

**UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD  
DALLAS REGIONAL OFFICE**

**ROBERT JOHN MCCARTHY,**  
Appellant,

v.

DOCKET NUMBER

**DA-1221-09-0725-W-1**

**INTERNATIONAL BOUNDARY AND  
WATER COMM: U.S. AND  
MEXICO,**

Agency.

DATE: May 3, 2010

**APPELLANT'S PETITION FOR REVIEW OF INITIAL DECISION**

Appellant Robert J. McCarthy hereby petitions for review of the Initial Decision (ID) entered by the Administrative Judge (AJ) on April 9, 2010. For convenient reference, the argument is outlined, below.

- I. Statement of the Case.
- II. Summary of Appellant's Argument.
- III. Statement of Harmful Errors, Abuse of Discretion, and Erroneous Interpretations of Statutes and Regulations in the ID.
  1. The AJ committed harmful error by failing to invalidate the Agency action due to the Agency's violation of Constitutional Due Process.
  2. The AJ abused his discretion in denying Appellant's multiple motions to compel and motions to sanction the Agency for not filing a timely response to the appeal; for discovery misconduct; and for fabrication of evidence and perpetrating fraud upon the tribunal.
  3. The AJ abused his discretion in denying Appellant's motion to postpone the hearing either to permit Appellant's counsel to attend or to permit Appellant time to prepare for self-representation.
  4. The AJ erroneously admitted into evidence calendar entries and records of meetings purportedly made by Commissioner Ruth, notwithstanding evidence of fabrication and absent evidence of business routine, while denying Appellant's repeated motions to compel production of the calendar or record book in which these documents allegedly were recorded.

5. The AJ abused his discretion in denying Appellant's motion made at hearing to admit as evidence documents that were previously unavailable and that were wrongfully withheld by the Agency in discovery.
6. The AJ erred in finding that the Agency proved by "clear and convincing evidence" that it would have removed Appellant in the absence of his protected disclosures, and the ID is not supported by the Record.
  - a. The lack of evidence in support of the personnel action.
  - b. The strength of motive to retaliate on the part of the agency officials who were involved in the decision.
  - c. The lack of evidence that the agency takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated.
7. The AJ erred in failing to find that Appellant engaged in activities protected under the Whistleblower Protection Act by making protected disclosures as defined by 5 U.S.C. § 2302(b)(8), instead merely assuming "arguendo."
8. The AJ erred in failing to find that Appellant's disclosures were a "contributing factor" in the personnel action taken against him, instead merely assuming "arguendo."
  - a. One or more factors, related to the protected disclosures, alone or in connection with other factors, tended to affect in some way the outcome of the decision.
  - b. The official taking the personnel action knew of the disclosure.
  - c. The personnel action occurred within a period of time that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action.
  - d. The proposing and/or deciding official is implicated.
  - e. There is disparate treatment.
  - f. The penalty is excessive.
  - g. The disclosures involve serious allegations.
9. The AJ erred in failing to find that the appointment of the Agency's head, absent Senate confirmation, did not give him the legal authority to remove Appellant and terminate his benefits.
10. The AJ erred in denying Appellant's Request for Stay on October 8, 2009, impermissibly relying on the Agency's fabricated evidence and the prohibited reference to the OSC rationale, and misapplying rules of law and evidence.

11. The AJ should be disqualified from any further involvement in the appeal based on demonstrated personal bias or prejudice.

IV. Conclusion: Appellant is a tenured employee whose removal violated Constitutional Due Process and the Whistleblower Protection Act; the Agency and its counsel should be severely sanctioned for illegal and unethical conduct.

#### **I. STATEMENT OF THE CASE.**

Appellant Robert McCarthy was hired by the United States Section, International Boundary and Water Commission, U.S. and Mexico (USIBWC or Agency) as a Schedule A Excepted Service GS-0905-15 Supervisory Attorney, by letter dated December 12, 2008, with an effective start date of January 18, 2009. McCarthy was previously employed as a Schedule A Excepted Service GS-0905-15 Supervisory Attorney with the United States Department of the Interior from November, 1999 to February, 2008.<sup>1</sup>

On July 28, 2009, McCarthy submitted a memorandum entitled “Disclosures of Fraud, Waste and Abuse” to several federal agencies, including the State Department Office of Inspector General (OIG), the United States Office of Special Counsel (OSC), the General Accounting Office (GAO), the Federal Bureau of Investigation (FBI), and the Office of White House Counsel.<sup>2</sup>

Also on July 28, 2009, McCarthy sent an email to his supervisor, USIBWC Commissioner Bill Ruth, stating he had made disclosures of fraud, waste and abuse (and suspected criminal activity) to the OIG, FBI, and /or other appropriate agencies, and that

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<sup>1</sup> Initial Decision (ID) at 1, *citing Joint Statement of Facts; see also Appellant Exhibit P - McCarthy Resume; Q - McCarthy Oklahoma Bar Association Award; CCCC - McCarthy position description.*

<sup>2</sup> *ID at 1; see also Appellant Exhibit E – July 28, 2009 disclosures of fraud, waste, and abuse; N - July 28, 2009 email from McCarthy to OIG re disclosures; X - July 28, 2009 Email from McCarthy to WHO regarding disclosures; Y - July 28, 2009 Email from McCarthy to GAO regarding disclosures; Z - July 28, 2009 Email from McCarthy to State Dept. regarding disclosures.*

he had been left with “no other recourse” than to make the disclosures.<sup>3</sup> Just three days later, on July 31, 2009, Commissioner Ruth responded with a letter removing McCarthy from Federal employment.<sup>4</sup> The letter parrots McCarthy’s use of the phrase, “no recourse,” and cites as the sole grounds supporting removal four legal memoranda authored by McCarthy in June and July 2009. Each of the four opinions in question deals with a significant aspect of the fraud, waste or abuse included in McCarthy’s July 28 protected disclosures.<sup>5</sup>

McCarthy filed both an Independent Right of Action (IRA) and an Otherwise Appealable Action (OAA) with respect to his removal, in addition to a separate IRA concerning premature termination and denial of benefits arising out of his removal.<sup>6</sup> The Administrative Judge (AJ) denied the OAA, finding that the Board lacks jurisdiction since McCarthy does not meet the definition of “employee” found at 5 U.S.C. § 7511.<sup>7</sup>

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<sup>3</sup> *ID* at 1; *Joint Statement of Facts*, 4; *see also Appellant Exhibit O*.

<sup>4</sup> *Joint Statement of Facts*, 5.

<sup>5</sup> *See Appellant Exhibit R*.

<sup>6</sup> On September 24, 2009, Appellant filed an Independent Right of Action (IRA) appeal with the Board under 5 U.S.C. § 2302(b)(8), alleging wrongful termination of employment in reprisal for engaging in protected whistleblower activities, DA-1221-09-0725-W-1. On October 22, 2009, Appellant filed an “Otherwise Appealable Action” (OAA) under 5 C.F.R. § 1201.3, Docket No. DA-0752-10-0044-I-1, raising an affirmative defense of retaliation for whistleblowing under 5 U.S.C. § 2302(b)(8). On November 4, 2009, Appellant filed another IRA appeal in which Appellant alleged the Agency prematurely terminated his health and life insurance benefits and denied payment of previously agreed employee moving expenses, in retaliation for whistleblowing, Docket No. DA-1221-10-0078-W-1.

<sup>7</sup> *See Initial Decision, McCarthy v. International Boundary and Water Commission*, MSPB Docket No. DA-0752-10-0044-I-1.

The AJ found that the Board has jurisdiction over the benefits IRA, but held that McCarthy failed to identify the official responsible for the denial of benefits, and therefore failed to establish that whistleblowing covered by 5 U.S.C. § 2302(b)(8) was a contributing factor in the denial.<sup>8</sup> That ID is currently the subject of a separate Petition for Review (PFR).

Concurrently with the IRA appeal from his removal, McCarthy filed a request to stay the Agency's action, a motion that was denied on October 8, 2009. On October 15, 2009, the AJ denied Agency motions to gag Appellant's counsel from publicly commenting on the case, to strike allegations from Appellant's disclosures contained in the IRA, to sanction Appellant for making such disclosures and/or allegations, and, ironically, to shorten time for Appellant to respond to Agency discovery. On November 5, 2009, the AJ denied the Agency's motion to dismiss, finding "that the Appellant had a reasonable belief that his disclosures were protected."

The AJ also denied multiple motions filed by Appellant to compel production of the Agency's Answer, the Agency File, and Agency responses to discovery, and to sanction the Agency for litigation misconduct. The first such motion was filed on November 12, 2009. On November 20, 2009, Appellant filed a Motion to Suspend Proceedings and Renewed Motion for Sanctions, after the AJ declined to grant the November 12 motion and suggested the parties needed the suspension "to allow time to complete discovery." On December 28, 2009, Appellant filed a Renewed Motion to

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<sup>8</sup> See Initial Decision, *McCarthy v. International Boundary and Water Commission*, MSPB Docket No. DA-1221-10-0725-W-1.

Compel and Second Renewed Motion for Sanctions, following expiration of the suspension with no substantial production by the Agency.

On January 5, 2010, the AJ entered an Order denying Appellant's November 12 and December 28 motions to compel and for sanctions. On January 13, 2010, Appellant filed a Motion to Reconsider, or in the alternative to Certify for Interlocutory Appeal, the January 5 Order denying the motions to compel and for sanctions. On January 20, 2010, the AJ denied Appellant's January 13 Motion, and on that day the Agency finally filed its Answer and Agency File, three months after the date set by the Acknowledgment Order.

On January 22, 2010 the parties filed their pre-hearing exhibits, lists of witnesses, and statements of facts. On February 5, 2010, Appellant moved to postpone the hearing on the basis that his counsel was unavailable due to a conflict with litigation in another case pending before the United States Court of Appeals for the Federal Circuit. In the alternative, Appellant requested "a very short continuance" to allow time for Mr. McCarthy to prepare to represent himself, unaided by counsel, at the hearing. On February 8, 2010, the AJ denied the motion.

On February 11 and 12, 2010, the matter went to hearing. Due to the denial of his motion for continuance, McCarthy represented himself at the hearing *pro se*, whereas the Agency was represented by outside counsel, while the Agency's in-house attorney appeared, in addition, as "agency representative." Evidence at the marathon two-day hearing consisted of hundreds of exhibits and the testimony of witnesses that included Mr. McCarthy; Alfredo Riera, the Agency's Principal Engineer for Operations and its Acting Commissioner-Designate (now employed as Public Works Director at Fort Bliss Army Base in El Paso); Kevin Petz, the Agency's Human Capital Director; Colleen

Burns, the Agency's Chief of Acquisitions (now employed at the Small Business Administration in El Paso); Matt Medor, an Agency Computer Specialist (now employed at the Department of Justice in El Paso); Commissioner Bill Ruth (now retired); and, by videotape, Mary Brandt, Agency liaison to the State Department (now retired).

The ID states that this appeal is limited to a determination of whether the appellant was terminated in reprisal for whistleblowing covered by 5 U.S.C. § 2302(b)(8). Under the provisions of the Whistleblower Protection Act of 1989 (Whistleblower Protection Act or WPA), an employee who believes he was subject to retaliation because of a protected whistleblowing disclosure may seek corrective action through an IRA appeal with the Board.<sup>9</sup> Before filing an IRA appeal, the employee must first seek relief and exhaust proceedings before OSC on the particular personnel action alleged to be in reprisal for whistleblowing.<sup>10</sup> The Board has jurisdiction over an IRA appeal if the appellant makes nonfrivolous allegations that: (1) he engaged in whistleblowing activity by making a protected disclosure; and (2) the disclosure was a contributing factor in the agency's decision to take or fail to take a personnel action.<sup>11</sup>

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<sup>9</sup> See 5 U.S.C. § 1221(a); 5 C.F.R. § 1209.2 (2009).

<sup>10</sup> 5 U.S.C. § 1214(a)(3); 5 C.F.R. § 1209.2(b)(1) (2009).

<sup>11</sup> See *Yunus v. Department of Veterans Affairs*, 242 F.3d 1367, 1371 (Fed. Cir. 2001); *Rusin v. Department of the Treasury*, 92 M.S.P.R. 298, ¶ 12 (2002). Under 5 U.S.C. § 2302(b)(8), a protected disclosure is a disclosure of information which the employee reasonably believes evidences a violation of the law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health and safety. See *Grubb v. Department of the Interior*, 96 M.S.P.R. 377, ¶ 11 (2004). To establish Board jurisdiction over the IRA appeal, the appellant must also nonfrivolously allege that his whistleblowing activity was a contributing factor in the agency's decision to take or fail to take a personnel action. See 5 U.S.C. § 2302(a)(2)(A)(iv).

The ID finds that McCarthy raised nonfrivolous allegations that he made protected disclosures under 5 U.S.C. § 2302(b)(8), and that his disclosures were a contributing factor in the termination action. Additionally, the ID finds that McCarthy met his burden of establishing the Board's jurisdiction over his appeal by making such nonfrivolous allegations and by demonstrating that he exhausted his administrative remedies before the OSC.<sup>12</sup>

In reviewing the merits of an IRA appeal, the Board must determine whether the appellant proved by preponderant evidence that he engaged in whistleblowing activity by making a protected disclosure under 5 U.S.C. § 2302(b)(8),<sup>13</sup> and whether such whistleblowing activity was a contributing factor in an agency personnel action.<sup>14</sup> If the appellant meets his requisite burden of proof, then the burden shifts to the agency to

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<sup>12</sup> ID at 5-6.

<sup>13</sup> A disclosure is protected if a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the appellant could reasonably conclude that the actions of the government evidence one of the categories in section 2302(b)(8)(A). To establish that the appellant had a reasonable belief that a disclosure met the criteria of 5 U.S.C. § 2302(b)(8), he need not prove that the condition disclosed actually established a regulatory violation or any of the other situations detailed under 5 U.S.C. § 2302(b)(8)(A)(ii); rather, the appellant must show that the matter disclosed was one which a reasonable person in his position would believe evidenced any of the situations specified in 5 U.S.C. § 2302(b)(8). See *Schnell v. Department of the Army*, 2010 MSPB 67, ¶18 (2010).

<sup>14</sup> “An employee may demonstrate that a disclosure was a contributing factor in a personnel action through circumstantial evidence, such as evidence that the official taking the personnel action knew of the disclosure, and that the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action. Once the knowledge/timing test has been met, an administrative judge must find that the appellant has shown that his whistleblowing was a contributing factor in the personnel action at issue, even if, after a complete analysis of all of the evidence, a reasonable factfinder could not conclude that the appellant’s whistleblowing was a contributing factor in the personnel action.” *Schnell*, 2010 MSPB 67, ¶19 (*internal citations omitted*).



demonstrate, by clear and convincing evidence, that it would have taken the same personnel action in the absence of such disclosures.<sup>15</sup>

The ID assumes, *arguendo*, that McCarthy showed that he made protected disclosures and that the disclosures were a contributing factor in his removal, and thus proceeds directly to the issue of whether the agency has shown by clear and convincing evidence that, absent any protected disclosures, it would have removed him.<sup>16</sup> The ID concludes, however, that the Agency would have removed McCarthy absent protected disclosures, stating, “I find Ruth’s testimony to be more fully supported by the documentary evidence and, therefore, more credible.”<sup>17</sup>

In fact, the AJ ruled previously in this proceeding, and not merely *arguendo*, that Appellant’s disclosures were protected.<sup>18</sup> Additionally, the issue of contributing factor is easily decided on the record, not merely *arguendo*, by mere application of the knowledge/timing test alone. As such, the sole issue still to be determined under the WPA is whether the agency has met its burden of proof, by clear and convincing evidence, that it would have taken the same personnel action in the absence of such disclosures. Appellant contends that due to the Agency’s violation of due process, and its

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<sup>15</sup> Corrective action must be ordered unless the Agency demonstrates by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosures. 5 U.S.C. 1221(e)(2). 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 and is a higher standard than the preponderance of the evidence standard. 5 C.F.R. § 1209.4(d) (2009).

<sup>16</sup> ID at 7.

<sup>17</sup> ID at 21.

<sup>18</sup> See November 5, 2009 Order Denying Agency Motion to Dismiss (“I find that he has provided sufficient detail, including the specific provisions of law allegedly violated, to conclude that a disinterested observer could reasonably conclude that the described actions evidenced a violation of law, rule, or regulation.”)

extreme litigation misconduct, Appellant is entitled to judgment in his favor without ever reaching the merits issue, and that the Agency should be estopped from even asserting the claim. In any event, the record plainly does not support such a conclusion.

## **II. SUMMARY OF APPELLANT'S ARGUMENT.**

The ID must be reversed based on issues which required a ruling in McCarthy's favor before ever reaching the merits, but which the AJ never addressed – the violation of McCarthy's constitutional due process rights and the Agency's discovery misconduct and fabrication of evidence. With regard to the sole issue that the AJ did address, whether the Agency proved by clear and convincing evidence that it would have taken the same action absent the protected disclosures, the record requires a finding that it did not.

McCarthy's well-documented disclosures portray an Agency that borders on the criminal. While senior Agency officials help themselves to illegal pay raises, spy on their colleagues with remote surveillance equipment, and routinely abuse Agency staff, levees crumble, millions of dollars are siphoned off for projects unrelated to the Agency's mission, and millions of border residents are put at ever-greater risk of catastrophic injury to their health and safety.

Within three days of McCarthy's disclosures, he was peremptorily removed by lame-duck Commissioner Ruth, with no advance notice or opportunity to respond. Immediately thereafter, the Agency set about fabricating a paper trail to support its retaliatory action. Several allegedly contemporaneous records were created and secretly back-dated as fraudulent evidence that the Agency had a non-retaliatory basis for its action. Ruth even read from a "Daytimer" at the hearing, a document Appellant was denied access to, which Ruth admitted was not a routine business record, and which no

one seems to remember seeing Ruth carry at the Agency. Ruth's testimony, which the ID credits as being supported by documentary evidence, is in fact inconsistent even with the fabricated evidence in important respects. His claim to have created the various documents contemporaneously, by himself, does not withstand even a cursory comparison to the Agency's limited discovery responses, or to his writing habits.

Although neither McCarthy nor the Agency's own Human Capital Director were previously aware of its existence, a mysterious personnel document surfaced after McCarthy's removal that purports to classify McCarthy as both "at will" and probationary, thus doubly undeserving of constitutional due process. The Agency stonewalled the vast majority of the Appellant's discovery requests, including one involving the provenance of this document, but the AJ denied Appellant's multiple motions to compel responses to discovery and to sanction the Agency for its egregious misconduct.

Notwithstanding harmful error inherent in numerous procedural and evidentiary rulings that favored the Agency, it nevertheless produced no meaningful evidence in support of the personnel action. To begin with, the removal subsequent to disclosure was expressly predicated on McCarthy's prior internal disclosures of the same matters that achieved protected status when they were disclosed outside of the Agency. An Agency may not, consistent with the WPA, remove an employee merely by the artifice of premising the removal only on the internal disclosures, even though the protected external disclosures had already occurred.

Additionally, an agency cannot meet its clear and convincing evidence burden of proof by claiming that disciplinary action was based on the derogatory, disrespectful or

inappropriate nature of protected disclosures rather than their content.<sup>19</sup> Yet, such objections to the critical form, tone and impact of the disclosures is exactly what the removal here was based upon and what the ID approved as a legitimate ground for dismissal. Commissioner Ruth claimed in the removal letter that the legal memos demonstrated a failure to support him and other members of the Executive staff in a “constructive and collegial manner.” Even if true, which, as discussed below, it is not, this characterization of the opinions cannot render them a legitimate basis for discipline.

Further, the charge that the four opinions in question were unsolicited and not “collegial” is simply unsupported by the evidence. The ID embraces Ruth’s incredible testimony that he did not request the opinions. Yet a plain reading of Ruth’s own written disavowal of his request, together with all of the evidence of record, confirms that Ruth not only requested the opinions, but that he requested them as part of an Agency reorganization; that they were approved by the official appointed by Ruth to coordinate the reorganization before they were distributed to executive staff; and that even after McCarthy’s removal the Agency tried to hire a consultant to complete the reorganization recommendations.

The ID also adheres closely to the Agency’s dishonest portrayal of the opinions as divisive attacks on two executive staff members, Forti and Graf. In fact, the opinions are steeped in law and regulation, and judiciously applied to organizational efficiency and to avoidance of fraud, waste and abuse. To the extent that these officials’ own regrettable words or actions are cited therein, it is solely in this context, and McCarthy repeats nothing they have not themselves proudly shouted from the rooftops. It is also shocking

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<sup>19</sup> *Greenspan v. Veterans Admin.*, 464 F.3d 1297, 1303-1304 (Fed. Cir. 2006).

that the ID repeats the dishonest charge that McCarthy's recommendations to reorganize the Agency according to well-established functional principles is some kind of personal vendetta against two individuals, among many, who would adapt to a new structure.

The ID impermissibly tracks the Agency's attempt at hearing to expand the basis for its action, with Ruth citing three new reasons for removal, each of which was exposed as poorly prepared pretext. Ruth testified that the removal was partly motivated by an allegedly discourteous email, however, presented with the email he confessed that the objectionable words were not McCarthy's (they were Graf's).

Next Ruth testified that "the State Department" had told him it disagreed with McCarthy's legal opinion concerning Senate confirmation of the Commissioner, thus the removal was based on his alleged dissatisfaction with the quality of McCarthy's legal work. Then Ruth reluctantly read from the State Department report that concluded with a recommendation virtually identical to McCarthy's, in contradiction to Ruth's new claim.

Undeterred, Ruth testified that he decided to remove McCarthy on July 27, and not before, because McCarthy expressed concerns on that day about being excluded from a Recovery Act Oversight Committee. Ruth and Brandt first contended there was no such committee, then admitted it had met, originally with McCarthy, but that McCarthy was thereafter excluded by Brandt, Forti and Graf, and then the committee was dissolved by Ruth.

The Agency's strong retaliatory motive is evidenced, in part, by the extreme penalty of removal, absent any record of conduct or performance issues, together with the Agency's peremptory procedure and abandonment of any pretense of due process. The record is replete with statements by the Agency's Human Capital Director, immediately

following removal, that in fact it was retaliatory. Indeed, Mr. Petz ruminated openly concerning his fear that “I will be next” for cooperating with the OSC.

