2. The terms "relating," "relate," or "regarding" as to any given subject means anything that constitutes, contains, embodies, identifies, deals with, or is in any manner whatsoever pertinent to that subject, including but not limited to records concerning the preparation of other records.