Finally, the evidence shows that Ruth took no disciplinary action against similarly situated executive officials, Graf and Forti, who were also involved in the removal decision, who have a perverse stranglehold on the management of the Agency, and who have a well-documented record of gross misconduct. Perhaps this is the greatest irony, that McCarthy is removed on a trumped up charge of not being collegial, while the Agency covers up the abuse and incompetence of his self-proclaimed antagonists.

The USIBWC is a relatively obscure independent Federal agency, with headquarters in El Paso, Texas, and led by a “commissioner” who is appointed by and serves at the will of the President. The Agency is responsible for administration of certain treaties with Mexico, joint maintenance of the 2,000 mile U.S.-Mexico boundary, construction and maintenance of flood control projects located mainly along the Rio Grande River, and joint operation of several international dams and wastewater treatment plants located in the States of Texas, New Mexico, Arizona and California.<sup>20</sup>

According to reports issued by the United States Department of State, which provides foreign policy guidance to the USIBWC, the Agency has been in continual chaos for several years, and continues to be “too vulnerable to management abuse.”<sup>21</sup>

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<sup>20</sup> See generally, [www.ibwc.gov](http://www.ibwc.gov).

<sup>21</sup> *Agency Exhibit XX*, at 6. The 2006 OIG Report states: “The USIBWC is out of the national limelight, but a major storm and flood could overwhelm the barriers and cause considerable damage. This would usher in bouts of finger pointing between Departments, agencies and jurisdictions concerned.” The Report continues, “The Agency is simply too small, too isolated, and too vulnerable to management abuse to continue without the protection and oversight of a major government department.” An earlier Report, in 2005, found, “Internal management problems have engulfed USIBWC,

Indeed, the USIBWC perennially ranks at the very bottom of all small Federal agencies when it comes to employee morale, and dead last when it comes to trust in Agency leadership.<sup>22</sup> The USIBWC itself acknowledged as much in a September 15, 2009, contract solicitation for reorganization assistance, that described the Agency's "rapidly declining indicators of human capital performance," caused by "a series of reorganizations that were not well planned out," resulting in "a structure that was not effective."<sup>23</sup>

In 2009, the Agency's normal annual budget of \$30 to \$40 million was supplemented by \$37 million in emergency flood control appropriations and another \$220 million in stimulus funding under the American Reinvestment and Recovery Act (ARRA or Recovery Act). The Agency was woefully unprepared for the task of undertaking a massive new levee construction project, let alone to carry out its routine operations and management responsibilities.

The situation was made more dire by ongoing internecine warfare among the executive staff. Principal Engineer Riera had taken over as Acting Commissioner in September, 2008, after Commissioner Marin was killed in a plane crash. Riera testified that executive officials Graf, Forti and Brandt undercut him at every opportunity, and prevented him from instituting any reforms. After Riera removed himself from consideration, President Bush appointed Ruth as interim commissioner, and Ruth took office on November 24, 2008. Riera and Human Capital Officer Petz had previously

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threatening its essential responsibilities for flood control and water management in the American Southwest." *Appellant Exhibit VVVV*, at 3.

<sup>22</sup> See <http://data.bestplacestowork.org/bptw/overall/small>.

<sup>23</sup> See *Appellant Exhibit KKKKK*.

interviewed candidates for general counsel, and the position was offered to McCarthy on December 12, 2008, after Commissioner Ruth took office.

Ruth was fully briefed by Riera concerning the Agency's management problems, but Ruth decided to avoid antagonizing Graf, Forti and Brandt. Indeed, Ruth allied himself with and essentially turned over management of the Agency to this "camp," as he has termed them, and gave them complete control over implementation of the Recovery Act. Although he included McCarthy in the membership of a Recovery Act Oversight Committee, he later dissolved the committee when the other members said they did not need or want McCarthy's legal advice.

To his initial credit, Ruth appointed Riera to head up a committee comprising all of the executive officials to consider recommendations for Agency reorganization. To his enduring discredit, Ruth would later disingenuously deny that he had ever requested reorganization recommendations, notwithstanding overwhelming documentary and testimonial evidence to the contrary. Among several such recommendations considered by the reorganization committee, under Riera's guidance, were two made by Graf, and two made by McCarthy. Graf's proposals were essentially to give himself complete control over agency policies and audits. At Ruth's specific request, McCarthy proposed reorganization to properly separate oversight of budget and contracts functions, and to establish minimum standards for the Agency's information management functions, respectively. Each of the executives was asked to comment on each proposal.<sup>24</sup>

McCarthy thus wrote four reorganization opinions – the four relied upon in his removal letter - two making his own proposals as requested by Ruth, and two

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<sup>24</sup> See, e.g., *Petz deposition* at 33-34 ("These are legal opinions and we were all asked to give our opinions. I said [to Ruth], Why would you be upset about these?")



commenting on Graf's proposals. One opinion, dated June 14, proposes separation of oversight responsibility for budget and contracts, citing a longstanding recommendation by the OIG;<sup>25</sup> a second opinion, also dated June 14, recommends that the agency's Chief Information Officer (CIO) should have at least minimal information technology qualifications and should report directly to the agency head, as required by law and regulation;<sup>26</sup> a third opinion, dated July 14, recommends against adoption of a proposal that would give Graf absolute power and control over internal agency audits, citing, *inter alia*, Graf's open declaration of hostility and bias toward certain executive staff and the programs they supervise;<sup>27</sup> and a fourth opinion, dated July 20, similarly counsels against another proposal by Graf to give him complete power and control over adoption of agency policies or "directives," noting *inter alia*, that the regulation claimed to require adoption of this proposal does not and never did exist.<sup>28</sup>

Each of McCarthy's four reorganization opinions was reviewed and approved in advance by reorganization committee chair Riera, before being distributed to the reorganization committee and to Ruth. Documentary evidence shows Riera's written comments and in some cases his own separate opinions. Each of McCarthy's reorganization opinions is legally accurate, and well-supported by citation to law and regulation. Yet McCarthy's reorganization opinions would later become the pretext for his July 31 removal, following his July 28 disclosures, allegedly for being insufficiently

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<sup>25</sup> *Appellant's Exhibit AAA.*

<sup>26</sup> *Appellant's Exhibit ZZZ.*

<sup>27</sup> *Appellant's Exhibit EEE.*

<sup>28</sup> *Appellant's Exhibit SS.*

collegial by making reorganization recommendations that Ruth now claims he did not request.

In addition to his four reorganization opinions, McCarthy issued dozens of legal opinions on a wide range of legal issues, with an increasing emphasis on his concerns about implementation of the Recovery Act.<sup>29</sup> For example, two opinions dated July 22, 2009, reiterated, respectively, his warnings that Agency plans to subsidize the construction of a border barrier would violate the Purpose Statute and the Antideficiency Act, and that construction of levees with architectural plans in which the Agency had no rights would create unnecessary and unwise legal liabilities.<sup>30</sup> Another opinion, dated July 23, 2009, and sent to the Office of White House Counsel as well as the Commissioner, reiterated a recommendation for Senate confirmation of the

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<sup>29</sup> See *Appellant's Exhibit F* – June 18, 2009 Memo to Commissioner summarizing dozens of legal opinions and reporting on the status of casework. The fourteen-page single-spaced document covered a period of six months, and included, *inter alia*, summaries of prior opinions concerning Senate confirmation of appointment of the commissioner; legal requirements for information management; solicitation of the first Recovery Act construction contract absent legal review, with specifications that cited to state rather than federal law and that identified the client as Hidalgo County rather than USIBWC; potential violation of the Antideficiency Act by cosmetic levee repairs at Presidio; liabilities created by unwise and unnecessary use of levee design work to which USIBWC held no rights; complaints of invasive computer monitoring; placing limits on electronic monitoring of employees; application of the Workplace Violence Prevention Program to gun-carrying executive official found threatening, cursing and spying on co-workers; unauthorized remote video surveillance of personnel offices by said executive officer; and personnel specialist's grievance charging Chief Administrative Officer with harassment and forcing employee to take unlawful personnel actions. Although all legal opinions were requested in discovery, only select opinions were produced by the Agency.

<sup>30</sup> *Appellant Exhibits PP* - July 22, 2009 McCarthy opinion regarding Antideficiency Act concerns in joint construction project with DHS; and *G* - July 22, 2009 McCarthy opinion regarding lack of privity of contract with design firm in levee construction.

commissioner's appointment, in compliance with the Appointments Clause of the United States Constitution.<sup>31</sup>

Increasingly concerned about fraud, waste and abuse, and pessimistic that Ruth would take any corrective action, McCarthy had begun in early July to work on a draft of his disclosures. Over the course of at least several weeks, he circulated drafts of his disclosures to Petz and Riera, who provided him with encouragement and added details to the disclosures. Riera even made extensive written comments on one draft.<sup>32</sup>

Developments during the last week of July culminated in McCarthy emailing his disclosures on the 28<sup>th</sup>. On July 27, Ruth had ordered McCarthy to finalize an interagency agreement that would obligate the Agency to subsidize the Department of Homeland Security's border barrier, notwithstanding the violation of the Purpose Statute and the Antideficiency Act.<sup>33</sup> On the same date, Ruth removed McCarthy from a committee formed to oversee implementation of the Recovery Act, and dissolved the

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<sup>31</sup> See *Appellant Exhibit EEEE* - July 23, 2009 McCarthy memo applying the Appointments Clause to the IBWC Commissioner

<sup>32</sup> See *Appellant Exhibit J* – July 22, 2009, draft disclosures w/ Riera comments. See also an earlier draft, Exhibit *UUU* and *VVV* (metadata for *UUU* indicates creation date July 7, 2009). Riera's written notations on the disclosures draft address topics including pornographic websites visited by Graf; computer surveillance and document manipulation; remote spying by Graf on personnel offices; unlawful pay and personnel actions; failure to separate budget and finance functions; potential Antideficiency Act violations and gross waste of funds at Hidalgo and Presidio; excessive and wasteful architectural engineering contract costs for S&B; Antideficiency violation at South Bay International Wastewater Treatment plant; abusive language and conduct by Forti and Graf; Forti directing subordinate IMD staff to erase evidence of manipulation; noncompliance with Federal Information Security Management Act (FISMA); Ruth failure to take appropriate actions despite being notified. Riera also recommends transferring IBWC technical and diplomatic duties to the Bureau of Reclamation and State Department, respectively.

<sup>33</sup> See *Appellant Exhibit HHHH*- July 27, 2009 Ruth email directing McCarthy to finalize the interagency agreement obligating IBWC to pay DHS costs that exceed \$1.75 million.

Committee, leaving the task to Forti, Graf and Brandt. A few days earlier, Ruth had ordered McCarthy to defer to Principal Engineer Merino on the matter of securing rights to the levee architectural designs; however, Merino had consistently argued over the course of four months against doing so, “in light of time constraints”, and only at McCarthy’s persistent urging did he finally take a first, tentative, reluctant and ineffectual step, on July 27.<sup>34</sup>

On July 28, 2009, Ruth issued a cryptic memo sent by email to the executive staff, stating that although he had requested McCarthy’s opinions on Agency reorganization, he did not actually want him to make recommendations on reorganization. Ironically, Ruth’s disingenuous disclaimer leaves the opposite impression, stating: “These memos were provided in respond [*sic*] to a request by me thru [*sic*] the Management Accountability Council (MAC) to review agency programs and determine what if any programs should be reviewed,” but that they “offered recommendations on reorganizations that were not requested.” Ruth concluded that “no reorganizations or organizational changes are contemplated at this time.”<sup>35</sup>

Within approximately 30 minutes of the time Ruth’s secretary sent his July 28 email, McCarthy had sent his 11 single-spaced pages of detailed disclosures of fraud, waste and abuse to five different federal agencies, simultaneously notifying Ruth, Riera and Petz that he had “no other recourse.” Immediately below is a summary of

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<sup>34</sup> See, e.g., *Appellant Exhibits AAAA* (March 30, 2009 emails from McCarthy stating that Agency must acquire architectural rights); *WWW, ZZZ, G, XXX, PPPP* (similar); *NNNN* (June 30 executive committee meeting minutes stating Merino and Forti decided not to pursue rights to plans being used “in light of time constraints following extensive internal discussions”); *QQQQ* (July 27 Merino email indicates he had yet to inquire about rights to use the plans).

<sup>35</sup> *Appellant’s Exhibit M* (memo dated July 27), L (email showing memo sent July 28).

McCarthy's protected disclosures; a comprehensive discussion including detailed citation to the record is found in Part III.7.

Agency officials solicited bids and issued a contract to construct Recovery Act levees with architectural designs in which USIBWC had no contractual rights and which cited to state rather than the required federal rules and standards; illegally subsidized a border barrier with Recovery Act funds intended solely for flood control; chose to build a "cosmetic" levee with \$37 million of emergency flood control funds to give the appearance of safety while covering up geophysical reports that the new levee will not withstand another flood; issued an \$88 million contract for expansion of a wastewater treatment plant months before Congress appropriated the funds, then covered up the knowing violation of the Antideficiency Act; conspired to conceal mismanagement of the \$220 million flood control project funded under the Recovery Act, making false and fraudulent reports to the State Department; refused to properly separate responsibility for oversight of budget and contract functions; illegally conducted secret surveillance of USIBWC personnel offices from a remote audio-video camera system; unlawfully conducted computer surveillance of USIBWC staff for improper reasons; intercepted, altered and destroyed official communications, while failing to comply with information management laws and regulations; made false and malicious reports to the Inspector General to undercut acting commissioner and principal engineer Riera; gave themselves illegal pay raises and otherwise improperly interfered in personnel matters; made vulgar and violent threats against agency staff, including even a death threat against a former Commissioner, creating a dangerous and hostile workplace.

Immediately upon learning of McCarthy's disclosures, Ruth flew to Washington, D.C., to try to head off the damage at the OIG, and to plot his revenge against McCarthy. There he met with Brandt, with the OIG, and for the very first time talked to State Department attorneys that he says he asked for legal advice.<sup>36</sup> Upon his return to IBWC offices in El Paso, Ruth huddled in his office with Forti and Graf,<sup>37</sup> who urged him to remove McCarthy, convincing him that McCarthy was "at will" and probationary, notwithstanding Petz's insistence to the contrary.

On the morning of July 31, Ruth told Riera that he was going to remove McCarthy that very day. When Riera suggested he reconsider, Ruth said "I thought about it long and hard last night, and this is what I have to do, and I don't want to discuss it."<sup>38</sup> Ruth was described as uncharacteristically "upset" that morning when he told Petz the same thing, saying "tell no one ... I'm not going to discuss this ... I've made my mind up." McCarthy described Ruth as "angry" when he handed him the letter of removal. McCarthy and Petz were "shocked" as Ruth directed Petz to escort McCarthy from the building.<sup>39</sup>

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<sup>36</sup> *ID* at 18 ("Ruth testified that it was not until his trip to Washington D.C. on July 29, 2009, that he was actually able to talk with Visek.")

<sup>37</sup> *See, e.g.*, Riera deposition at 16-17.

<sup>38</sup> Riera's testimony was undisputed. Indeed, he also reaffirmed his deposition testimony where he was asked twice whether he was sure that Ruth had said "last night," and he said he was sure. *See Riera deposition at p. 18.*

<sup>39</sup> In addition to the testimony of McCarthy and Petz at hearing, distorted or ignored in the ID, Petz also testified at his deposition that Ruth was "upset" on July 31 when he told Petz he was going to remove McCarthy. *See Petz deposition at 49* ("He was still upset. He said for me to tell no one. He said, I'm not going to discuss this. I've made my mind up.") *See also, e.g., Appellant Exhibit D* (Petz email, "Robert ... I was shocked on Friday. Felt like it was me the Commissioner fired.")

Ruth's letter of removal states the reason for taking the action was that McCarthy was not "collegial," as evidenced by the four legal opinions concerning Agency reorganization that Ruth falsely claimed he had not requested. Ruth's letter also used the same unusual phrase "no recourse," that McCarthy had used in his notice to Ruth that he had made the disclosures. It is undisputed that the removal decision, made effective immediately, was issued absent advance notice or opportunity to respond. The Agency contends McCarthy was a probationary and "at will" employee, thus not entitled to constitutional due process.

Notwithstanding this wishful "belt and suspenders" argument, the documentary evidence of record, together with the testimony of the Agency's Human Capital Director, Kevin Petz, establishes that there was in fact no probationary period, that McCarthy did not serve at the will of the Commissioner, and that no one had ever advised McCarthy to the contrary.<sup>40</sup>

In response to the IRA appeal, the Agency unleashed an avalanche of fabricated evidence and other litigation misconduct. The Agency's no holds barred defense of its removal action started with impermissible argument and evidence against Appellant's Motion for Stay, unlawfully citing to OSC rationale in declining to pursue the complaint, and fraudulently presenting three secretly-backdated meeting memoranda as

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<sup>40</sup> The probation issue is discussed further below and also with comprehensive citation to the record at part III.1. *See also Appellant Exhibit KKKKK, Navigating the Probationary Period after Van Wersch and McCormack*, a Report by the United States Merit Systems Protection Board, p. 20-21 (2005) ("In the excepted service, unlike the competitive service, there is no statutory requirement that there be a probationary or trial period for appointments.")

contemporaneous evidence of an independent decision to remove McCarthy.<sup>41</sup> The Order denying Stay explicitly relied on the above inadmissible and fabricated evidence submitted by the Agency, in addition to wrongly assuming that Appellant was probationary, in contrast to the only evidence of record. The Order also gave no weight to Appellant's sworn statements and documentary evidence, while accepting as true Agency Counsel's unsupported hearsay.

Thus emboldened, the Agency later filed more fraudulent documents, including at least two key pieces of fabricated evidence that the Agency deemed essential to its case. A typewritten memo dated July 23, 2009, was filed on November 23, 2009, and characterized as a contemporaneous record of a purported July 23 meeting at which Commissioner Ruth allegedly expressed disapproval of the same four reorganization opinions for which McCarthy was later removed.<sup>42</sup> The Agency and Mr. Ruth conceded at hearing that this document was in fact created on August 2, 2009, as indicated by computer metadata, three days after McCarthy's removal, and was not based on any contemporaneous record.<sup>43</sup>

Ruth still claimed that he created the document himself, with no notes or assistance, although he admitted he doesn't normally write, and testimony of Ruth and others established that his secretary handles even his email. A simple comparison to a document Ruth did write, the July 28 memo denying that he had requested reorganization recommendations, is like comparing night and day. The July 28 memo shows Ruth's true

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<sup>41</sup> See October 7, 2009, Agency Opposition to Motion for Stay.

<sup>42</sup> See Agency Opposition to Motion to Compel, November 23, 2009.

<sup>43</sup> See *Appellant Exhibit W*- July 23 Ruth memo re. alleged meeting with McCarthy, and metadata showing the document was created August 2.



writing style, replete with grammatical errors and circular logic (nearly a dozen errors in grammar, spelling, and punctuation in as many lines, with uncertain meaning), which does not at all equate to the style of the July 23 memo or the other back-dated meeting memoranda he claims to have authored, unaided.

The Agency also introduced a highly suspicious “SF 50” claiming that McCarthy was probationary and “at will”, yet conceded that McCarthy had never been given a copy of the document. Human Capital Director Petz testified that he did not request or approve the probationary or at will statements on the document, which included his signature stamp but not his own signature; that he had not seen the SF 50 prior to McCarthy’s removal; that at no point did Ruth have or even ask for a copy of an SF 50; and that Petz issued a corrected SF 50, with OPM approval, as soon as he became aware of the inaccurate information included on the SF 50 introduced into evidence by Agency Counsel.<sup>44</sup> The Agency declined to answer an interrogatory concerning the creation of this SF 50, including when it was created and by whom, with the bizarre objection that the information is irrelevant and “confidential.”<sup>45</sup>

Agency counsel thereafter filed a flurry of frivolous motions, but did not get around to filing the Agency File and an Answer to the Appeal until January 20, 2010, three months after the date set by the Acknowledgment Order, a mere two days before the deadline for Appellant’s pre-hearing submissions, and just three weeks before the hearing

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<sup>44</sup> The testimony of Mr. Petz is consistent with his deposition testimony, *e.g.* at pp. 15-20, 71-78. Petz had never seen the so-called original SF 50 prior to the removal, and he testified that Ruth hadn’t either. *See also Petz deposition at, e.g.* pp. 45-46.

<sup>45</sup> *See Appellant’s Renewed Motion to Compel Discovery and for Sanctions, Attachment B, Agency Response to Appellant’s First Set of Interrogatories and Document Requests* (December 10, 2009), Interrogatory 1.

was held, putting Appellant at a distinct disadvantage. Appellant could not even get the Agency to turn over a copy of his Official Personnel File (OPF), which is maintained in the IBWC headquarters, until nearly three months after he filed his IRA appeal.<sup>46</sup>

Similarly, the Agency withheld production of documents in response to the vast majority of Appellant's discovery requests and provided evasive responses to interrogatories, yet the AJ denied Appellant's multiple motions to compel and for sanctions.<sup>47</sup>

The Agency objected to virtually every document request, often with frivolous claims such as "Appellant has not made protected disclosures and therefore is not entitled to discovery regarding same" (made in response to a broad range of requests for Agency documents concerning McCarthy's disclosures). Numerous documents were deemed "confidential," "highly confidential," or "confidential and personal," including Federal employee salaries that are designated by federal regulation as public information, and documents previously published by the Agency on the internet, such as contract solicitations!

With regard to several secretly back-dated documents introduced as contemporaneous records by the Agency Counsel, the Agency simply declined to identify the source of each such document, including "the date and place it was created, and the names of each person who requested or assisted in its creation." The Agency refused to respond to requests for information concerning specific executive officials, objecting that "As the only Supervising Attorney and in a unique fiduciary relationship with the Agency as well as member of the Executive Staff, Appellant cannot establish that he was

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<sup>46</sup> *Id.*, Request for Production 1.

<sup>47</sup> Although this summary includes only a few specific citations to record concerning the Agency's abuse of discovery, a comprehensive discussion is set forth below, with detailed citation to the record, at part III.2.

similarly situated to any other person at the Agency in 2009.” The Agency also refused to produce any contemporaneous documents relating to its abrupt decision on August 3 to change Appellant’s termination date from July 31, 2009 to August 28, 2009, described by Petz as an apparent attempt by Ruth to belatedly provide the notice period during which an employee would normally have an opportunity to respond.<sup>48</sup>

After stalling for months, the Agency produced a paltry number of requested documents, padded with voluminous extraneous and duplicate material, and excluding numerous documents the Agency had specifically agreed to produce. Although most of the documents that were provided were in electronic form, very few included the requested and required metadata. At this point, in response to one of Appellant’s multiple motions to compel, the Agency moderated its strategy of denial while reverting to one of deception, refusing to produce any more documents in the manner requested and in the manner that had been established and agreed upon between the parties, insisting instead that any additional production would only be made in response to requests repeated in person by Appellant’s counsel at Agency headquarters, presumably on bended knee.

The Agency’s new demand was limited to a narrow category of documents, and was explicitly made “subject to” a long list of standing objections. The new demand, presented as an “offer,” was coupled with another impermissible demand that Appellant’s counsel “come prepared to identify with particularity the documents requested,” and it also specifically excluded anything the Agency might deem “privileged,” although the Agency refused to provide a privilege log.

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<sup>48</sup> See, e.g., *Petz deposition* at 101 (“So someone told him, I guess, that you need to give him 30 days’ administrative leave.”)

Notwithstanding its extensive litigation misconduct, the Agency failed to prove by “clear and convincing evidence” that it would have removed Appellant in the absence of his protected disclosures. Ruth’s stated reasons for taking the action were extremely weak, amounting to an unsupported allegation that four legal opinions recommending Agency reorganization were not “collegial,” and had not been requested by Ruth. Although Ruth denied it, overwhelming documentary evidence and testimony leave no doubt that the opinions were in fact requested as part of an Agency reorganization, and that drafts of McCarthy’s opinions were reviewed and approved in advance by the very official named by Ruth to oversee the reorganization, Mr. Riera.

Fearing that it would undercut Ruth’s false claim that he had not requested McCarthy’s reorganization recommendations, the Agency even attempted to cover up evidence that it later sought bids for an outside contractor to complete the reorganization recommendations, after McCarthy was removed.<sup>49</sup> Although published on the internet, the Agency withheld in discovery the requested solicitation for bids. Ironically, the reorganization contract solicitation was eventually cancelled due to “cost” concerns, while the Agency chose instead to spend over \$100,000 (as of the hearing), on a \$450 per hour law firm with a reputation for advising its clients to use illegal tactics.<sup>50</sup>

It is no less than astonishing that the ID credits Ruth’s testimony as being allegedly supported by the documentary evidence, when on virtually every issue the documents contradict his testimony (either directly, as in the case, *e.g.*, of the reorganization opinions, e-mails, State Department agreement with McCarthy’s opinions,

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<sup>49</sup> See *Appellant’s Exhibit KKKKK*- solicitation published on *fedbizopps* (September 15, 2009).

<sup>50</sup> See Purchase Order and partially redacted Retainer Agreement attached hereto.

Ruth's own "meeting memorandums", and the Agency's limited discovery responses; or by implication, where the Agency's documents are shown to have been fabricated and admittedly back-dated in a secret attempt to give credibility to Ruth's testimony). For example, the ID, at 14, states that Ruth testified that not only did he not request reorganization recommendations; he didn't even request any of the opinions that contained those recommendations! This claim, actually embraced by the ID as credible, is in direct contradiction to Ruth's admission in his own July 28 memo that "These memos were provided in respond [*sic*] to a request by me thru [*sic*] the Management Accountability Council (MAC) to review agency programs and determine what if any programs should be reviewed [*sic*]."

The ID states that McCarthy's reorganization opinions were "divisive," citing Ruth's testimony that Forti had filed a grievance against McCarthy accusing him of "bullying behavior" (not coincidentally echoing the language of a grievance that had been filed against Forti, accusing her of, among other things, "bully behavior").<sup>51</sup> Whereas the ID accepts this testimony at face value, the so-called grievance actually demands the "immediate removal of Alfredo Riera, Kevin Petz and Robert McCarthy from their positions," accusing all three of "conspiring" to damage Forti's reputation. Forti's allegation is explicitly "based on your [Ruth's] personal validation that you did not approach nor solicit from the above mentioned individuals their critical examination of Administration Department." Ruth and Forti both knew, of course, that was not true.

Suspiciously, Forti's alleged grievance is unsigned, not on letterhead, and was never made known to McCarthy (or for that matter to Petz or Riera) until after his

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<sup>51</sup> ID at 16, citing *AF Tab 38, subtab 4II*.

removal. Finally, the document was the subject of discovery requests that the Agency, in its usual manner, refused to grant. Specifically asked to produce any documents related to the Forti grievance, including metadata, the Agency responded that it is “not relevant.”<sup>52</sup> Obviously, if it is not relevant for purposes of discovery, as deemed by both the Agency and the AJ, then it certainly cannot be relevant for any other purpose, least of all to support a claim that McCarthy was not “collegial.”

The ID’s near-sycophantic allegiance to the Agency’s claims extends to the Agency’s misrepresentation of the opinions in question, in an attempt to portray them as not “collegial.” The ID simply adopts the Agency’s characterization of the opinions, by blaming McCarthy for simply describing the facts and the law. McCarthy is not the one who is guilty of “invective,” however, for reciting the actual content of Graf’s poisonous words, in the context of citing Federal regulations that prohibit one who has expressed bias toward a program from then being given authority to audit that program!<sup>53</sup>

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<sup>52</sup> See *Appellant’s Objections and Supplements to the Summary of Status Conference*, issued on January 15, 2010 (January 21, 2010), Attachment B, *Agency Response to Appellant’s First Set of Interrogatories and Second Document Requests*, request 13.

<sup>53</sup> The opinion in question is actually quite restrained in that regard, citing only a very narrow set of Graf’s biased remarks, where in a widely distributed email he cited “repeated failures of the current executive staff to step up and exercise true leadership,” stating “the current executive staff, as a group, does not come close to executive staffs in terms of earning trust and confidence in leadership,” that executive staff members are “irresponsible” and “dysfunctional”, and that, in regard to Mr. Petz in particular, “Speaking with ‘the manager involved’ has been a ridiculous waste of time and effort in the past,” because Petz “will pretend to listen to other viewpoints and then proceed to do whatever he wants.” Although not mentioned in McCarthy’s reorganization opinions, the undisputed evidence of record establishes that Graf also threatened to have the late Commissioner Carlos Marin assassinated because he wouldn’t give Graf a promotion; that Graf called Riera “the devil,” a “motherfucker” and “a son of a bitch,” for the same reasons; that in a confidential memo to Ruth, concerning a personnel matter, he mischaracterized McCarthy and Petz as “one small segment of the executive staff ignoring an Agency Directive and once again attempting to control a management action

Nor did McCarthy refer to Forti as a “mid-level administrator who does not possess these core [IT] competencies,” as was apparent from McCarthy’s testimony. The document itself clearly shows the reference was to a position (not to a person, and certainly not to Forti) of IT supervisor, and was followed by a caution against filling the position of CIO with “an administrator who may possess these competencies but whose primary duties lie elsewhere”. To the extent this is considered a reference to Forti, then it is indeed an overly generous one. Forti in fact served as Chief Administrative Officer, Budget Officer, and Chief Information Officer, although the Agency does not deny that she is, as Medor testified, “IT ignorant.”

Similarly, the ID blindly adopts the Agency’s criticism of McCarthy for suggesting that the budget officer should not supervise contracts. The ID and the Agency again present this opinion as an attack on Forti, when the document itself is focused not on whether any individual is qualified or competent to perform multiple tasks but whether combining administrative positions creates, rather than resolves organizational conflicts of interest.<sup>54</sup> Further, the ID and the Agency falsely portray this as the structure recommended by the OIG, conveniently ignoring the fact that the contracts officer still reports to the budget officer, the exact situation condemned by OIG. Indeed, the ID also

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at the exclusion of other, more qualified management officials”; that Graf frequently visited pornographic websites from his office, where he also oversees the EEO function. Graf’s vitriolic attacks on other executive staff are set forth elsewhere herein with detailed citation to the record.

<sup>54</sup> The opinion does not mention, for example, that Forti lacks the training to perform her job, and has given herself illegal pay raises; that Forti abuses contracts and budget staff; that Forti is incompetent to supervise contracts; and that Forti has been directly responsible for violating and covering up violations of the Antideficiency Act, with Ruth’s complicity; all of which is established by undisputed testimony and evidence introduced at the hearing, including testimony of former Contracts Chief Burns and a written investigative report from an outside consultant.

fails to mention Ruth's testimony that he has "no problem" with the budget officer supervising contracts, the very definition of "invitation to fraud, waste and abuse" the OIG and McCarthy both sought to avoid.

McCarthy's opinion essentially recommends that the budget position at long last be filled with a budget supervisor, five years after OIG recommended it, and had been told it was done. McCarthy's opinion does not say that once the position is filled, that both contracts and budget must report to the Commissioner, as falsely stated by the Agency and the ID. Rather, the opinion concludes by embracing the OIG recommendation that budget and contracts "remain truly autonomous" from one another and that they "separately" report to a chief executive officer or the commissioner, but that contracts not continue to report to the budget officer, no matter how many more fancy titles the budget officer is given.<sup>55</sup>

With regard to McCarthy's legal opinion on Graf's proposal to be given total control over audits, McCarthy is falsely charged by Ruth, and in the ID, of accusing Graf of being unethical and incompetent. Indeed, the ID, at 21, goes further, alleging "The appellant did not just comment on the proposal, but made a personal attack on the proposing staff member and then recommended that all his duties be removed." That is simply false. In fact the opinion merely considers the proposal in the context of the very regulations that Graf falsely claims *mandate* adoption of his proposal. The opinion cites Graf's own actions and words to show that federal regulations, excluding a phantom

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<sup>55</sup> See *Appellant's Exhibit AAA* ("My legal opinion is that the OIG recommendation of 2005 should be implemented without further delay, and that additional steps should be taken to ensure that Budget and Contracts functions remain truly autonomous and separately accountable to the Commissioner or to a qualified chief executive officer or deputy commissioner.")



regulation that Graf invented, would ethically and legally prohibit him – or anyone else who has already condemned the programs he proposes to audit - from performing the duties he sought to have assigned to him. Nor is McCarthy the first to suggest that audit and other functions be assigned to more appropriate functional areas, a proposal that had been pending since the prior administration and was actively promoted by Riera, the head of the reorganization committee. Nor would Graf be left with no duties; the Federal government is not organized around individuals – he would have the duties assigned to him under whatever organizational structure is adopted.

McCarthy is not to blame for being the bearer of bad news for Graf and Forti. Nor is it appropriate for the Agency’s General Counsel to look the other way and ignore fraud, waste and abuse in order to preserve the appearance of “collegiality.” Obviously, that has been the practice at USIBWC for many years, and we see where that has led, to “chaos.” Ironically, for all its hand-wringing about McCarthy’s alleged criticisms of the Agency, his opinions were confidential and their distribution was limited to the executive staff. Other Agency officials, meanwhile, have ham-handedly advertised the Agency’s incompetence on the internet.

Immediately after removing McCarthy, purportedly for making allegedly unsolicited reorganization recommendations, Agency officials who are purportedly so sensitive and concerned about their reputation blithely announced to the world that the USIBWC has undergone “a series of reorganizations that were not well planned out,” resulting in “a structure that was not effective” and “rapidly declining indicators of human capital performance,” requiring a consultant to come in and reorganize the Agency! Of course that announcement was quietly cancelled when the irony hit home,

and the Agency unsuccessfully attempted to cover-up the evidence. As far as we know, no one was removed for the non-collegial blunder.

Anticipating the weakness of the stated reasons for removal, but declining to be restricted to its original charge, the Agency attempted at hearing to bulk up its case by identifying three new reasons for removal. With regard to a legal opinion in which McCarthy had recommended Senate confirmation of the commissioner's appointment, both Ruth and Brandt testified under oath that the State Department had told them the opinion was wrong, when in fact it is virtually identical to the State Department's own written opinion on the topic, as proven by documentary evidence, and as ultimately conceded by Ruth under cross examination. Yet this non-controversial opinion, supported by the State Department and currently under review at the White House, forms a significant part of the rationale offered in the ID as evidence in support of the removal action. The ID does not attempt to reconcile Ruth's knowledge of the State Department's actual position with Ruth's and Brandt's sworn testimony that the OIG told them they disagreed with McCarthy's opinion.<sup>56</sup>

In any event, the quality or correctness of McCarthy's legal opinions is not at issue, as the stated basis for removal was an alleged lack of collegiality, and specifically four opinions on Agency reorganization. The second newly-identified action claimed to support removal at least returns to the issue of collegiality, although it clumsily attempts to assign to McCarthy certain non-collegial remarks he never made. According to Ruth's sworn testimony, he became upset with McCarthy over allegedly inappropriate remarks

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<sup>56</sup> ID at 10, 14, 21. *See Appellant Exhibit EEEE* July 23, 2009 McCarthy memo applying the Appointments Clause to the IBWC Commissioner; *VVVV* March 2005 OIG Inspection Report, e.g. Recommendation 2 at 51.

in an email exchange. In fact, when presented with the e-mail he cited, Ruth conceded it included no inappropriate remarks except those made by Graf, who had launched a vitriolic and wide-ranging attack on the competence and integrity of his fellow executive staff members. Again, the ID mentions neither Ruth's false testimony, nor even Graf's intemperate, highly unprofessional, abusive and "non-collegial" remarks.<sup>57</sup>

The third belatedly-identified reason for the removal action, and purportedly the one true reason according to Ruth's sworn testimony, was McCarthy's July 27 objection to being excluded from a committee responsible for reporting to the State Department on the Agency's Recovery Act implementation. It is difficult to classify this new alleged reason for removal as evidence of non-collegiality on McCarthy's part, when it involves a scheme to exclude him from a committee to which Ruth had appointed him. As reflected in the ID, Brandt and Ruth testified the committee didn't even exist, yet in fact both eventually acknowledged on cross examination that McCarthy actually had been appointed to the committee, that he was allowed to participate in the first committee meeting, a videoconference with the OIG that was set up by Brandt herself, and that he was ultimately removed from the committee by Ruth, after being informally excluded by Forti, Graf and Brandt. In the end, Ruth, McCarthy, Brandt, and Riera all testified that Ruth in fact dissolved the committee after McCarthy brought up the issue of his exclusion. Yet again, the ID is silent about the inconsistencies in the testimony of Ruth and Brandt, embracing this new theory that the removal decision came about on July 27,

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<sup>57</sup> The ID cites Ruth testimony that in April, 2009, he became concerned about "exchanges of inappropriate e-mails between the appellant and other executive staff members." *ID at 13*. See *Appellant's Exhibits E and UUU* (March 31 – April 1 emails).

due to a disagreement over the Recovery Act Committee, which they say did and didn't exist, before it was dissolved.

Assuming, *arguendo*, that Ruth actually decided to remove McCarthy as a result of his objection to being excluded from the Recovery Act Committee responsible for reporting to the State Department, the implication is that Ruth feared McCarthy's ongoing disclosure of the Agency's fraud, waste and abuse through his participation in the committee. Indeed, McCarthy testified that he told the OIG at the first committee meeting that it should aggressively monitor the Agency, and not defer to internal audits, as the other members of the committee urged. (The Agency refused to produce in discovery a copy of a misleading memo provided by the other committee members to the OIG, over McCarthy's objection.) McCarthy's disclosures make clear that his objection to being excluded from the committee was that the committee was covering up fraud, waste and abuse, and making false reports to the State Department.

Similarly, the Agency's belated claim that McCarthy was removed, in part, for his opinion on Senate confirmation of the appointment of the commissioner reflects Ruth's irritation that the opinion had been sent to the State Department months earlier. Even the reorganization recommendation concerning budget and contracts had been sent to the State Department, according to both Ruth and Brandt, and thus became a source of irritation and a cause for retaliation. Thus, the Agency's ever-shifting claims regarding its basis for removal, weak as they are, provide only alternate and cumulative retaliatory motives.

Tellingly, the new claim that the Recovery Act Committee issue that arose on July 27 was the real reason for the removal finds no support anywhere in the carefully laid

paper trail of back-dated documents that had been intended to show an earlier intent. That plan was compromised when McCarthy uncovered metadata that showed the documents were fraudulent, and had been fraudulently presented in evidence. The ID, of course, is completely silent on the fabricated evidence, even the July 23 meeting memo that was secretly backdated, as admitted by Ruth when confronted with metadata.

Indeed, the ID even credits a July 18 document purported to be “a draft” of the removal letter created on that date by Ruth, although Ruth couldn’t identify it as such until Agency counsel finally put the words in his mouth; although the metadata the Agency provided appears to describe something else; although it is entitled “July 20 meeting with Robert McCarthy”; although the writing style is distinctly not Ruth’s; and although Ruth doesn’t even claim to have decided to remove McCarthy until July 27!

Uncertain it could rely on the fabricated documents showing a plan to remove McCarthy, the Agency hatched the July 27 story instead, but did not give up entirely its reliance on the fabricated documents, leaning heavily at the hearing on Ruth’s “Daytimer,” as a purported record of his prior consideration of removing McCarthy. Ruth even perused the “Daytimer” at the hearing, although the Agency had adamantly refused to produce it in discovery, with the AJ’s blessing. Yet this attempt to lend credibility to the earlier timeline was again exposed, since Petz, who met almost daily with Ruth (ID at 8), testified he’d never even seen the allegedly ubiquitous “Daytimer”. Indeed, Ruth confessed that the “Daytimer” contained only a very selective record of meetings, and conceded that he did not routinely make records or put anything in writing.

Yet the ID gives the bogus Daytimer a sheen of credibility, noting neither Petz’s testimony nor Ruth’s admission that the Daytimer was not a routinely kept record. Ruth

even admitted that the fictional July 23 meeting, curiously, was not recorded in the Daytimer. (We have to take Ruth's word on this, of course, because McCarthy was not allowed to see the Daytimer, or even any page or date on which such events allegedly occurred, unless the Agency had decided those pages would be helpful to its case.) Incredibly, the alleged record of a July 20 meeting is deemed definitive by the ID, which expresses no concern about the authenticity of the neatly lettered entry, or the corresponding typed memo, that Ruth testified he created himself, on that date, although the Agency admits in discovery was created sometime after that date, and for which there is, mysteriously, no metadata.

The extreme penalty of removal, absent any record of conduct or performance issues, together with the Agency's peremptory procedure, also demonstrates retaliatory motive. There are only two sections of Federal law that authorize an Agency to take an adverse action against a non-probationary Federal employee for poor performance, 5 U.S.C. §§ 4303 and 7513, both of which require the Agency to provide a notice of proposed action 30 days before any action can be taken, and a reasonable opportunity to reply before a decision is made.<sup>58</sup> Under 5 CFR 315.804, termination of probationers for unsatisfactory performance or conduct, the Agency must establish that the employee is probationary, which the Agency failed to do, thus that section could not apply. Here, the Agency declined to identify the source of authority for its action, using an unprecedented procedure in direct contravention of Agency practice as described and urged by the Human Capital Director.

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<sup>58</sup> See MSPB report, *Addressing Poor Performance and the Law* (Sept 2009).

Despite its best efforts, the Agency simply could not hide the raw evidence of retaliation. In fact, so pervasive was knowledge of Ruth's retaliatory motive that even the Agency's Human Capital Director could not help but cringe when he saw the notice of disclosures, instinctively assuming a retaliatory dismissal: "I thought -- at the time when I saw the e-mail, I thought, Oh, my gosh. I hope he doesn't get fired for this."<sup>59</sup> Indeed, Petz acknowledged in an email to McCarthy that the removal was retaliatory: "You tried hard to straighten out this office and got fired for it."<sup>60</sup> Petz even expressed fear that he himself might be the subject of retaliation for simply cooperating in the OSC investigation, fretting in an email to McCarthy that, "I will be next."<sup>61</sup> So afraid of further retaliation by Ruth was Petz that even to deliver such straightforward business as a change in termination date he felt compelled to use his home computer and email address.<sup>62</sup>

Finally, the evidence shows that Ruth took no disciplinary action against similarly situated executive officials, Graf and Forti, who were known by Ruth to be genuinely non-cooperative and non-collegial, if not downright criminal. There is evidence that these same officials were also involved in the decision to remove McCarthy, as testified to by Riera (who said they appeared to be lobbying Ruth) and Petz (who told OSC that Brandt was the source of the July 31 removal letter). Although the Agency again refused

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<sup>59</sup> See *Petz deposition* at 53.

<sup>60</sup> See *Appellant Exhibit D*.

<sup>61</sup> See *McCarthy Deposition Exhibit 20*.

<sup>62</sup> See *Appellant Exhibit B*.

discovery regarding these individuals, the evidence shows that Ruth even covered up for these executive staff while going after only McCarthy, the whistleblower.

Undisputed evidence shows that Forti routinely abused staff with foul language and threats such as “don’t blow smoke up my ass”; and that she referred to legitimate staff concerns about computer monitoring as the ravings of “paranoid employees.” A personnel specialist’s grievance against Forti described her “patterns of demands that laws and regulations be ignored, lack of respect for the Privacy Act, bully behavior and harassment against me and others.” An external investigation found Forti had obtained unlawful salary increases and lacked training needed to do her job, although Ruth covered it over for her more than four years later. Former Contracts Chief Burns testified Forti was verbally abusive, incompetent to supervise contracts, that she routinely violated laws and regulations, and that she even required staff to baby-sit her young son every day. Computer Specialist Medor testified that “Chief Information Officer” Forti was “IT ignorant.” McCarthy, Riera and Petz also testified to Forti’s abusive character.

Undisputed evidence established that Graf threatened to have the late Commissioner Carlos Marin assassinated because he wouldn’t give Graf a promotion; that Graf called Riera “the devil,” a “motherfucker” and “a son of a bitch,” among other things, and that Graf threatened he was going to “get him”; that Graf openly attacked Petz, in writing copied to the entire executive staff and Ruth, with the allegation that Petz “will pretend to listen to other viewpoints and then proceed to do whatever he wants;” that Graf openly displayed his hostility toward executive staff by, for example, his display at staff meetings of a book entitled “How to Work with Jerks”; that Graf falsely portrayed McCarthy and Petz, in a memo to Ruth regarding a personnel matter, as “one



small segment of the executive staff ignoring an Agency Directive and once again attempting to control a management action at the exclusion of other, more qualified management officials”; that Graf sent emails to the entire executive staff and Ruth, in which he referred to the entire executive staff as “irresponsible” and “dysfunctional,” stating that they were the reason for employees’ lack of “trust and confidence in leadership”, and that he alone was somehow not part of “the executive staff’s failed leadership.”

Testimony established that Graf routinely visited pornographic websites from his office computer. Consistent with this behavior, Graf was assumed by “everyone” at the Agency (according to a Petz email) to have been the author of a horrific pornographic post on a public newspaper website, libeling Human Capital Director Petz, Principal Engineer/Acting Commissioner Riera and General Counsel McCarthy.<sup>63</sup> Even after Petz testified that Graf had threatened to have Commissioner Marin assassinated, and after Agency Counsel acknowledged Graf’s death threat (chalking it up to a twisted sense of “humor”), Ruth persisted in denying that Graf had made any such comment.

Ruth actively covered up Forti’s (and his own) violation of the Antideficiency Act, hid documentary evidence of her unlawful and abusive behavior that Burns had given to him, covered over Forti’s illegal pay raises, refused to allow any question about her credentials, blocked every attempt to investigate her destruction of electronic records, and declined to intervene in her routine use of abusive, threatening and profane language and threats, even as she drove away competent professional employees, such as Burns.

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<sup>63</sup> See *Appellant’s Exhibit W* (libelous publication); see also *Appellant’s Exhibit A* (Petz email).

Similarly, Ruth refused to permit any investigation of Graf's secret surveillance of the personnel office; his abusive, profane and threatening conduct; and his false citations to federal regulations in attempts to increase his authority. Ruth even falsely attributed to McCarthy Graf's abusive attacks on his executive colleagues!

McCarthy has proven by a preponderance of the evidence that he made protected disclosures that he reasonably believed evidenced violations of laws, rules, or regulations; gross mismanagement; gross waste of funds; abuse of authority; and substantial and specific dangers to public health or safety. Similarly, he established that his disclosures were a "contributing factor" in the personnel actions taken against him.

The record does not support the conclusion in the ID that the Agency demonstrated by "clear and convincing evidence" that it would have taken the actions in the absence of McCarthy's protected disclosures, a finding that is based on fabricated documentary evidence. The credibility finding made in the ID regarding Ruth's testimony about McCarthy's performance is explicitly based on the same fraudulent documents, and is due no deference by the Board.

On the contrary, the record demonstrates McCarthy's exemplary performance, and shows that he has held numerous positions of great responsibility and trust, winning honors and awards throughout his career, including, in 2008, the Oklahoma Bar Association's "Courageous Lawyer Award." The genuine documentary evidence – as opposed to the fraudulent documents fabricated by the Agency - together with the truly credible testimony of McCarthy, Riera and Petz – as opposed to the perjured testimony of Brandt and Ruth - shows that McCarthy was congenial and supportive at all times, in stark contrast to executive staff members Graf and Forti. Indeed, Petz conveyed the true

feelings of the Agency's staff in hoping for McCarthy's swift return, "as most all employees are."<sup>64</sup>

The record plainly establishes that the Agency violated the WPA and McCarthy's constitutional right to due process; committed reprehensible discovery misconduct; and perpetrated fraud upon the tribunal with its use of fabricated evidence. The AJ abused his discretion in denying Appellant's motions to compel discovery and sanction the Agency for failing to timely respond to the appeal, for widespread discovery misconduct, for unlawful and unethical fabrication of evidence, and for committing fraud upon the tribunal. Far from sustaining McCarthy's removal, the record requires that the Board return him to the *status quo ante*,<sup>65</sup> and refer for disciplinary action the Agency officials and Agency counsel responsible for the reprehensible conduct described herein.

### **III. STATEMENT OF HARMFUL ERRORS, ABUSE OF DISCRETION, AND ERRONEOUS INTERPRETATIONS OF STATUTES AND REGULATIONS IN THE ID.**

The ID assumes, *arguendo*, that McCarthy, the Agency's General Counsel, made protected disclosures of fraud, waste and abuse on July 28, 2009, and that the disclosures were a contributing factor in his removal, effected by letter dated July 31, 2009. The ID concludes, however, that the Agency has shown by clear and convincing evidence that, absent any protected disclosures, it would have removed McCarthy.

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<sup>64</sup> See McCarthy deposition Exhibit 20, August 26, 2009 email from Petz.

<sup>65</sup> Generally, an appellant who prevails in an IRA appeal is entitled to status quo ante relief that includes the following: cancellation of the retaliatory personnel action; the appellant's reinstatement to his former position or to another substantially equivalent position, as appropriate; back pay; interest on back pay; and other employment benefits that he would have received had the action not occurred. 5 U.S.C. § 1221(g)(1); *Armstrong v. Department of Justice*, 107 M.S.P.R. 375, ¶ 34 (2007).

An initial decision must identify all material issues of fact and law, summarize the evidence, resolve issues of credibility, and include the AJ's conclusions of law and his legal reasoning, as well as the authorities on which that reasoning rests.<sup>66</sup> Here the AJ failed on all counts. To begin with, numerous material issues of fact and law are completely ignored in the ID, including but not limited to the Agency's violation of constitutional due process; the Agency's falsification of federal records, fabrication of evidence and perpetration of fraud upon the tribunal; and the Agency's egregious discovery misconduct. Any one of these issues alone requires the invalidation of the Agency action, as well as the most severe sanctions against the responsible Agency officials and Agency Counsel.

Appellant respectfully requests the Board to enter an Order that reverses the ID and enters judgment for Appellant on the basis that the Agency violated Appellant's constitutional due process rights in taking its actions without proper notice and opportunity to respond; that the AJ abused his discretion in failing to severely sanction the Agency for its fabrication of evidence, fraud upon the tribunal, falsification of federal records and discovery misconduct; that the AJ abused his discretion and made erroneous interpretations of statutes or regulations; that the appeal was wrongly decided based on the evidence in the record; that the AJ made erroneous rulings limiting the issues and the evidence in the record; that there is new evidence, which was previously unavailable despite due diligence, that supports a different outcome; that the ID was based on an erroneous interpretation or application of the statutory requirements governing the weight of the evidence; that errors in the way the appeals proceeding was handled denied

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<sup>66</sup> *Spithaler v. Office of Personnel Management*, 1 M.S.P.R. 587, 589 (1980).

Appellant the opportunity to fairly present his case; that the AJ abused his discretion in denying Appellant's motion to postpone the hearing either to permit Appellant's counsel to attend or to permit Appellant time to prepare for self-representation; that the Agency's decision was not in accordance with law; that there was harmful error in the application of the Agency's procedures in arriving at its decision; and that the Agency's decision to remove Appellant was based on a prohibited personnel practice described in 5 USC section 2302(b).

Appellant also respectfully requests the Board to enter an Order that the Office of Special Counsel shall investigate and bring appropriate disciplinary charges against Agency officials and Agency counsel responsible for the misconduct described herein.

**1. The AJ committed harmful error by failing to invalidate the Agency action due to the Agency's violation of Constitutional Due Process.**

Mr. McCarthy was removed from a position as a permanent, non-probationary employee, in violation of constitutional due process. This issue is addressed nowhere in the ID, despite overwhelming evidence that McCarthy was non-probationary, and persistent urging by McCarthy that the AJ address the due process issue. Instead, the ID ducks the issue entirely by making an irrelevant reference to another finding in another appeal, that McCarthy did not meet the definition of "employee" under 5 U.S.C. § 7511, and that the Board lacks jurisdiction under that statute to hear a removal appeal. The AJ ruled in DA-0752-10-0044-I-1 that Appellant had no statutory rights to appeal under chapter 75 of Title 5, because he had not been continuously employed for two years at the time of the decision. This appeal, obviously, is not brought under chapter 75, but under the Whistleblower Protection Act, 5 U.S.C. § 1221(a). There is no requirement under the WPA that an employee meet the definition of employee required to establish jurisdiction

under chapter 75, nor indeed is there any requirement that an employee establish whether he is probationary or non-probationary to invoke WPA jurisdiction. The WPA protects whistleblowers from retribution regardless of their probationary status, or whether they have been employed continuously for two years or two days.

The significance of McCarthy's non-probationary status lies not in his statutory right of appeal, but rather in the United States Constitution Fifth Amendment guarantee of Due Process, which states that no person shall be "deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation." The United States Supreme Court has consistently applied these constitutional protections to tenured government employees.<sup>67</sup> The Supreme Court has held that due process *must* be given to a non-probationary public employee when, absent probationary status, the employee acquires a property interest in continued employment.<sup>68</sup> The procedures for depriving that property interest are governed by the Due Process Clause rather than by statute.<sup>69</sup> As a non-probationary public employee, therefore, McCarthy is entitled to constitutional due process, which, at a minimum, provides the procedural rights set forth under Chapter 75.<sup>70</sup>

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<sup>67</sup> *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 539, 542 (1985); *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 576–78 (1972).

<sup>68</sup> *Perry v. Sindermann*, 408 U.S. 593, 602–03 (1972). In *Perry v. Sindermann*, the Court found that a faculty manual, along with guidelines promulgated by the state college system, created a property interest for a faculty member because the institution's actions legitimated his claim of entitlement to continued employment. 408 U.S. at 600–03. Thus, even though not formally tenured by the college, the faculty member had the opportunity to prove in the district court that he had a legitimate expectation to continued employment, which in turn would give him a de facto tenure. *Id.* at 602–03.

<sup>69</sup> See *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541.

<sup>70</sup> *Chavies v. Department of the Navy*, 2006 MSPB 336, Para. 10 (2006).

That the record establishes McCarthy's non-probationary status cannot seriously be disputed. He was appointed to an excepted service position. In the excepted service, probationary periods are determined by the individual Agency, not by statute.<sup>71</sup> Indeed, the Board has recognized that "In the excepted service, unlike the competitive service, there is no statutory requirement that there be a probationary or trial period for appointments."<sup>72</sup>

The Agency has essentially conceded that McCarthy was never informed of, let alone agreed to any probationary period at point during his tenure.<sup>73</sup> The Agency's

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<sup>71</sup> See *Navigating the Probationary Period after Van Wersch and McCormack, a Report by the United States Merit Systems Protection Board*, p. 1 fn. 1 (2005).

The term "probationary period" generally applies to employees in the competitive service. "Trial period," by contrast, generally applies to employees in the excepted service, as well as to some appointments in the competitive service, such as term appointments, which have a 1-year trial period set by OPM. A fundamental difference between the two is the length of time in which employees must serve. The probationary period is set by law to last 1 year. When the trial period is set by individual agencies, it can last up to 2 years. For ease of discussion, we will refer to probationary and trial periods as "probationary periods" in this report unless otherwise indicated."

*Id.* This MSPB Report was cited in Appellant's pleadings and later offered as an Exhibit, but for some reason the AJ refused to admit it into evidence. See *Appellant Exhibit KKKKK* (one of four sets of documents so labeled by the AJ at hearing, all denied admission as evidentiary exhibits).

<sup>72</sup> *Id.* at p. 20-21.

<sup>73</sup> In any event, "Merely informing an individual that she will be required to serve a new probationary period is not the same as a knowing and voluntary agreement on the part of that individual to serve a new probationary period or waive an appeal right." *Id.* at 23 (citations omitted). Thus, "when an Agency wants to hire an applicant who would have appeal rights shortly after appointment, it must balance the desirability of hiring that applicant based on the assessments already made against the risk that the Agency, if it later decided to terminate the applicant, would have to provide the procedural and appeal rights set forth in 5 U.S.C. Chapter 75." *Id.* at 27.

Human Capital Director, Kevin Petz, testified that Mr. McCarthy was appointed to a non-probationary permanent position. McCarthy testified that he was not probationary and had never been advised otherwise until well after his removal.

All of the key documents related to McCarthy's appointment and even to his removal, save one that was superseded during his tenure, acknowledge that he was not a probationary employee.<sup>74</sup> One mysterious SF-50 form of uncertain provenance, that was prepared and signed by someone other than the Human Capital Director and without his knowledge, states "Appointment is subject to completion of one year initial probationary period beginning 00/00/00, and includes the seemingly redundant phrase, "Serves at the will of the Commissioner." This is the form that was corrected by the Human Capital Director during McCarthy's tenure to specify non-probationary status. Petz testified he corrected the form immediately upon becoming aware of its existence.<sup>75</sup> Petz testified

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<sup>74</sup> See *Appellant Exhibit BB*, January 18, 2008 IBWC SF 52 Routing Form (shows recruitment at 3 – "indefinite" which is crossed out and replaced with 1- "permanent", followed by a handwritten date of 1-30-09); *CC* (HR approval form for McCarthy); *EE*-December 12, 2008, Letter of hire (w/Petz comment – "nothing about serving on probation"); *S*- Original SF-50 form (box 45 - "Appointment is subject to completion of one year initial probationary period beginning 00/00/00"); *T* – "Corrected" SF-50 form issued on August 9, 2009 with retroactive effective date of January 19, 2009, removes initial probationary period remark, removes "Serves at the will of the Commissioner" remark; *YYYY*- SF 52 request for personnel action to remove McCarthy from employment as a permanent position, dated and signed by Mr. Ruth on August 28, 2009; *HH* – SF 52 dated August 28, 2009 with employee status correction; *DDDDD* – January 30, 2009 Master Record (computer data re. employment status); *XXXX* - August 28, 2009 SF-50 form approving McCarthy's removal from a permanent (non-probationary) position.

<sup>75</sup> There is considerable evidence of falsification of federal records and fabrication of evidence by the Agency in this proceeding, as explained in detail in the next section of this PFR. The origins of the erroneous SF 50 are mysterious, and there is no evidence to establish when it was actually created. There is a date stamp, but then there is also a Petz signature stamp, that he testified he did not enter. The entry of both a probationary period (from an unspecified date) and an "at will" clause suggests overkill by someone not familiar with Federal personnel laws and regulations. Moreover, the Agency refused



that he reported the correction to the Office of Personnel Management (OPM), and that OPM approved his action.<sup>76</sup>

Petz testified that he is the Agency's "top-line" Human Resources officer and that no one at OPM, the State Department or elsewhere directs his actions.<sup>77</sup> Although there is some question about whether the Agency is specifically governed by Federal personnel regulations, Petz testified that the Agency had administratively adopted Title 5 CFR.<sup>78</sup>

There is no dispute regarding the fact that the July 31, 2009 letter of removal did not include any advance notice or opportunity to respond.<sup>79</sup> Indeed, McCarthy, Petz, and

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specific discovery requests for SF 50s of similarly-situated executive staff employees hired within the past year, claiming they are irrelevant, although in fact they might shine some light on the issue. All of this falls short of proving that the SF 50 was intentionally falsified and back-dated, like other records discussed below. Nevertheless, the Agency's admitted practice of falsifying and back-dating those federal records while presenting them as contemporaneous calls for an inference that the SF 50 too is fraudulent.

<sup>76</sup> The Agency specifically denied McCarthy's requests for records of communications between the Agency and OPM concerning McCarthy's appointment, tenure or removal, as discussed below.

<sup>77</sup> See also Appellant Exhibit FF- Job description for Human Capital Director ("Speaks for the USIBWC regarding all human resources management matters in communicating with other officials, labor organizations, and external agencies, organizations, and individuals." Also, "The Incumbent independently plans and carries out day-to-day work.") See also *Petz deposition* at 17 ("Q. Is there -- you are the human resources director for the Agency. And I understand the Agency is an autonomous Agency. Do you, nonetheless, have HR people to whom you report or are you the top-line HR person? A. Top line.")

<sup>78</sup> See also *Appellant exhibit VVVV, 2005 OIG Report* at 38-39 ("Most exempt agencies have developed policies and practices that mirror Title 5 requirements. This is also true at USIBWC.")

<sup>79</sup> The July 31 removal letter itself is found at *Appellant Exhibit R*. The Agency withheld information in discovery related to the removal letter, refusing to say where it was created, at whose request, or with whose assistance. On August 25, 2009, Human Capital Director Petz emailed McCarthy to say he had talked with OPM and told them he thought Brandt was the source of the removal letter. *McCarthy Deposition Exhibit 20* (August 25 2009 Petz email).

Ruth all testified that Ruth made it very clear on July 31, when he handed McCarthy the removal letter, that it was not open to discussion of any kind. All agreed McCarthy was ordered to remove himself from the building immediately, and that Petz was directed to escort him to the door.<sup>80</sup> McCarthy and Petz both testified to their “shock”, and Petz later sent emails to McCarthy reiterating his “shock.”<sup>81</sup>

Petz testified at length about his attempts to persuade Ruth that McCarthy could not be removed without due process, including at least thirty days notice and an opportunity to respond, before issuance of the decision. Although Ruth chose instead to dispense with notice and other due process requirements, he apparently had second thoughts the following week, and attempted to cover his tracks. On August 3, 2009, Petz

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<sup>80</sup> It is also undisputed that McCarthy was not given advance notice of any kind that Ruth was even considering his removal. Ruth, Petz and McCarthy all agree that July 31 was the first time the very possibility was mentioned to McCarthy. Although there is testimony establishing that Petz had told Principal Engineer Al Riera that Ruth was thinking about removing McCarthy, Petz, Riera, and McCarthy all testified that no one said anything about it McCarthy. *See also Riera deposition* at 12 (“Q. Did you tell Mr. McCarthy about your conversation with Kevin Petz? A. No.”); *Petz deposition* at 32-33 (“... I do remember that I went to Robert and talked to him. Q. When did you do that? A. It was -- I can't remember. It would have been around this same time, July 24th or 25<sup>th</sup> ... Q. And did you tell Robert that you were doing some research into the circumstances under which he could be terminated? A. No, I didn't. I didn't ... Q. So what did you tell Robert about your conversation with the Commissioner? A. What I remember telling -- I don't remember that I told him anything about the conversation.) *Id.* at 83 (“Q. ... Is it possible that you indicated to Mr. McCarthy that the Commissioner asked you to look into the circumstances of his termination or that didn't happen? A. It did not happen.”) In any event, Ruth testified that he had not made a decision to remove Mr. McCarthy until July 27, 2009, the day before Mr. McCarthy's disclosures, and that he did not prepare a removal letter or actually remove Mr. McCarthy until July 31, three days after the disclosures.

<sup>81</sup> *Appellant Exhibit D* (“Robert, my internet just came on after the storm last night. I was shocked on Friday. Felt like it was me the Commissioner fired. I am so sorry he did that. You tried hard to straighten out this office and got fired for it. Please fight this. Should be very easy to win since you didn't get due process or appeal rights of any kind. Let me know if you need anything from me, Kevin.”)

said in an email to McCarthy that Ruth had decided to extend the effective date of McCarthy's termination, placing McCarthy on administrative leave for 30 days, through August 28, 2009.<sup>82</sup>

As a non-probationary excepted service employee, McCarthy was entitled to constitutional due process, which includes notice and an opportunity to be heard prior to loss of his property right in his job and benefits that were taken away. When a procedural due process violation has occurred, "the merits of the adverse action are wholly disregarded."<sup>83</sup> "[S]uch a violation is not subject to the harmless error test."<sup>84</sup>

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<sup>82</sup> *Appellant Exhibit B* ("Robert the Commissioner has decided to give you 30 days adm leave. We will leave you on the books for the month of August.")

<sup>83</sup> *Giannantonio v. United States Postal Service*, 2009 MSPB 54 (2009) (citing *Stone v. Federal Deposit Insurance Corporation*, 179 F.3d 1368 (Fed. Cir. 1999)).

Thus, the Supreme Court expressly recognized that the employee's response is essential not only to the issue of whether the allegations are true, but also with regard to whether the level of penalty to be imposed is appropriate. Even the leading Board decision regarding the evaluation of the appropriateness of disciplinary penalties explains that aggravating factors on which the Agency intends to rely for imposition of an enhanced penalty, such as a prior disciplinary record, should be included in the advance notice of charges so that the employee will have a fair opportunity to respond to those alleged factors before the Agency's deciding official, and the decision notice should explain what weight was given to those factors in reaching the Agency's final decision.

*Stone v. Federal Deposit Insurance Corporation*, 179 F.3d 1368 (Fed. Cir. 1999) (citing *Loudermill*, 470 U.S. at 541, and *Douglas v. Veterans Admin.*, 5 MSPB 313 (1981).)

<sup>84</sup> *Stone*, 179 F.3d 1368 at 41, citing *Sullivan v. Department of the Navy*, 720 F.2d 1266, 1274 (Fed.Cir.1983); *Ryder v. United States*, 218 Ct.Cl. 289, 585 F.2d 482, 488 (Ct.Cl.1978) (refusing to apply harmless error test: "[W]here a serious procedural curtailment mars an adverse personnel action which deprives the employee of pay, the court has regularly taken the position that the defect divests the removal (or demotion) of legality, leaving the employee on the rolls of the employing Agency and entitled to his pay until proper procedural steps are taken toward removing or disciplining him. In that

Additionally, to meet due process standards, an Agency "must notify the employee of the conduct with which he is charged 'in sufficient detail to permit the employee to make an informed reply.'" <sup>85</sup> Here, the charge contained in the notice is failure to be collegial and cooperative, although the Agency tried during the hearing to stretch the allegations to encompass a wide range of performance and conduct. "[T]he Agency must prove what it charges; where the specification contains the only meaningful description of the charge ... the Agency must prove what it has alleged in the specification.") <sup>86</sup>

**2. The AJ abused his discretion in denying Appellant's motions to compel and motions to sanction the Agency for not filing a timely response to the appeal for egregious discovery misconduct; and for fabrication of evidence and fraud upon the tribunal.**

In the course of the appeal, agency officials and agency counsel compounded their violation of Mr. McCarthy's constitutional right to due process by refusing to file a timely response to the appeal, delaying and obstructing discovery, falsifying federal records, fabricating evidence, perpetrating fraud upon the tribunal, and apparently suborning and committing perjury.

The Agency failed to file an answer to the appeal until fully three months after it was due, and then merely three weeks prior to hearing, and only two days before pre-

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situation, the merits of the adverse action are wholly disregarded."); *Camero v. United States*, 179 Ct.Cl. 520, 375 F.2d 777, 780 (Ct.Cl.1967).

<sup>85</sup> *Lachance v. MSPB*, 147 F.3d 1367, 1371 (Fed. Cir. 1998) (quoting *Pope v. USPS*, 114 F.3d 1144, 1148 (Fed. Cir. 1997)).

<sup>86</sup> *Lachance*, at 1372, citing *King v. Nazelrod*, 43 F.3d 663 (Fed. Cir. 1994).

hearing submissions were due.<sup>87</sup> Similarly, the Agency refused to respond to or produce documents in response to a majority of Appellant's discovery requests, and ultimately padded its paltry production with irrelevant and redundant material, all made with the caveat, "subject to and without waiving these objections," so that the Agency could hide behind these objections while making selective production.<sup>88</sup>

The bad faith delay in production alone is grounds for severe sanction, but in addition the Agency refused to produce documents in response to requests for production concerning a wide range of topics, and refused to respond fully to numerous interrogatories. The Agency declined to produce documents from within broad categories, objecting in almost every case that the requests were "not relevant", "overly

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<sup>87</sup> The Acknowledgement Order, dated September 30, 2009, required the Agency to file its Response within 20 days. After several motions to compel and for sanctions, and eventually a second order, the agency record was filed on January 20, 2010. A more complete account of the Agency's intransigence, and the failure of the AJ to act, is contained in *Appellant's Motion for Certification for Interlocutory Appeal, or in the alternative, Motion for Reconsideration* (January 13, 2010). The AJ denied Appellant's motions to compel, first stating that Appellant did not comply with 5 C.F.R. § 1201.73(e), eventually admitting that he was in error, yet still denying all motions to compel and for sanctions without explanation. In *Okleson v. USPS*, the Board found that where a motion to compel discovery was denied without reason given by the AJ, and the information sought was found to be relevant, the AJ erred in failing to order the Agency to respond to the request. *See Okleson v. USPS*, 90 M.S.P.R. 415 (2001).

<sup>88</sup> On November 2, 2009, Appellant received the Agency's response to Appellant's *First Set of Document Requests*. The responses included no documents. On November 17, mere hours before a status conference with the AJ, the Agency made its first partial document production. In a November 23, 2009 Response to Appellant's first Motion to Compel, the Agency attached a *Supplemental Response to Appellant's First Set of Document Requests*. On December 10, 2009, the Agency served Appellant with *Agency's Response to Appellant's First Set of Interrogatories and Second Document Requests*. Although that Agency Response alluded to some documents to be produced, there was a further delay in producing the documents, which were finally received on December 21, 2009.

broad” and “unduly burdensome”<sup>89</sup>; “fails to identify with particularity the documents requested”;<sup>90</sup> “assumes facts not in evidence”; “exceeds the scope of the unprotected [*sic*] disclosures made by Appellant”; “vague and ambiguous”; “confidential”<sup>91</sup>; “highly

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<sup>89</sup> Among the discovery denials made on the basis that the requests were “not relevant”, unduly burdensome” and “overly broad” were requests for documents “showing abusive conduct by executive staff;” “use of abusive, threatening, slanderous or malicious conduct toward co-workers by current members of the USIBWC executive staff”; documents showing gag orders issued to staff; communications among Forti, Graf, Brandt and Ruth criticizing McCarthy or discussing his disclosures or his removal, discussing Ruth’s appointment to or retention of the position of Commissioner, or criticizing Riera; communications between Forti and Mora regarding computer surveillance, alteration or deletion of electronic documents; and other communications between the Agency and the State Department concerning appointment of Ruth as Commissioner, extension of Ruth’s tenure as Commissioner, McCarthy’s allegations of fraud, waste, and abuse, or McCarthy’s performance or removal. The Agency’s blatant abuse of the “relevance” objection was also applied to document requests concerning investigations of Agency grievances, complaints, “proposals to reorganize, or efforts to improve collaboration among staff”; a July 2009 report by the Agency’s security officer to Principal Engineer Riera concerning Agency violations of law, mismanagement, waste of funds, and failure to adequately address safety issues; and complaints by employees Burns and Soto against Forti (denied but ultimately produced by witness Burns, and admittedly concealed by Ruth, proving beyond dispute an attempted cover-up of a blatant violation of the Antideficiency Act).

<sup>90</sup> Among the discovery denials made on the basis that the request “fails to identify with particularity the documents requested” were “communications between any official of the USIBWC and any official of the Office of Personnel Management regarding Robert McCarthy.”

<sup>91</sup> Among the discovery denials made on the basis that the documents were “confidential” were requests for executive staff salaries (made public by federal regulation); reports concerning Agency implementation of the Recovery Act (public under the Act itself); documents involving allegations or investigations of fraud, waste, abuse or criminal conduct by the Commissioner or any member of the executive staff; disciplinary records of two similarly situated executive staff, Forti and Graf; and records concerning purchase and use of electronic surveillance equipment by Fred Graf. According to OPM regulations, civilian federal employees generally have no expectation of privacy regarding their names, titles, grades, salaries, and duty stations as employees or regarding the parts of their successful employment applications that show their qualifications for their positions. See 5 C.F.R. § 293.311 (2009) (specifying that certain information contained in federal employee personnel files is available to public). The regulation provides, in relevant part:

confidential”<sup>92</sup>; “confidential information ... Subject to an appropriate protective order, the Agency will produce the requested document”<sup>93</sup>; “confidential and personal”<sup>94</sup>;  
“Appellant has not made protected disclosures and therefore is not entitled to discovery

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(a) The following information from both the OPF and employee performance file system folders, their automated equivalent records, and from other personnel record files that constitute an agency record within the meaning of the FOIA and which are under the control of the Office, about most present and former Federal employees, is available to the public: (1) Name (2) Present and past position titles and occupational series (3) Present and past grades, and (4) Present and past annual salary rates (including performance awards or bonuses, incentive awards, merit pay amount, Meritorious or Distinguished Executive Ranks, and allowances and differentials.

<sup>92</sup> Among the discovery denials made on the basis that the documents were “highly confidential” is Ruth’s controversial “Daytimer” that he was allowed to peruse at hearing and produce selected passages from. The only conceivable basis for admissibility of such excerpts is if Ruth was in the habit of routinely recording such events, which he testified he was not. Indeed, asked by Agency counsel about the allegedly ubiquitous “Daytimer”, Human Capital Director Kevin Petz, who testified he met almost daily with Ruth, said he’d never seen it. Principal Engineer Riera also testified Ruth was not one to keep records. Moreover, the record contains overwhelming evidence that Ruth secretly backdated his formal records of meetings. Ruth admitted on cross-examination that in at least one case he waited weeks – until after McCarthy’s removal – to create and secretly backdate a record of an alleged meeting with McCarthy, a meeting for which Ruth’s notorious “Daytimer” included no mention (according to both discovery responses and Ruth’s testimony). With regard to yet another claimed meeting with Petz on July 20, this one with a neatly lettered entry in the Daytimer, Ruth testified there were no other entries on that date, and claimed that he created a formal record of the meeting on the same date – in contradiction to the Agency’s admission in discovery that the formal record was created “after” that date.

<sup>93</sup> The unique objection that the document request called for production of “confidential information ... [but that] Subject to an appropriate protective order, the Agency will produce the requested document,” was limited to a request for a copy of the Agency’s first Solicitation for bids under the Recovery Act, to construct a levee, a public document the Agency had published on the internet over the course of several recent months (and indeed it was never produced by the Agency).

<sup>94</sup> The objection that the document request called for production of “confidential and personal” information was made with respect to a request for the grade and salary of Commissioner Ruth, made public by Federal regulation.

regarding same”.<sup>95</sup> In response to one interrogatory, the Agency also refused to identify the supervisors of Acquisitions and Budget since 2005, claiming the information is “irrelevant,” although one of the opinions cited by Ruth as reason for removing McCarthy was the allegation of a lack of separation between the two functions.

The Agency’s abusive discovery objections and wrongfully withheld documents touch upon virtually every issue in this case. A comprehensive list with detailed citation to the record is provided below. The extreme bad faith conduct of the Agency is further illustrated by the Agency’s blatant refusal to respond fully to interrogatories, without even going to the trouble of inventing any objection. With regard to several supposedly contemporaneous documents introduced by the Agency to support its pleadings, the Agency was requested to identify the source of each such document, “including the name

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<sup>95</sup> The objection that “Appellant has not made protected disclosures and therefore is not entitled to discovery regarding same” was made in response to an exceptionally broad range of requests for Agency documents concerning McCarthy’s disclosures and other matters, including the Agency’s use of unlicensed architectural designs for levee construction; unlawful subsidy for border barrier; building sub-par levees; failure to separate budget and contracts; electronic surveillance of Agency employees; computer surveillance of Agency employees; interception, alteration and/or destruction of computer communications; failure to comply with information management laws and regulations; unlawful pay raises; abusive emails from Fred Graf to executive staff and Commissioner (production of Graf’s abusive emails was also said to be unduly burdensome); allegations of misconduct made against Principal Engineer Al Riera to the Inspector General; unlawful personnel actions involving Fred Graf, Diana Forti, Susan Daniel, or Yvonne Serano; communications regarding Ruth’s appointment; geotechnical reports concerning integrity of levees or levee sites in Presidio County; a financial award for the South Bay International Water Treatment Plant (SBIWTP); “information management” qualifications of the Agency’s “Chief Information Officer” (Forti); Agency’s practices of monitoring individual computer users, including any communications instructing USIBWC information management staff with respect to monitoring or disclosing information relating to monitoring; Agency’s practices with regard to maintenance or destruction of Agency electronic records, including email communications; use of abusive, threatening, slanderous or malicious conduct toward co-workers by current members of the USIBWC executive staff; restriction of communications by Agency employees with McCarthy.



and address of the person who created it, the date and place it was created, and the names of each person who requested or assisted in its creation.”

The specificity of the interrogatory was not lost on Agency counsel, as demonstrated by the Agency’s response with respect to one of the documents allegedly prepared by Forti, that “no one ‘requested’ or assisted in its creation” (although even this response fails to identify the “date and place it was created.”) For the remainder of the documents, each allegedly prepared by Ruth, the Agency simply refused to say whether anyone, let alone whom, requested or assisted in its creation. Of course none of the responses disclose where the documents were created. All of these documents are purported to evidence Ruth’s consideration of removing McCarthy, yet as it turns out, all had been secretly back-dated, and Agency counsel did not disclose this fact to the tribunal or to opposing counsel when the documents were used to sway the AJ in ruling on various motions.

With regard to a purported July 23 memorandum of meeting, the Agency actually did produce metadata (apparently inadvertently, although it is required under the Federal rules) that showed it was not created until August 2. Yet this document had been used by the Agency in its pleadings as if it were a contemporaneous record. The Agency produced no metadata for several other documents, nor would it say where, when or with whose assistance or at whose request they were created.<sup>96</sup> The documents may have been

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<sup>96</sup> Electronically produced documents (which all of those referenced herein were) must be produced in their native file format, with original metadata. See, e.g., *Williams v. Sprint/United Management Co.*, 230 F.R.D. 640, 2005 WL 2401626 (D.Kan.2005) (The Court ordered Defendant to "produce the electronic spreadsheets in the manner in which they were maintained, which includes the spreadsheets' metadata"); *Nova Measuring Instruments Ltd. v. Nanometrics, Inc.*, 2006 WL 524708 (N.D. Cal. 2006) ("...if it has not already done so, it must produce the documents in their native file format, with original

created in Washington, D.C., Dallas, or El Paso, at anyone's home or office, at virtually any time, including after McCarthy's removal, as was the case with the key July 23 document.

Pressed to put a creation date on another key piece of apparently fabricated evidence, a document purporting to record a July 20 meeting between Ruth and Petz, the Agency settled on "soon after" July 20 as the date of creation, although the Agency persisted in refusing to identify the "date and place it was created, and the names of each person who requested or assisted in its creation." Apparently there exists no metadata to show the provenance of this critical piece of evidence – essential, really, to the Agency's theory of the case as purportedly demonstrating Ruth's intent to remove McCarthy prior to his protected disclosures. How is it that there is no metadata for this and other documents? How soon after is "soon after"? Was August 2 also "soon after" July 23? At hearing, paradoxically, Ruth departed from the script, and claimed that he wrote the July 20 document on July 20 (not "soon after" as claimed in a discovery response), and he proclaimed that he had no assistance (although the Agency refused to answer this interrogatory in discovery).

Even more alarming, however, is that this memo of a July 20 meeting, as well as other documents that Ruth swears he wrote (and that the Agency discovery response claims he wrote) are clearly not Ruth's work, as demonstrated by a simple comparison to a document Ruth did write. The July 28 memo disowning his own request to McCarthy for reorganization recommendations shows Ruth's writing style, replete with grammatical

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metadata"); *In re Verisign*, 2004 WL 2445243 at 1 (N.D.Cal.2004) ([t]he electronic version must include metadata as well as be searchable)". *See also In re Honeywell International, Inc.*, 230 F.R.D. 293, 296 (S.D.N.Y.2003).

errors and circular logic (nearly a dozen errors in grammar, spelling, and punctuation in as many lines, with uncertain meaning), which does not at all equate to the style of the various back-dated meeting memoranda he claims to have authored, unaided.<sup>97</sup>

The Agency's discovery responses use the "soon after" dodge for several documents lacking metadata, including a typed memo of meeting dated July 30, 2009; a typed memo of meeting dated June 25, 2009; a typed memo of meeting dated June 29, 2009; and a typed memo of meeting dated July 31, 2009. In each case, the Agency again declined to identify the "date and place it was created, and the names of each person who requested or assisted in its creation." But in each and every case, as detailed below, the Agency claims Ruth created the document, again notwithstanding his completely different writing style and testimony that he rarely wrote anything down.

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<sup>97</sup> Ruth's memo dated July 27 (Appellant Exhibit M; Agency exhibit MM) and sent by his secretary under cover of email dated July 28 (Appellant Exhibit L), is set forth below, in its entirety.

To Executive Staff

July 27, 2009

This memorandum is to clarify questions raised by memorandums [*sic*] to the Commissioner from Legal Council [*sic*] Robert McCarthy dated June 19, 2009 regarding "Legal Requirements for Information Management" and "Legal Requirements for Separation of Budget and Finance Responsibilities". These memos were provided in respond [*sic*] to a request by me thru [*sic*] the Management Accountability Council (MAC) to review agency programs and determine what if any programs should be reviewed [*sic*].

A third memo to me from Legal Council [*sic*] on July 14, 2009, offered opinion [*sic*] on the "Draft Internal Audit Program Directive and Manuel" [*sic*] providing comments on the draft proposal. All three of the these [*sic*] memos offered recommendations on reorganizations that were not requested [*sic*].

I want to clarify with this memorandum that no reorganizations or organizational changes are contemplated at this time [*sic*]

After stalling for months and refusing to permit good faith discovery, the Agency abruptly changed its discovery strategy from one of obstruction and denial to one of obfuscation and deception. In response to one of Appellant's multiple motions to compel, the Agency insisted that it would make no further production unless Appellant's counsel repeated the discovery requests in person at Agency headquarters. This radical departure from the form of production requested and established between the parties was made further "subject to" the Agency's standing objections, claims of privilege (absent a privilege log), and a new requirement that Appellant "identify with particularity" each requested document. This new demand, presented as an "offer", was specifically limited to a very select and narrow category of documents, which the Agency suggested might be made available, but only if Appellant's counsel were to travel there and request them in person, in the waning days before the hearing.<sup>98</sup> Yet even this "offer" proved entirely deceptive, as it did not extend to 31 document requests that according to the Agency's written denials would be denied even under these circumstances.<sup>99</sup> Nor did the belated

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<sup>98</sup> Discovery requirements are not met when an Agency "deigns to produce documents at a site and time of its choosing." *Resolution Trust Corp. v. North Bridge Assocs.*, 22 F.3d 1198, 1205 (1st Cir. 1994).

[T]he rules give the discovering party, not the discovery target, the option of specifying the time, place, and manner of production and inspection. See Fed. R. Civ. P. 34(b). Absent a court order or an agreement among the litigants, a party from whom discovery is sought cannot unilaterally alter these directives to suit its fancy.

*Id.* The First Circuit in *Resolution Trust* characterized an offer to produce documents at the party's law firm as "a token gesture toward compliance." *Id.*

<sup>99</sup> This list includes communications concerning Mr. Ruth's appointment as Commissioner; internal Agency communications instructing information management staff to intercept, alter or delete federal communication records; Ruth's calendar and notebooks of meetings; disciplinary records for Graf and Forti; investigations of fraud, waste and abuse at the Agency; personnel and salary records for persons alleged to have violated personnel laws and regulations; Agency communications with the State Department regarding Appellant and/or the Recovery Act implementation; geo-technical

“offer” provide any assurances that the Agency would reconsider its previous written denials of another 45 document requests. The Agency also specified two document requests with respect to which it would reconsider its denial, subject to further objection, but only if Appellant’s counsel made arrangements to meet Agency counsel at the Agency’s headquarters.<sup>100</sup> In the end, the Agency *guaranteed* to make production in exactly two document requests, but only if Appellant’s counsel made arrangements to meet Agency counsel at the Agency’s headquarters.<sup>101</sup> Indeed, even then, the Agency

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reports and communications the structural integrity of a levee site in Presidio County; certifications or other assurances by the USIBWC concerning a financial award for the South Bay International Water Treatment Plant (SBIWTP); separation of duties for supervision of budget and contracts; “information management” qualifications of the Agency’s “Chief Information Officer”; Agency’s practices of monitoring individual computer users and maintenance or destruction of Agency electronic records, including email communications; use of abusive, threatening, slanderous or malicious conduct toward co-workers by current members of the USIBWC executive staff; restriction of communications by USIBWC officials or employees with any third party concerning Appellant; grade and salary of Commissioner Bill Ruth, including any such documents that relate to retention of retirement income; agreements to restrict conduct of investigations of the USIBWC by the Office of the Inspector General of the State Department; Agency communications with OPM regarding Appellant; complaints by recently separated employees Burns and Soto against Ms. Forti.

<sup>100</sup> These were limited to communications between the Agency and DHS regarding payment of respective Agency costs on a proposed joint border barrier in Hidalgo County (ultimately not produced); and communications between the Agency and Hidalgo County regarding potential use of architectural designs made by Dannenbaum Construction for construction of a levee in Hidalgo County (also not produced).

<sup>101</sup> In effect, Appellant was asked to forego his right to discovery in exchange for a promise to view an email he sent requesting a July meeting that Mr. Ruth falsely claimed was for another purpose entirely; and a few emails between Appellant and engineer Lyell, neither of which ultimately was produced. In a magnanimous gesture, the Agency also suggested Appellant’s Counsel would be allowed to examine McCarthy’s own former desk computer (but not the Agency’s central electronic or paper files; not the office or home computers of Bill Ruth, Diana Forti, Kevin Petz and Fred Graf, all of whom have written relevant emails or other documents from non-office computers; not the central backup email system maintained by the Agency’s Information Management Division; not

refused to allow McCarthy himself to come to the Agency to receive the documents, even though McCarthy was also listed as counsel of record, lives in El Paso, and in fact represented himself *pro se* at the hearing.<sup>102</sup>

Additionally, the so-called offer to make some documents available at the Agency's office in El Paso was explicitly made "subject to and without waiving these objections," so the Agency could hide behind this standing objection while being selective about production, and Appellant would have no way of knowing what was being withheld.<sup>103</sup> This standing objection was coupled with the impermissible demand that Appellant's counsel "come prepared to identify with particularity the documents requested," and also specifically excluded anything the Agency might deem "privileged," although the Agency refused to provide a privilege log. Finally, none of the foregoing gymnastics would have the slightest impact on the Agency's refusal to provide fully responsive answers to a list of 20 interrogatories.<sup>104</sup>

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the Washington, D.C. offices of the IBWC, including the computer and paper files used by the IBWC's liaison to the State Department, Mary Brandt).

<sup>102</sup> The AJ eventually invited Appellant's counsel to make a formal motion requesting permission for McCarthy to conduct discovery at the Agency, under the restrictive terms of the Agency's "offer", a motion that if granted would have left McCarthy begging for scraps in the waning days before hearing instead of preparing his *pro se* case, since the AJ denied a motion that would have permitted his counsel to appear, as discussed below.

<sup>103</sup> See *Agency Response to Appellant's Motion to Compel, with Amended Response to First Document Requests* (Nov. 23, 2009), *Exhibit 7* (Every "amended" response repeats the original objections and those that offer up a handful of documents repeat that the selective production is made "subject to and without waiving these objections.")

<sup>104</sup> *Id.*, e.g., Exhibits 5 and 6 (correspondence between counsel). The very fact that see Fed.R.Civ.P 43(b)(1)(A) refers to "categories of documents" insures that discovery requests need not identify particular documents. One of the purposes of discovery is to allow parties to discover documents which they do not yet know exist which contain "information that appears reasonably calculated to lead to the discovery of admissible

The Agency's unethical, illegal and deceptive "offer" to open its files at Agency headquarters instead of simply providing the requested documents and answers was made with full knowledge that no documents or answers would be provided. At worst, from the Agency perspective, McCarthy would have to fund an expensive undertaking and he and his counsel would be distracted and kept busy in the weeks before the hearing. In fact, the Agency even used the ruse to break promises it had made previously to send to Appellant's Counsel a small number of selected documents, deciding instead to hold them hostage too, and ultimately producing none.<sup>105</sup>

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evidence." 5 C.F.R. § 1201.72(a). Requests for categories of documents relevant to issues in the case are entirely acceptable.

It is more the purpose of the rule that definite matters which are material and about which information is desired be designated rather than certain books be designated which may or may not contain the information desired. It may be impossible for the plaintiff to know in just what book or what ledger this information is contained but certainly the defendant knows and with that information in mind the defendant knows exactly which books or records it is supposed to produce and which ones it is not required to produce.

*United Mercantile Agencies v. Silver Fleet Motor Express, Inc.*, 1 F.R.D. 709, 712 (D. Ky. 1941). Courts have interpreted the "reasonable particularity" requirement to demand only that a request "apprise a person of ordinary intelligence what documents are required." *Regan Touhy v. Walgreen Co.*, 526 F.3d 641, 649 (10th Cir. 2008). It is then the responding party's responsibility to produce all responsive documents in their possession or under their control.

<sup>105</sup> This list of broken promises includes "The initial Solicitation for bids under the Recovery Act to construct the North Banker Floodway in Hidalgo County, in its entirety as originally issued, a document that was posted on the world-wide web." This document was the subject of a very specific disclosure regarding the unlawful citation to state rather than federal law. The Agency made the false claim in its pleadings against Appellant's motions to compel that it had or would provide this document, but it never did. *See, e.g.*, Agency Response to Appellant's Motion to Compel, at p. 20 (Nov. 23, 2009) ("The Agency has agreed and will provide the initial solicitation.") Other broken promises relate to requests for metadata and any documents relied upon for several documents produced electronically, including back-dated memoranda of meetings fraudulently introduced into evidence by the Agency; a specific email from Mr. McCarthy to Lisa

For convenient reference, the discovery requests and responses are reproduced in summary fashion below, and of course the originals are in the record as attachments to McCarthy's repeated motions to compel and for sanctions, which are also described below and included in the record. The Agency objected to and failed to respond in good faith to the following discovery requests, among others.

(1) produce documents that address allegations of fraud, waste, abuse or criminal conduct made by employees or former employees of the Agency, made after September 18, 2008.<sup>106</sup>

(2) produce communications between Appellant and any other official of the Agency regarding:

- a. Use or proposed use by USIBWC of architectural designs made by Dannenbaum Construction for constructing any Recovery Act Levee in Hidalgo County;
- b. Use or proposed use of USIBWC funds for the costs of construction of a joint levee – border barrier in Hidalgo County in cooperation with the Department of Homeland Security (DHS), to the extent that such costs might exceed an amount determined in advance by DHS as its maximum contribution;
- c. Use or proposed use of USIBWC funds for the costs of construction or repair of a levee or levees in Presidio County to standards below that required for certification by the Federal Emergency Management Agency (FEMA);
- d. Lack of Separation of Budget and Contracts;
- e. Electronic Surveillance of USIBWC employees by Fred Graf;
- f. Computer surveillance of USIBWC employees;
- g. Interception, alteration and/or destruction of computer communications;

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Holguin requesting to meet with Mr. Ruth in July regarding two legal opinions issued July 22 concerning levees in Hidalgo County (also disproving Mr. Ruth's perjured testimony and fabricated evidence that the meeting was one he convened to lecture Mr. McCarthy about his legal opinions not being collegial); a report by a consultant on dissension among executive staff and recommendations for improvements; and a July 2009 report by security officer James Leiman to Principal Engineer Al Riera concerning safety and legal violations in the Agency.

<sup>106</sup> See *Appellant's Objections and Supplements to the Summary of Status Conference*, issued on January 15, 2010 (January 21, 2010), Attachment B, *Agency Response to Appellant's First Set of Document Requests*, Request for Production 9 (the Agency claims the information is "not relevant" and "overly broad"). See also *Agency Response to Appellant's Motion to Compel, with Amended Response to First Document Requests* (Nov. 23, 2009), *Exhibit 7*.



- h. Failure of any person to comply with information management laws and regulations;
- i. Pay raises awarded to Diana Forti, Sue Daniel, Commissioner Marin, Yvonne Serano, during any period during which Fred Graf was acting Director of Human Resources;
- j. [abusive] Emails from Fred Graf to executive staff and Commissioner ...<sup>107</sup>

(3) produce communications sent after January 18, 2009, between Diana Forti and Al Riera, in which Ms. Forti criticized Appellant<sup>108</sup>

(4) produce emails from Diana Forti after September 18, 2008, to Kevin Petz, in which Ms. Forti criticized Kevin Petz<sup>109</sup>

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<sup>107</sup> *Id.*, Request for Production 9 (the Agency objection is set forth in full below).

The Agency objects to this Request as it seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Appellant has not made protected disclosures and therefore is not entitled to discovery regarding same. The Agency further objects to this Request as it fails to identify with particularity the documents requested. Appellant is not entitled to engage in a fishing expedition to establish that the allegations he made are protected. Rather, he is required to identify the documents on which he relied, if any, in forming a reasonable belief that his disclosures are, in fact, protected. The Agency further objects to this Request as overly broad in time and scope and unduly burdensome. Responding to such a request would be unduly burdensome such that the burden or expense of the proposed discovery outweighs its likely benefits considering the needs of the case, the amount in controversy, and the importance of the discovery in resolving the issues. In addition to these objections applicable to each subcategory, the Agency makes the following additional objections:

- a. The Agency further objects that (b) assumes facts not in evidence.
- b. The Agency further objects that (c) assumes facts not in evidence and far exceeds the scope of the unprotected disclosures made by Appellant.
- c. The Agency further objects that (d) is vague and ambiguous.
- d. The Agency further objections that (e) assumes facts not in evidence.
- e. The Agency further objects that (f) assumes facts not in evidence.
- f. The Agency further objects that (g) is vague and ambiguous.
- g. The Agency further objects that (h) is vague and ambiguous.

<sup>108</sup> *Id.*, Request for Production 10 (the Agency claims the information is “not relevant”, unduly burdensome” and “overly broad”).

<sup>109</sup> *Id.*, Request for Production 11 (the Agency claims the information is “not relevant”, unduly burdensome” and “overly broad”).

(5) produce communications between Diana Forti, Fred Graf, Mary Brandt and Bill Ruth (or any of them), after September 18, 2008, regarding, in whole in part,

- a. Criticism of Appellant’s job performance;
- b. Termination of Appellant;
- c. Mr. Ruth’s possible appointment to or retention of the position of Commissioner;
- d. Appellant’s allegations of fraud, waste, abuse, and/or criminal conduct;
- e. Criticism of Principal Engineer and/or Acting Commissioner Al Riera.<sup>110</sup>

(6) produce communications between Diana Forti and Z Mora, after September 18, 2008, regarding, in whole or in part, computer surveillance, or alteration or deletion of any electronic communications or documents, or alteration or deletion of any evidence of same.<sup>111</sup>

(7) produce communications between the Agency, or any of its employees, and any non-USIBWC employee of the United States Department of State, after September 18, 2008, concerning:

- a. Appointment of a Commissioner to succeed Mr. Marin;
- b. Appointment of Mr. Ruth as Commissioner;
- c. Extension of Mr. Ruth’s tenure as Commissioner;
- d. Appellant’s allegations of fraud, waste, abuse, and/or criminal conduct;
- e. Criticism of Appellant’s job performance;
- f. Termination of Appellant.<sup>112</sup>

(8) produce record books maintained by Commissioner Ruth or on his behalf that include schedules of Mr. Ruth’s meetings or notes of meetings, after September 18, 2008.<sup>113</sup>

(9) produce disciplinary records, including records of all charges, complaints, investigations and discipline, for Fred Graf and Diana Forti, whether maintained in their respective official personnel files or elsewhere.<sup>114</sup>

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<sup>110</sup> *Id.*, Request for Production 12 (the Agency claims the information is “not relevant”, unduly burdensome” and “overly broad”).

<sup>111</sup> *Id.*, Request for Production 13 (the Agency claims the information is “not relevant”, unduly burdensome” and “overly broad”).

<sup>112</sup> *Id.*, request 14 (the Agency claims the information is “not relevant”, unduly burdensome” and “overly broad”).

<sup>113</sup> *Id.*, request 15 (the Agency refused claiming the documents are not relevant, “overly broad”, “unduly burdensome”, and “highly confidential”).

(10) produce documents that relate in any way to allegations or investigations of fraud, waste, abuse or criminal conduct by the Commissioner or any member of the executive staff of the USIBWC, whether prepared by the Agency, its agents, any other Agency or any other person, since September 18, 2008.<sup>115</sup>

(11) produce documents that relate in any way to establishment of starting salary, salary increases, or job titles for Diana Forti, Fred Graf, Carlos Marin, Yvonne Serano, Mary Brandt and Susan Daniel, since January 1, 2005<sup>116</sup>

(12) produce documents that relate in any way to the purchase and use of electronic surveillance equipment by Fred Graf<sup>117</sup>

(13) produce documents that relate in any way to allegations of misconduct made against Principal Engineer Al Riera, whether to the Inspector General or to any other person or Agency.<sup>118</sup>

(14) Any and all documents that relate in any way to unlawful personnel actions involving Fred Graf, Diana Forti, Susan Daniel, or Yvonne Serano.<sup>119</sup>

(15) produce documents that relate in any way to meetings or any other communications between Commissioner Ruth and any member of the USIBWC

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<sup>114</sup> *Id.*, request 16 (the Agency refused claiming the documents are not relevant, “overly broad”, “unduly burdensome”, and “confidential”).

<sup>115</sup> *Id.*, request 20 (the Agency refused claiming the documents are not relevant, “overly broad”, and “confidential”).

<sup>116</sup> *Id.*, request 21 (the Agency refused claiming the documents are not relevant, “overly broad”, and “confidential”; “Appellant has not made protected disclosures and therefore is not entitled to discovery regarding same”).

<sup>117</sup> *Id.*, request 22 (the Agency refused claiming the documents are not relevant, “overly broad”, and “confidential”; “fails to identify with particularity the documents requested”; “assumes facts not in evidence”).

<sup>118</sup> *Id.*, request 23 (the Agency refused claiming the documents are not relevant; “Appellant has not made protected disclosures and therefore is not entitled to discovery regarding same. The Agency further objects to this Request as it fails to identify with particularity the documents requested”).

<sup>119</sup> *Id.*, request 24 (the Agency refused claiming the documents are not relevant, “overly broad”, “unduly burdensome”; “Appellant has not made protected disclosures and therefore is not entitled to discovery regarding same.”)

executive staff or any official of the State Department, between September 18, 2008, and December 31, 2008.<sup>120</sup>

(16) produce documents that relate in any way to USIBWC reports to the State Department concerning implementation of the American Reinvestment and Recovery Act.<sup>121</sup>

(17) produce documents that relate in any way to use by USIBWC of architectural plans made by Dannenbaum Engineering for Hidalgo County, after September 18, 2008.<sup>122</sup>

(18) produce the initial Solicitation for bids under the Recovery Act to construct the North Banker Floodway in Hidalgo County, in its entirety as originally issued.<sup>123</sup>

(19) produce documents that relate in any way to proposals, communications, draft agreements, or agreements that USIBWC might pay for the costs to build a joint levee-border barrier in Hidalgo County in cooperation with the Department of Homeland Security (DHS), to the extent that such costs might exceed an amount determined in advance by DHS as DHS estimated share of costs, after September 18, 2008.<sup>124</sup>

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<sup>120</sup> *Id.*, request 25 (the Agency refused claiming the documents are not relevant, “overly broad”, “unduly burdensome”; “Appellant has not made protected disclosures and therefore is not entitled to discovery regarding same.”)

<sup>121</sup> *Id.*, request 26 (the Agency refused claiming the documents are not relevant, “overly broad”, “unduly burdensome”; “Appellant has not made protected disclosures and therefore is not entitled to discovery regarding same. The Agency further objects to this Request as it fails to identify with particularity the documents requested.”)

<sup>122</sup> *Id.*, request 27 (the Agency refused claiming the documents are not relevant, “overly broad”, “unduly burdensome”; “Appellant has not made protected disclosures and therefore is not entitled to discovery regarding same. The Agency further objects to this Request as it fails to identify with particularity the documents requested.”)

<sup>123</sup> *Id.*, request 28 (the Agency answer in full: “The Agency objects to this Request as requiring the disclosure of confidential information. Subject to an appropriate protective order, the Agency will produce the requested document.”) This “confidential information” was published on the World Wide Web, where Appellant ultimately obtained a copy.

<sup>124</sup> *Id.*, request 29 (the Agency refused claiming the documents are not relevant, “overly broad”, “unduly burdensome”; “Appellant has not made protected disclosures and therefore is not entitled to discovery regarding same. The Agency further objects to this Request as it fails to identify with particularity the documents requested.”)

(20) produce documents that relate in any way to proposals, communications, draft agreements, or agreements that USIBWC might repair a levee or levees in Presidio County to standards below that required for certification by the Federal Emergency Management Agency (FEMA), after September 18, 2008.<sup>125</sup>

(21) produce documents that relate in any way to proposals, communications, draft agreements, or agreements that USIBWC might obtain a right of way necessary to build a so-called “spur” levee in Presidio County, after September 18, 2008.<sup>126</sup>

(22) produce documents that relate in any way to geo-technical surveys, reports, or other geotechnical information in any format, oral or written, concerning the structural integrity of a levee or levees in Presidio County, the suitability of such levy or levees for repair, or the suitability of the existing or any other site for repair or reconstruction of the levee or levees, after September 18, 2008.<sup>127</sup>

(23) produce documents that relate in any way to certifications or other assurances by the USIBWC concerning a financial award for the South Bay International Water Treatment Plant (SBIWTP), after January 1, 2007.<sup>128</sup>

(24) produce documents that relate in any way to separation of duties for supervision of budget and contracts at USIBWC, after January 1, 2005.<sup>129</sup>

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<sup>125</sup> *Id.*, request 30 (the Agency refused claiming the documents are not relevant, “overly broad”, “unduly burdensome”; “Appellant has not made protected disclosures and therefore is not entitled to discovery regarding same. The Agency further objects to this Request as it fails to identify with particularity the documents requested.”)

<sup>126</sup> *Id.*, request 31 (the Agency refused claiming the documents are not relevant, “overly broad”, “unduly burdensome”; “Appellant has not made protected disclosures and therefore is not entitled to discovery regarding same. The Agency further objects to this Request as it fails to identify with particularity the documents requested.”)

<sup>127</sup> *Id.*, request 32 (the Agency refused claiming the documents are not relevant, “overly broad”, “unduly burdensome”; “Appellant has not made protected disclosures and therefore is not entitled to discovery regarding same. The Agency further objects to this Request as it fails to identify with particularity the documents requested.”)

<sup>128</sup> *Id.*, request 33 (the Agency refused claiming the documents are not relevant, “overly broad”, “unduly burdensome”; “Appellant has not made protected disclosures and therefore is not entitled to discovery regarding same. The Agency further objects to this Request as it fails to identify with particularity the documents requested.”)

<sup>129</sup> *Id.*, request 35 (the Agency refused claiming the documents are not relevant, “overly broad”, “unduly burdensome”; “Appellant has not made protected disclosures and therefore is not entitled to discovery regarding same. The Agency further objects to this Request as it fails to identify with particularity the documents requested.”)

(25) produce documents that relate in any way to the “information management” qualifications of the Agency’s “Chief Information Officer.”<sup>130</sup>

(26) produce documents that relate in any way to the Agency’s practices of monitoring individual computer users, including any communications instructing USIBWC information management staff with respect to monitoring or disclosing information relating to monitoring.<sup>131</sup>

(27) produce documents that relate in any way to the Agency’s practices with regard to maintenance or destruction of Agency electronic records, including email communications.<sup>132</sup>

(28) produce documents that relate in any way to the use of abusive, threatening, slanderous or malicious conduct toward co-workers by current members of the USIBWC executive staff.<sup>133</sup>

(29) produce documents regarding, in whole or in part, restriction of communications by USIBWC officials or employees with Appellant.<sup>134</sup>

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<sup>130</sup> *Id.*, request 37 (the Agency refused claiming the documents are not relevant, “overly broad”, “unduly burdensome”; “Appellant has not made protected disclosures and therefore is not entitled to discovery regarding same. The Agency further objects to this Request as it fails to identify with particularity the documents requested.”)

<sup>131</sup> *Id.*, request 38 (the Agency refused claiming the documents are not relevant, “overly broad”, “unduly burdensome”; “Appellant has not made protected disclosures and therefore is not entitled to discovery regarding same. The Agency further objects to this Request as it fails to identify with particularity the documents requested.”)

<sup>132</sup> *Id.*, request 39 (the Agency refused claiming the documents are not relevant, “overly broad”, “unduly burdensome”; “Appellant has not made protected disclosures and therefore is not entitled to discovery regarding same. The Agency further objects to this Request as it fails to identify with particularity the documents requested.”)

<sup>133</sup> *Id.*, request 40 (the Agency refused claiming the documents are not relevant, “overly broad”, “unduly burdensome”; “Appellant has not made protected disclosures and therefore is not entitled to discovery regarding same. The Agency further objects to this Request as it fails to identify with particularity the documents requested.”) Again, it is ironic that the Agency admits it would be burdensome to produce all documents showing abusive conduct by executive staff, but that does not make it unduly so.

<sup>134</sup> *Id.*, request 42 (the Agency refused claiming the documents are not relevant, “overly broad”, “unduly burdensome”; “Appellant has not made protected disclosures and therefore is not entitled to discovery regarding same. The Agency further objects to this

(30) produce personnel documents regarding grade and salary of Commissioner Bill Ruth, including any such documents that relate to retention of retirement income.<sup>135</sup>

(31) produce documents upon which the [Forti grievance dated July 1, 2009] is based, including any notes, drafts, communications, and related documents, including documents that evidence subsequent action or communication, and including all metadata related to the referenced document.<sup>136</sup>

(32) produce all emails between Mr. McCarthy and Lisa Holguin concerning any request by Mr. McCarthy to meet with Mr. Ruth in July, 2009.<sup>137</sup>

(33) produce all communications between any official of the USIBWC and any official of the DHS regarding payment of respective Agency costs on a proposed joint border-barrier in Hidalgo County.<sup>138</sup>

(34) produce all communications between any official of Hidalgo County Irrigation District and any official of the USIBWC regarding potential use of architectural

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Request as it fails to identify with particularity the documents requested.”) Again, it is ironic that the Agency admits it would be burdensome to produce all documents showing gag orders issued to staff, but the objection is insufficient, and does not include any suggestion that the documents are privileged.

<sup>135</sup> *Id.*, request 43 (the Agency refused claiming the documents are not relevant, “confidential and personal”). Indeed the requested information is supposed to be freely available to the public by law and regulation, a fact well known to the Agency, as repeatedly illustrated in pleadings. It is relevant to Mr. Ruth’s motive to retaliate. According to the OIG, the Commissioner sets his own salary. *See VVVV at 11* (“The Commissioner’s self-selected salary grade is now at the Executive Level II, equivalent to that of a Cabinet deputy secretary or armed forces secretary. He feels he can fire and hire, set salaries including his own, and generally run his Agency without reference to other authority.”)

<sup>136</sup> *See Appellant’s Objections and Supplements to the Summary of Status Conference, issued on January 15, 2010* (January 21, 2010), Attachment B, *Agency Response to Appellant’s First Set of Interrogatories and Second Document Requests*, request 13 (the Agency objects that the information is not relevant).

<sup>137</sup> *Id.*, request 22 (the Agency claimed that it would produce the documents but did not do so, because it would conflict with the Agency’s claim that Mr. Ruth sought a meeting with Mr. McCarthy in July).

<sup>138</sup> *Id.*, request 23 (the Agency refused but proposed to make the information available at its offices).

designs made by Dannenbaum Construction for construction of a levee in Hidalgo County.<sup>139</sup>

(35) produce all communications between any official of the USIBWC and any official of the Office of Personnel Management regarding Robert McCarthy, whether or not identified by name or position.<sup>140</sup>

(36) produce all communications between any official of the USIBWC and any consultant, contractor, or government official from outside USIBWC who was paid to investigate or report on USIBWC issues including grievances, complaints, proposals to reorganize, or efforts to improve collaboration among staff, between January 18, 2009 and present.<sup>141</sup>

(37) produce all documents related to complaints or reports by James Leiman to Al Riera concerning potential or suspected USIBWC violation of any law, mismanagement, waste of funds, or failure to adequately address safety issues, made between January 18, 2009 and present, including specifically any reports made by Mr. Leiman in July 2009 and any related notes of discussions or subsequent related communications.<sup>142</sup>

(38) produce all documents related to formal or informal complaints by employees Burns and Soto against Ms. Forti, including any investigative reports whether in draft or final form, and related communications and notes thereof.<sup>143</sup>

(39) produce all email communications from Robert McCarthy to engineers Steven Lyell, Dr. Aguirre, and Jose Nunez, or any of them.<sup>144</sup>

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<sup>139</sup> *Id.*, request 24 (the Agency refused but proposed to make the information available at its offices).

<sup>140</sup> *Id.*, request 25 (the Agency refused but “invites the Appellant to amplify his Request and identify with particularity the documents requested.”)

<sup>141</sup> *Id.*, request 26 (the Agency refused claiming the documents are not relevant).

<sup>142</sup> *Id.*, request 27 (the Agency refused claiming the documents are not relevant).

<sup>143</sup> *Id.*, request 29 (the Agency refused claiming the documents are not relevant; it turns out these documents included ones belatedly obtained by Mr. McCarthy from Ms. Burns, denied admission by the AJ, but proving beyond dispute an attempted cover-up of a blatant violation of the Antideficiency Act, and admittedly hidden by Ruth in his private files).

<sup>144</sup> *Id.*, request 30 (the Agency refused claiming the documents are not relevant).



(40) produce all email communications from Diana Forti to Kevin Petz in which Ms. Forti is critical of Mr. Petz, including both paper copies of all such email communications and electronic copies, with all metadata.<sup>145</sup>

In addition, the Agency refused to fully answer numerous interrogatories, including the following.

(1) identify the source of the [July 23 File Memo of Meeting], including the name and address of the person who created it, the date and place it was created, and the names of each person who requested or assisted in its creation<sup>146</sup>

(2) identify the date and place [an unsigned draft memo dated July 20 2009] was created, and the names of each person who requested, created or assisted in its creation<sup>147</sup>

(3) identify the date and place [an unsigned termination letter dated July 31 2009] was created, and the names of each person who requested, created or assisted in its creation<sup>148</sup>

(4) identify the date and place [a termination letter from Mr. Ruth, dated July 31, 2009] was created, and the names of each person who requested, created or assisted in its creation<sup>149</sup>

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<sup>145</sup> *Id.*, request 31 (the Agency refused claiming the documents are not relevant and “unduly burdensome”; admittedly there would be burdensome volume of such non-collegial email from a similarly situated official, one whose abusive behavior Mr. McCarthy disclosed, but it is neither unduly burdensome nor irrelevant).

<sup>146</sup> *Id.*, interrogatory 1 (the Agency claims Commissioner Ruth created the document and identifies the metadata but fails to identify the “place it was created, and the names of each person who requested or assisted in its creation”).

<sup>147</sup> *Id.*, interrogatory 2 (the Agency claims Commissioner Ruth created the document and identifies the metadata but fails to identify the “place it was created, and the names of each person who requested or assisted in its creation”).

<sup>148</sup> *Id.*, interrogatory 3 (the Agency claims Commissioner Ruth created the document and identifies the metadata but fails to identify the “place it was created, and the names of each person who requested or assisted in its creation”).

<sup>149</sup> *Id.*, interrogatory 5 (the Agency claims Commissioner Ruth created the document but fails to identify the “date and place it was created, and the names of each person who requested or assisted in its creation”).

(5) identify the date and place [a memo to executive staff dated July 27, 2009] was created, and the names of each person who requested, created or assisted in its creation<sup>150</sup>

(6) identify the date and place [a typed message dated July 20 2009] was created, and the names of each person who requested, created or assisted in its creation<sup>151</sup>

(7) identify the date and place [a typed memo of meeting dated July 30 2009] was created, and the names of each person who requested, created or assisted in its creation<sup>152</sup>

(8) identify the date and place [a typed memo of meeting dated June 25 2009] was created, and the names of each person who requested, created or assisted in its creation<sup>153</sup>

(9) identify the date and place [a typed memo of meeting dated June 29, 2009] was created, and the names of each person who requested, created or assisted in its creation<sup>154</sup>

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<sup>150</sup> *Id.*, interrogatory 6 (the Agency claims Commissioner Ruth created the document but fails to identify the “date and place it was created, and the names of each person who requested or assisted in its creation”)

<sup>151</sup> *Id.*, interrogatory 7 (the Agency claims Commissioner Ruth created the document and it “was prepared from written notes soon after July 20, 2009, but fails to identify the “date and place it was created, and the names of each person who requested or assisted in its creation”; in addition, Commissioner Ruth insisted in his testimony that he created the document on July 20, not soon after, therefore the testimony is inconsistent with this response).

<sup>152</sup> *Id.*, interrogatory 8 (the Agency claims Commissioner Ruth created the document and it “was prepared from written notes soon after July 30, 2009,” but fails to identify the “date and place it was created, and the names of each person who requested or assisted in its creation).

<sup>153</sup> *Id.*, interrogatory 9 (the Agency claims Commissioner Ruth created the document and it “was prepared from written notes soon after June 25, 2009,” but fails to identify the “date and place it was created, and the names of each person who requested or assisted in its creation).

<sup>154</sup> *Id.*, interrogatory 10 (the Agency claims Commissioner Ruth created the document and it “was prepared from written notes soon after his conversation with Rich Visek,” but fails to identify the “date and place it was created, and the names of each person who requested or assisted in its creation; in addition, there is evidence of only one actual conversation with Mr. Visek, and that took place after Mr. McCarthy’s removal).

(10) identify the date and place [a typed memo of meeting dated July 31 2009] was created, and the names of each person who requested, created or assisted in its creation<sup>155</sup>

(11) identify the date and place [a typed grievance memo from Ms. Forti, dated July 1 2009] was created, and the names of each person who requested, created or assisted in its creation<sup>156</sup>

(12) identify each person who held the office of supervisor of Acquisitions for USIBWC from January 1, 2005 to July 31, 2009, providing the name of each such person, the dates during which they held such office.<sup>157</sup>

(13) identify each person who held the office of supervisor of Budget for USIBWC from January 1, 2005 to July 31, 2009, providing the name of each such person, the dates during which they held such office.<sup>158</sup>

Also of record in this proceeding are the Agency's limited discovery responses in the related proceeding in case DA-0752-10-0044-I-1. Pursuant to Appellant's understanding of the instructions given by the AJ, discovery and other pleadings were filed in both cases. Although that case was dismissed, the Agency's discovery responses were made part of the record herein as attachments to Appellant's motion to compel. The

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<sup>155</sup> *Id.*, interrogatory 11 (the Agency claims Commissioner Ruth created the document and it "was prepared from written notes soon after his meeting with Mr. McCarthy," but fails to identify the "date and place it was created, and the names of each person who requested or assisted in its creation).

<sup>156</sup> *Id.*, interrogatory 12 (the Agency claims "Ms. Forti created the memo on or about the date stated and that no one 'requested' or assisted in its creation", but fails to identify the "date and place it was created; in addition, the effort the Agency went to deny that anyone "requested or assisted," and the "on or about" claim shows that the Agency took special care to use evasive language in response to the other interrogatories.)

<sup>157</sup> *Id.*, interrogatory 21 (the Agency objects that the information is not relevant).

<sup>158</sup> *Id.*, interrogatory 22 (the Agency objects that the information is not relevant)

Agency's limited responses to those discovery requests sheds further light on not just the Agency's discovery misconduct but also on several issues in this case.<sup>159</sup>

A selection of requests and responses, reproduced below and included in the record in this proceeding illustrate the Agency's repeated objections that the information requested is irrelevant and confidential. The Agency even claims that information concerning the creation of Appellant's SF 50s is irrelevant and "confidential," an astounding claim given the mystery surrounding the so-called "original" SF 50 that was never provided at any time to Appellant during his employment, and that Human Capital Director Petz said he was unaware of, did not request or approve, and did not sign. Also irrelevant and confidential, according to the Agency, is information concerning similarly situated employees, because the Agency has determined that "As the only Supervising Attorney and in a unique fiduciary relationship with the Agency as well as member of the Executive Staff, Appellant cannot establish that he was similarly situated to any other person at the Agency in 2009." The agency also failed to produce any contemporaneous documents relating to the decision made by USIBWC to change Appellant's termination date from July 31, 2009 to August 28, 2009.

(1) Produce Appellant's Official Personnel File (OPF).<sup>160</sup>

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<sup>159</sup> See Appellant's Renewed Motion to Compel Discovery and for Sanctions, Attachment B, Agency Response to Appellant's First Set of Interrogatories and Document Requests (December 10, 2009), filed in both DA-1221-09-0725-W-1 and DA-0752-10-0044-I-1. See Motion at p. 4 ("In addition, the Agency has failed to respond adequately to the first set of discovery in the companion case, Docket No. DA-0752-10-0044-I-1. FN 1: Appellant understands the directions of the Administrative Judge are to include both case numbers on discovery documents. A pleading filed with the Board on December 21, 2009, however, was returned by the Clerk due to a misunderstanding regarding this procedure. The pleading was refiled in each respective case on December 22, 2009. A December 23, 2009 Order directed the parties to wait until on or after December 28, 2009, to address discovery issues not resolved during the suspension of proceedings.")

(2) For each document produced in response to Request for Production 2 [“a copy of each and every SF 50 and SF 52 for Robert McCarthy that was signed by any agency official at any time”], identify the date and place it was created, and the names of each person who requested, created or assisted in its creation.<sup>161</sup>

(3) Identify by name, grade and position each current and former USIBWC employee whose employment status you contend was “probationary” in 2009.<sup>162</sup>

(4) Identify by name, grade and position each current and former USIBWC employee whose employment status you contend was “at will” in 2009.<sup>163</sup>

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<sup>160</sup> *Id.*, Request for production 1 (“Appellant’s OPF is produced at IBWC/McCarthy 0514-0660.”) As noted in Appellant’s motion, it took the Agency until December 10 to produce Appellant’s OPF, which was requested and required within 20 days of the filing of the IRA appeal in DA-1221-09-0725-W-1, but not produced there. Unfortunately, the file consists mainly of documents obtained from OPM for 9 years of Appellant’s employment prior to IBWC. In fact, out of 153 pages, and approximately 74 “documents”, approximately 90 pages and well over half of the documents relate exclusively to Appellant’s prior employment with the Department of the Interior from 11/09 to 02/08. Of the remainder, many are duplicates. The OPF produced here did not include Appellant’s Performance Plan, against which any deficiencies in performance must be measured. The Agency did not explain why it took nearly three months to produce Appellant’s OPF, which is maintained in the IBWC’s own office, not at OPM.

<sup>161</sup> *Id.*, interrogatory 1 (“The Agency objects to this Interrogatory as it seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. The Agency further objects to this Interrogatory as it requests information that is confidential.”) It is truly astounding that the Agency claims that information concerning the creation of Appellant’s SF 50s is irrelevant and “confidential,” especially given the mystery surrounding the so-called “original” SF 50 that was never provided at any time to Appellant during his employment, and that Human Capital Director Petz said he was unaware of, did not request or approve, and did not sign.

<sup>162</sup> *Id.*, interrogatory 2 (“The Agency objects to this Request as it seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. The Agency further objects to this Request as it requests information that is confidential.”) Federal employee’s grade and employment status is public information. The Agency’s claim of probationary status is a key element in this appeal. Probationary employees may be similarly situated to Appellant. The Agency’s refusal to identify other employees whose employment status it contends was “probationary” in 2009 should estop the Agency from raising any defense that it would have removed Appellant in the absence of his disclosures.

<sup>163</sup> *Id.*, interrogatory 3 (same objection).

(5) To the extent not provided in response to a foregoing request, produce a copy of the original SF 50 and any subsequent SF 50 for USIBWC Principal Engineer John Merino.<sup>164</sup>

(6) To the extent not provided in response to a foregoing request, produce a copy of the original SF 50 and any subsequent SF 50 for USIBWC attorney Pamela Barber.<sup>165</sup>

(7) Identify by name, grade and position each current and former USIBWC employee who was subject to any adverse personnel action in 2009 due to allegedly unacceptable performance, and for each such person describe each adverse action taken, including but not limited to unacceptable performance rating, placement on performance improvement plan, reduction in grade, and removal.<sup>166</sup>

(8) Produce each and every notice provided by USIBWC to Appellant that you contend advised Appellant of his alleged probationary or at will status.<sup>167</sup>

(9) Produce each and every notice provided by USIBWC to Appellant that you contend advised Appellant of his right to appeal the July 31, 2009 termination notice.<sup>168</sup>

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<sup>164</sup> *Id.*, Request for production 5 (same objection). Merino was an executive staff member hired shortly before McCarthy.

<sup>165</sup> *Id.*, Request for production 6 (same objection). Barber was an executive staff member hired after McCarthy's removal.

<sup>166</sup> *Id.*, interrogatory 4 ("The Agency objects to this Request as it seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. The Agency further objects to this Request as it requests information that is confidential. As the only Supervising Attorney and in a unique fiduciary relationship with the Agency as well as member of the Executive Staff, Appellant cannot establish that he was similarly situated to any other person at the Agency in 2009.")

<sup>167</sup> *Id.*, Request for production 8 ("The Agency objects to this Request as it seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Appellant was not entitled to notice or appeal rights based on both his probationary status but also because he fails to meet the definition of "employee" for purposes of Board appellate jurisdiction. The Agency refers Appellant to documents previously produced including his original SF 50, the job notice, as well as the statutory definition of employee for those employed in the excepted service.") The Agency concedes that no such notice of probationary or at will status was ever provided, as also testified to by Petz.

<sup>168</sup> *Id.*, Request for production 9 ("The Agency responds that Appellant was not entitled to appeal the July 31, 2009 termination notice.")

(10) Produce each and every document in your possession, including meeting notes, document drafts, emails, forms, or any other document, that relates in any manner to the decision made by USIBWC to change Appellant's termination date from July 31, 2009 to August 28, 2009.<sup>169</sup>

Described below are some of the numerous documents created by the Agency well after the events they purport to describe, secretly back-dated, and used to perpetrate fraud upon the tribunal. Each of these documents constitutes fabricated evidence, and each constitutes a falsified federal record. Moreover, they create an inference that the Agency's case was so weak that it felt compelled to resort to such reprehensible tactics.

First is the typewritten Ruth memo dated July 23, 2009, purportedly commemorating the substance of an alleged July 23 meeting with McCarthy at which Mr. Ruth allegedly expressed disapproval of certain of Mr. McCarthy's legal opinions.<sup>170</sup> McCarthy later learned that this document was in fact created on August 2, 2009, and was surreptitiously back-dated to July 23. Ruth testified he wrote it three days after he

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<sup>169</sup> *Id.*, Request for production 10 ("The Agency refers Appellant to his Personnel File and a December 7, 2009 statement of events at Bates-Label IBWC/McCarthy 0662.") Nothing relevant is found in the personnel file and the December 7 statement is an after the fact chronicle of events prepared for purposes of litigation.

<sup>170</sup> *See Appellant Exhibit W- July 23 Ruth memo re meeting with McCarthy, and metadata showing the document was created August 2.* Although the Agency finally included the metadata in its hearing exhibit, after being called out on the fraudulent presentation as part of its pleadings, it failed to do so when it filed the "July 23" memo in support of its pleadings, and did not acknowledge that the document was backdated at any time prior to the hearing, well after Appellant had moved for sanctions due to fabrication of evidence. Indeed, so embarrassed was the Agency by this evidence of its unethical conduct, that it did not even ask Ruth to testify about the critical July 23 memo at the hearing. Rather, it was Appellant, on cross examination, that elicited testimony about the document. In a further reprehensible attempt to hide the true facts about when the document was created, the Agency simply refused to respond to a pointed interrogatory asking precisely that question.

removed McCarthy, with no advice or assistance, based solely on his detailed recollection of events ten days earlier.<sup>171</sup>

Even accepting Ruth's sworn testimony as true, this document was prepared in anticipation of litigation, yet it had been filed in support of the Agency's November 23 Opposition to Appellant's Motion to Compel, with Agency Counsel describing it at the time simply as "a memo to the file drafted by the Commissioner documenting his conversation with Appellant about the legal memoranda at issue," when all the while Agency Counsel had no factual basis for presenting the document as a contemporaneous record.

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<sup>171</sup> Ruth previously testified that he was not in the habit of putting his instructions in writing. Principal Engineer/Acting Commissioner Riera testified that Commissioner Ruth was not in the habit of making records of any kind to document meetings. Asked by Agency Counsel if he had ever seen Commissioner Ruth carrying his allegedly ubiquitous "Day-Timer", Human Capital Director Petz, who testified he met with Commissioner Ruth almost daily, said no. Commissioner Ruth's claim that he made the record as claimed is not credible, but even more, it is contradicted by other evidence of record, and the fact that the Agency resorted to fabricated evidence creates an inference that the evidence is false. McCarthy testified that he never had any such conversation or meeting with Ruth on July 23 or on any other date. McCarthy identified a July 22, 2009 meeting that he initiated to discuss his opinions of that date concerning the Presidio and Hidalgo levees. He produced documentary proof, by way of confirmatory emails, that he met with Ruth concerning those subjects on that date. McCarthy testified that he himself brought up the issue of non-cooperation – on the part of Forti and Graf – and that he asked Ruth to intervene. McCarthy testified that Ruth was noncommittal, as usual, and wished that everyone would just get along. Further, the Agency refused to produce additional relevant records requested in discovery. The Agency resisted all efforts by Appellant to see Ruth's calendar. Yet incredibly, Ruth alone was allowed to review his so-called "day-timer" during the hearing. The selective use of the secretive calendar, especially since Ruth is known to have surreptitiously back-dated purported records of meetings, violates the most basic rules of evidence and fair play. There is an inference that the notes in the calendar are fictitious; moreover, Appellant is prevented from seeing whether Ruth is indeed in the habit of recording such meetings, as he claims, which is the only imaginable reason for admitting the records in the first place!



Next is a purported record of a meeting between Commissioner Ruth and Human Capital Director Kevin Petz on July 20, 2009, at which the two allegedly discussed termination “and alternatives to termination”, filed by the Agency in its successful Opposition to Appellant’s Stay Request, with the claim that it was prepared “contemporaneously with this meeting.” McCarthy later learned that this document was not in fact “contemporaneous”, as falsely claimed, that at best it was created “soon after July 20, 2009,” and surreptitiously post-dated, and that Agency Counsel never had any factual basis for presenting the document as a contemporaneous record. Ruth later testified that he created the document on July 20, again contradicting the Agency’s admission that it was created after that date.<sup>172</sup> Also, as noted above, the document bears no resemblance to Ruth’s writing style.

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<sup>172</sup> Agency Exhibit CC- July 20 Ruth memo re meeting w/ Petz. Ruth also identified a calendar notation from his “Day-Timer,” a very neatly lettered summary of the alleged meeting. Agency Exhibit DD-July 20 calendar note re meeting with Petz (very neat; nothing else happened that day). Since he had already been permitted on direct to reference his so-called “Day-Timer” (and not merely the cherry-picked excerpts previously produced), Appellant asked Ruth on cross examination to double-check his Day-Timer, and Ruth said he could find no evidence of any other meetings on that day. Commissioner Ruth’s claim that he made the record as claimed is not credible, but even more, it is contradicted by other evidence of record, and the fact that the Agency resorted to fabricated evidence creates an inference that the evidence is false.

Petz testified that he first had a similar conversation with Ruth on July 23 or 24<sup>th</sup>, and only changed his mind about the date based on a July 20 file memo (that he didn’t know had been back-dated). See also Petz deposition, at 29:

Q. Let me ask you, what stands out about – you mentioned earlier that this conversation happened on July 23rd? A. Yes. Q. What is it that stands out in your memory that you know it was the 23rd when you had that conversation? A. Because I remember the next day giving him this document. Q. So it stands out in your mind that you had the conversation on the 23rd because your understanding is that you gave him this document on the 24th? A. I know I did. Q. And you know that the conversation with Mr. -- with the Commissioner occurred the day before you gave him the document? A. That's my recollection. Q. And how

A typed memo of meeting between Mr. Ruth and Ms. Brandt, dated June 25, 2009, purports to be a record of Ruth seeking legal advice regarding McCarthy's employment rights, and was represented to the Board to be an authentic business record when filed by the Agency in its Opposition to Appellant's Stay Request. McCarthy later learned that this document was created "soon after June 25, 2009," at best, and surreptitiously post-dated, and that Agency Counsel never had any factual basis for presenting the document as a contemporaneous record. Again, despite the Agency's partial discovery response, there is no reason to believe Ruth even authored the document.

A typed memo of meeting between Mr. Ruth and State Department lawyers, dated June 29, 2009, purports to involve legal advice concerning McCarthy's employment

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is that you know you gave it to him on the 24th? A. Because I made a -- I put the date on my copy.  
See also Riera deposition at 11-12, concerning a subsequent conversation with Petz, placing the Ruth meeting again much later than what Ruth now claims, and more consistent with Petz's initial recollection:

Q. Who did you understand Mr. Petz was talking about? A. Mr. McCarthy. Q. What was your response? A. I don't recall exactly what transpired in the conversation, but I think it was something along the lines of why does the Commissioner think that Robert is not doing a good job. Q. What did Mr. Petz say? A. I don't know exactly what he said, but I think what we talked about -- now that I think about it, I think we said, I think Robert needs to know that he's not -- apparently, not doing a good job and he needs to develop a better relationship with the Commissioner and he needs to basically talk to the Commissioner and show the Commissioner his work. Q. Do you remember when that conversation happened? A. As I recall, it must have been a couple of days before Robert was fired. Q. Mr. Petz recalls that it was sometime around July 22nd or 23rd, in that time frame. The Commissioner recalls it was around the 20th. Do you place it later than that or -- A. Later, like closer to the end. Q. You said it was a couple of days before his termination? A. No. That's what I recall. I can't tell you exactly when, but I know that it wasn't -- wasn't too far behind or before his termination.

rights, and was filed by the Agency in Opposition to Appellant's Stay Request. This document was later revealed to be a postdated document created by Commissioner Ruth "soon after his conversation with Rich Viseck," and in which Agency Counsel never had any factual basis for presenting the document as a contemporaneous record.

There are numerous other falsified documents produced by the Agency. These include, for example, an unsigned draft memo dated July 20, 2009, purporting to express concern about certain of McCarthy's legal opinions, accompanied by metadata that describes a document entitled "meeting with Robert McCarthy July 20" (a meeting no one contends took place), showing the document was actually created on July 18 and amended on July 26, and describing a document that contains too few kilobytes (KB) to be the document described. Another such document purports to be a typed memo of a meeting between Ruth and State Department OIG officials, back-dated to July 30, 2009, and supposedly "prepared from written notes soon after July 30, 2009." However, the supposed notes cited by the Agency in its discovery response do not in fact exist! The continuing refusal of the Agency to disclose the actual dates on which various key documents were created creates an inference that they were fabricated after the fact solely for purposes of litigation, and that they have been presented under false pretenses.

Finally, added to this list is the mysterious "original" SF 50 presented by the Agency in an abundance of overkill as evidence of both "probationary" (from a blank date) and "at will" status, notwithstanding the facts that the document was not created by or with the knowledge or consent of the Agency's Human Capital Director Kevin Petz; that it was not known by Mr. Petz even to exist prior to the date of Ruth's removal letter; that it was never provided to McCarthy until well after the date of the removal letter; that

it was completely erroneous; that it was immediately replaced by Petz with a corrected SF 50 after he became aware of it in August, but while McCarthy was still employed at the agency; that OPM approved the correction; and that the Agency refused to produce in discovery SF 50 documents for similarly situated employees.

In spite of the Agency's egregious discovery misconduct and blatant fabrication of evidence demonstrated above, the AJ flatly and completely denied all of Appellant's efforts to compel discovery or sanction the Agency's misconduct. On November 12, 2009, Appellant filed his first Motion to Compel Discovery and Motion for Sanctions. On November 20, 2009, Appellant filed a Motion to Suspend Proceedings and Renewed Motion for Sanctions. Appellant reluctantly filed the motion to suspend at the direction of the AJ "to allow time to complete discovery", after the AJ orally declined to grant Appellant's November 12 motion to compel. On December 28, 2009, Appellant filed a Renewed Motion to Compel and Second Renewed Motion for Sanctions, following expiration of the suspension with no further production by Agency.

On January 5, 2010, the AJ entered an Order formally denying Appellant's November 12, 2009 Motion to Compel and Motion for Sanctions, as well as the December 28, 2009 Renewed Motion to Compel and Renewed Motion for Sanctions, citing an unspecified failure to comply with technical requirements of the rules. On January 13, 2010, Appellant filed a Motion to Reconsider, or in the alternative to Certify for Interlocutory Appeal, the January 5 Order denying the motions to compel and for sanctions.<sup>173</sup> On January 14, 2010, during a telephonic conference, the AJ stated that he

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<sup>173</sup> The January 13 Motion to Reconsider or Certify Interlocutory Appeal states, in part:

The Administrative Judge in this case has denied Appellant's motions to compel because he has ruled that Appellant did not comply with 5 C.F.R.

denied Appellant's motions to compel because he had concluded (mistakenly) that the original requests had not been included, unedited, with the motions. When informed of his error, the AJ said he would not grant the motions or reconsider his ruling in any event.

On January 20, 2010, the AJ denied Appellant's January 13 Motion to Reconsider, or in the alternative to Certify for Interlocutory Appeal. Additionally, on January 20, 2010, the agency finally filed its response to the appeal, a full three months after the deadline set by the acknowledgement order, months after unsuccessful motions to compel, less than a month before the hearing, and just two days before the deadline for pre-hearing exhibits.

On January 21, 2010, Appellant objected to a January 20, 2010 Summary of Status Conference, specifically including objection to Agency's failure to timely answer

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§ 1201.73(e), but yet did not cite or explain which part of the rule Appellant failed to meet. In *Okleson v. USPS*, the Board found that where a motion to compel discovery was denied without reason given by the AJ, and the information sought was found to be relevant, the AJ erred in failing to order the Agency to respond to the request. *See Okleson v. USPS*, 90 M.S.P.R. 415 (2001). Here, as in *Okleson*, the Administrative Judge has denied the motion to compel relevant information without giving reason. Through his ruling, the Administrative Judge has severely hindered Appellant's case and his ability to fully present his claims and defenses.

Similarly, the Administrative Judge has completely failed to address the merits of Appellant's motions for sanctions without citing any reason or claimed procedural deficiency at all. Once again, sanctions were requested not only because of the Agency's abuse of discovery, but also because of the Agency's documented falsification of evidence in this proceeding.

the appeals.<sup>174</sup> On February 11, 2010, Appellant made an oral and written Motion for Sanctions at hearing, again denied by the AJ.

The Board's regulations provide that "[d]iscovery is designed to enable a party to obtain relevant information needed to prepare the party's case."<sup>175</sup> "Discovery covers any non-privileged matter that is relevant to the issues involved in the appeal . . .".<sup>176</sup> The Federal Rules of Civil Procedure are used as a general guide to discovery before the MSPB.<sup>177</sup> With regard to the scope of discovery, the Board's rules track Federal Rule 26, Fed.R.Civ.P., which provides for discovery of "any matter relevant to the subject matter involved in the action." The Supreme Court has found that:

The key phrase in this definition -- "relevant to the subject matter involved in the pending action" -- has been construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case.<sup>178</sup>

"Relevant" information includes any information "that appears reasonably calculated to lead to the discovery of admissible evidence."<sup>179</sup> As such, what constitutes relevant information in discovery is to be liberally interpreted, and uncertainty should be

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<sup>174</sup> The object also states: "The Administrative Judge orally denied Appellant's Motion to Reconsider and flatly stated that no discovery would be compelled beyond that which is freely produced by the Agency."

<sup>175</sup> 5 C.F.R. § 1201.71.

<sup>176</sup> 5 C.F.R. § 1201.72(b).

<sup>177</sup> 5 C.F.R. § 1201.72(b).

<sup>178</sup> *Oppenheimer Fund v. Sanders*, 437 U.S. 340, 351 (1978).

<sup>179</sup> 5 C.F.R. § 1201.72(a). *See also*, Fed.R.Civ.P. 26(b)(1) ("Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence."); *McGrath v. Dep't of the Army*, 83 M.S.P.R. 48, 51 (M.S.P.B. 1999).

resolved in favor of the movant absent any undue delay or hardship caused by such request.<sup>180</sup>

The Agency's refusal to produce the disciplinary records of Forti and Graf, executive committee members alleged by Mr. McCarthy to have committed much more egregious acts than those he is accused of, including being uncooperative and non-collegial, and of having been involved in the decision to terminate McCarthy's employment. Yet the Agency claims there are no employees similarly situated to McCarthy. Under similar circumstances, the Board has held that "the AJ abused her discretion and committed reversible error by denying the appellant's motion to compel."<sup>181</sup>

The Board has held that the appellant is entitled to discovery of information relating to any factor to be examined in making a determination of whether the agency

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<sup>180</sup> *Bize v. Department of the Treasury*, 3 M.S.P.R. 155, 164 (1980).

<sup>181</sup> *White v GPO*, 2008 MSPB 61 (2008).

The appellant's initial discovery request and subsequent motion to compel sought discovery of the disciplinary records of other agency Police Officers for the purposes of proving his affirmative defense of race discrimination. IAF, Tab 14 at 6. The appellant alleged in his motion to compel that other officers of a different race received lesser or no discipline for similar offenses. *Id.* at 7. This discovery request is on its face directed at evidence that could be relevant and admissible concerning the appellant's affirmative defense of race discrimination and the appellant, as the party bearing the burden of proof on the claim, is entitled to obtain such evidence to support his claim. As the appellant's motion to compel was reasonably calculated to lead to the discovery of admissible evidence, he was prejudiced in his ability to present his affirmative defense of race discrimination. Therefore, the AJ abused her discretion and committed reversible error by denying the appellant's motion to compel.

*White* at p. 6 (internal citations omitted).

proved by clear and convincing evidence that it would have taken the same actions in the absence of the appellant's protected disclosures, specifically including: "The strength of the agency's evidence in support of its action; the existence and strength of any motive to retaliate on the part of the agency officials who were involved in the decision; and any evidence that the agency takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated."<sup>182</sup> Additionally, the Board held "Information relating to whether the appellant made protected disclosures or whether those disclosures were a contributing factor in any personnel actions may also be discoverable."<sup>183</sup>

Observing that the AJ had "denied the appellant's motions to compel in their entirety" and that the Agency refused to produce documents in response to requests that it considered overbroad, the Board stated that the proper procedure is to require production of those documents seeking "information that appears reasonably calculated to lead to the discovery of admissible evidence."<sup>184</sup>

In a case with striking similarities to the present appeal, the Board gave a detailed

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<sup>182</sup> In *Ryan v. Dep't of Air force*, 2009 MSPB 235 (2009).

<sup>183</sup> *Ryan*, citing *Carr v. Social Security Administration*, 185 F.3d 1318, 1323 (Fed. Cir. 1999); *McGrath v Dept of the Army*, 83 M.S.P.R. 48 (1999).

<sup>184</sup> *Ryan*, 2009 MSPB 235. (Among these, the Board cited "all e-mails or any other correspondence related to or referring to [the] appellant (directly or indirectly) or related to one of the appellant's disclosures from 01 August 2002 to current date." "The agency might argue that this request is overly broad," noted the Board, "but that would not excuse the agency from providing documents that are clearly relevant to the matters at issue in this appeal." "To the extent the agency believes that a request is overly broad, it should comply with the request to the maximum extent possible and explain why it should not be required to respond more fully. The administrative judge shall then determine whether the agency has properly responded to each of the appellant's discovery requests.")



analysis of documents requested by the appellant and withheld by the agency, finding for the appellant.<sup>185</sup> Denial of similarly broad requests have been grounds for finding abuse of discretion by the AJ in many such cases.<sup>186</sup>

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<sup>185</sup> *McGrath v Dept of the Army*, 83 M.S.P.R. 48 (1999).

The appellant requested copies of all agency records involving inquiries or investigations by the NGB, the Air Force, the Department of Defense, U.S. Congressmen and Senators, the Environmental Protection Agency, the State of Colorado, the Defense Criminal Investigation Service, and the Air Force Office of Special Investigation ... The appellant further requested copies of all agency records that provided information as to corrective action taken by the agency against NGB officials in response to the alleged violations raised in the disclosures ... the appellant sought copies of all agency records that involved "meetings with Brig Gen Paul A. Weaver, Jr., Deputy Director, NGBCF, and other NGB officials" ... the AJ abused her discretion in denying the appellant's motion to compel the production of the above documents because they all appear reasonably calculated to lead to the discovery of admissible evidence, i.e., rebuttal evidence that could show a motive to retaliate on the part of the responsible agency officials.

*Id at* para. 9. Further the Board extended the reach of discovery to other agencies to whom disclosures were not made, here denied by the agency, and to other individuals who were not whistleblowers. *Id.* paras. 10-15, 19.

<sup>186</sup> See, e.g., *Beam v. Office of Personnel Management*, 71 M.S.P.R. 629, 632-33 (1996); *Kiser v. Department of Education*, 66 M.S.P.R. 372, 381-82 (1995) ("Interrogatories four and five asked the agency to identify each individual who had a discussion ... concerning the appellant's performance during his probationary period and the nature of the discussion. The administrative judge denied the motion as to these interrogatories on grounds of relevance, but she did not explain why [such] discussions about the appellant's performance were not relevant. Because the agency's primary defense to the appellant's claim of marital discrimination was that he had been demoted because of poor performance, the administrative judge's ruling is erroneous."); *Kiser*, 381-82 ("As to the appellant's request for copies of [supervisor's] handwritten notes of conversations with various employees regarding the appellant, the administrative judge accepted the agency's documents for in camera review and, finding "only" two discrepancies between the handwritten notes and the typewritten transcriptions, ordered the agency to provide to the appellant only those two notes. We find this ruling to be an abuse of discretion. On remand, the administrative judge shall direct the agency to provide copies of the remaining notes.")

The only fair and equitable response to the agency's unconstitutional, unethical, and unlawful actions is for the Board to enter judgment for Mr. McCarthy and to order his reinstatement to *status quo ante*. In a case before the Federal Circuit Court of Appeals, decided, coincidentally, just a day before Mr. McCarthy made his whistleblower disclosures in this case, and three days before he was fired in retribution, the Court vacated and reversed a decision of the MSPB because the Appellant's rights were violated where the Board abused its discretion in failing to draw adverse inferences against the Agency defendant with respect to its spoliation of evidence.<sup>187</sup> Board precedent clearly establishes the appropriateness and necessity of imposing sanctions for

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<sup>187</sup> *Kirkendall v. Department of the Army*, Fed. Cir. 08-3342 (July 27, 2009). In *Brady v. U.S.*, 877 F.Supp. 444 (C.D. Ill., 1994), the plaintiff attempted to create a factual record supporting his case by backdating a number of forms. The court imposed the ultimate sanction, dismissal. Such reported cases are legion. See, e.g., *Aoude v. Mobil Oil Corporation*, 892 F.2d 1115, 1118 (1st Cir.1989)(cause of action dismissed for "fraud on the court" where plaintiff attached a bogus agreement to the complaint); *TeleVideo Systems, Inc. v. Heidenthal*, 826 F.2d 915, 917 (9th Cir.1987) (default entered where defendant engaged in scheme involving perjury designed to willfully deceive the court); *Sun World, Inc. v. Olivarria*, 144 F.R.D. 384, 390 (E.D.Cal.1992) (default judgment appropriate where plaintiff submitted false document and committed perjury in furtherance of fraud); *Eppes v. Snowden*, 656 F.Supp. 1267, 1279 (E.D.Ky.1986) (defendant's answer and counterclaim stricken where defendant committed "fraud on the court" by producing "backdated" letters). In *Southern Union Co. v. Southwest Gas Corp.*, 415 F.3d 1001 (9th Cir. 2005), the Circuit Court approvingly recounted the district court's outrage at fabricated notes of telephone conversations. In *Rep Mc Realty, L.L.C. v. Lynch*, 363 F.Supp.2d 984 (N.D. Ill., 2005), the court stated, "The Court agrees with precedent finding that when a litigant fabricates critical evidence, the interests of the judicial system militate strongly in favor of dismissal of the suit so as to deter all litigants from such misconduct in the future." *Rep Mcr Realty, L.L.C.*, at 1012 (citations omitted). See also, e.g., *Pope v. Fed. Express Corp.*, 974 F.2d 982, 984 (8th Cir.1992) ("Dismissal of Pope's lawsuit is a severe sanction, yet under the circumstances we cannot find that such a sanction constitutes an abuse of the district court's discretion. The dismissal of Pope's suit was based on the district court's finding that manufactured evidence and perjured testimony had been introduced in an attempt to enhance the case through fraudulent conduct.")

discovery misconduct. Severe sanctions, up to and including judgment, are in order when a party flagrantly abuses the discovery process.<sup>188</sup>

Such outrageous litigation misconduct should be met with the most severe sanctions, including an order that the Agency not be permitted to raise the defense that it would have taken the personnel actions absent the disclosures. In fact that is exactly what the Board decided in *Armstrong v. Department of Justice*, 2007 MSPB 280 (2007), a case with striking similarities to the case at hand. There the Board upheld a ruling that imposed a sanction on the Agency for its failure to fully comply with discovery. The sanction barred the Agency from asserting the affirmative defense that it would have taken the same action absent any protected disclosure, and further barred the Agency from submitting or relying on any evidence relating to the strengths or weaknesses of the personnel actions at issue.<sup>189</sup>

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<sup>188</sup> See *Diehl v. H.J. Heinz Co.*, 901 F.2d 73, 74-75 (7th Cir.1990) (dismissal of plaintiff's action justified for willful failure to comply with the defendants' request for discovery on a timetable to which plaintiff's lawyer had agreed); Cf. *C.K.S. Engineers, Inc. v. White Mountain Gypsum Co.*, 726 F.2d 1202 (7th Cir.1984)(district court did not abuse its discretion in refusing to vacate default judgment entered when defendants failed to meet the court's deadline for responding to interrogatories, which deadline had been extended twice by the district court); *Anheuser-Busch, Inc. v. Natural Beverage Distributors*, 151 F.R.D. 346, 354 (N.D. Cal. 1993) (dismissing defendant's counterclaim under Fed.R.Civ.P. 37 and the court's inherent powers for defendant's failure to produce requested documents, violation of court's orders, and perjury). In *Ryan v. Dept. of the Air Force*, 2009 MSPB 235 (2009), the Board reversed the AJ, holding that the Appellant was entitled to discovery of information relating to any factor to be examined in making a determination of whether the Agency proved by clear and convincing evidence that it would have taken the same actions in the absence of the Appellant's protected disclosures.

<sup>189</sup> The Board has also recognized that it is appropriate to enter sanctions against the Agency for failing to file its response to the acknowledgement order. *Taylor v. USPS*, 75 M.S.P.R. 322 (1997) (upholding sanction of "deny[ing] the Agency the right to introduce additional evidence supporting its case-in-chief against the Appellant.")

Additionally, the Board should call upon the Office of Special Counsel (OSC) to launch an investigation into the truly reprehensible conduct of agency officials and agency counsel at evidence in this proceeding, and to bring appropriate disciplinary actions.<sup>190</sup>

Finally, there are no words strong enough to condemn the reprehensible conduct of Agency counsel.<sup>191</sup> Attorneys for the Government have an even higher standard of conduct that Agency counsel in this case also failed to observe.<sup>192</sup> Government lawyers

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<sup>190</sup> In *Anderson v DOT FAA*, CH075281FO873 (Oct 30, 1990), the MSPB discussed at length the ramifications where the Agency falsified evidence. Citing a congressional report that was the source of information showing the Agency had falsified evidence before the MSPB, the Board noted the report recommended officials responsible for the falsification be prosecuted.

<sup>191</sup> An attorney was suspended for six months for backdating a document submitted to opposing counsel and to a bankruptcy court and then repeatedly failing to correct false statements about the date the document was executed. *In re Jagiela*, 517 N.W.2d 333, 336 (Minn.1994). As noted twenty years ago by the federal district court for the District of Columbia, "Documents are an attorney's stock in trade, and should be tendered and accepted at face value in the course of professional activity." *In re Schneider*, 553 A.2d 206, 209 (D.C. 1989). Pursuant to Fed.R.Civ.P. Rule 26(g), "every discovery request, response, or objection must be signed by at least one attorney of record in the attorney's own name." "By signing, an attorney . . . certifies that to the best of the [attorney]'s knowledge, information, and belief formed after a *reasonable inquiry*: (A) with respect to a disclosure, it is complete and correct as of the time it is made; and (B) with respect to a discovery request, response, or objection, it is consistent with the [Federal Rules of Civil Procedure]." (Emphasis supplied). If a court finds that the certification requirement of Rule 26(g) has been violated, sanctions are mandatory. FED. R. CIV. P. 26(g)(3). Additionally the ABA Model Rules of Professional Responsibility, Model Rule 3.4, states that a "lawyer shall not in pretrial procedure, . . . fail to make [a] *reasonably diligent* effort to comply with a legally proper discovery request by an opposing party." (Emphasis supplied). Further, Model Rule 3.4 establishes an affirmative duty to refrain from unlawfully suppressing or obstructing, altering, destroying, or concealing evidence or counseling or assisting client to do same. This duty also finds a companion in Federal Rule 26(g), the comments to which explain that Federal Rule 26(g) imposes an affirmative duty to engage in pretrial discovery in a responsible manner that is consistent with the spirit and purposes of Federal Rules 26 through 37.39.

<sup>192</sup> Federal Regulations provide that:

must "seek justice" and avoid unfair settlements or results.<sup>193</sup> The Texas Disciplinary Rules of Professional Conduct, Rule 3.03, reflects the universal rule of "candor toward the tribunal".<sup>194</sup>

**3. The AJ abused his discretion in denying Appellant's motion to postpone the hearing either to permit Appellant's counsel to attend or to permit Appellant time to prepare for self-representation.**

On February 5, 2010, Appellant moved for an order continuing the hearing for no less than two weeks, on grounds, *inter alia*, that "Counsel for Mr. McCarthy at Public Employees for Environmental Responsibility (PEER) have had conflicts arise which render them unable to attend the hearing on the dates currently scheduled." In the alternative, the motion stated "even if a postponement long enough to allow PEER

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Attorneys performing work for the government must maintain the highest ethical standards. They should be particularly sensitive to questions of appearances and propriety. Neither the circumstances of their retention nor their conduct of their engagement should provide the slightest basis for loss of public confidence in the administration or justice or the integrity of the governmental process.

1 C.F.R. 305.87-3.

<sup>193</sup> *In re: Bruce R. Lindsey*, 148 F.3d 1100, 1109, n. 4 (U.S. App. D.C. 1998), citing CODE OF PROFESSIONAL RESPONSIBILITY EC 7-14 (1980).

<sup>194</sup> (a) A lawyer shall not knowingly:

- (1) make a false statement of material fact or law to a tribunal;
- (2) fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act; ...
- (5) offer or use evidence that the lawyer knows to be false.

The Note to this rule adds that "There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation." Agency counsel's failure to disclose the surreptitious back-dating of key documents it relied on in this case, until after it was caught falsely claiming they were contemporaneous, "is the equivalent of an affirmative misrepresentation."

counsel to participate is not granted, a short postponement to allow Appellant to prepare to conduct the hearing alone would be needed.”

The AJ entered an Order Denying Appellant’s Request for Postponement of Hearing on February 8, 2010. The Order stated that it appeared one of two PEER counsel could attend the hearing. It did not address the request for time to permit McCarthy to proceed *pro se*. Ironically, due to the severe snowstorms that hit Washington D.C. in mid-February, Appellant’s counsel would not have been able to travel to the hearing in any event.

As a result of the AJ’s abuse of discretion, McCarthy proceeded *pro se* at the hearing, whereas the Agency packed the hearing room with Agency officials, so much so that the hearing had to be relocated to a larger room for the second day (when most of the Agency officials did not return). The Agency was fully represented throughout by two contract attorneys, an Agency staff attorney (who was there as “Agency representative”), and the Agency’s public affairs officer, whereas McCarthy had zero assistance.

McCarthy is further prejudiced by the fact that in preparing this appeal, he must rely solely on his own records and notes.

- 4. The AJ erroneously admitted into evidence calendar entries and records of meetings purportedly made by Commissioner Ruth, while denying Appellant’s repeated motions to compel production of the calendar or record book in which these documents allegedly were recorded.**

The AJ abused his discretion in denying Appellant’s objection at hearing to certain of the Agency’s Exhibits, including self-serving documents created strictly for purposes of litigation that have no evidentiary value, sworn statements of witnesses who were available to and did testify at hearing (in contradiction of their sworn statements), and an uncorrected, unsigned version of Mr. McCarthy’s corrected and signed deposition.

The AJ denied Appellant's objection at hearing to admission of several exhibits offered by the Agency, including several purported calendar entries and records of alleged meetings, although Appellant was repeatedly denied access to the calendars and notebooks of Commissioner Ruth as the Agency objected to producing the documents and the AJ repeatedly denied motions to compel.<sup>195</sup> Yet even at the hearing, Commissioner Ruth was permitted to reference his "Day-Timer" (not just the previously admitted excerpts but the entire book itself) but Appellant was not allowed to see the calendar.<sup>196</sup>

Worse, evidence shows the Agency fabricated at least one such document, a purported record of a July 23 meeting between Commissioner Ruth and McCarthy, the only documentary evidence that supports Commissioner Ruth's claim that he ever spoke with McCarthy about his opinions, at a meeting McCarthy denies ever took place. Confronted with metadata concerning a document that purportedly recorded this meeting, Commissioner Ruth admitted the document was not in fact created contemporaneously, but on August 2, after Mr. McCarthy's dismissal, and secretly backdated.

Evidence at the hearing and in pleadings show that the Agency presented several such documents as being contemporaneous records, eventually to back down and claim they were created "soon after" the dates previously claimed. Even then, Commissioner

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<sup>195</sup> See, e.g., *Appellant's objection to Exhibits at hearing; Appellant's Motion for Certification for Interlocutory Appeal, or in the alternative, Motion for Reconsideration* (January 13, 2010).

<sup>196</sup> The legitimacy of the "Daytimer" is seriously suspect. Human Capital Director Petz, who testified he met virtually daily with Ruth, testified he'd never even seen the allegedly ubiquitous Daytimer. Petz, Riera, and even Ruth testified Ruth was not in the habit of writing down important information.

Ruth claimed one such document, a purported memo of an alleged July 20 meeting with Petz was created the same day, in contrast to the Agency's discovery response that the document was created "soon after" that date.

Additionally, Ruth and the Agency both claimed that Ruth was the author of the various back-dated records, although the writing style is completely inconsistent with Ruth's writing, and testimony established that Ruth simply did was not in the habit of making such records. Moreover, the Agency failed to answer fully interrogatories that sought details about when, where and with whose assistance the documents were created, other than to admit that none of them were created on the dates stated thereon.

There are no grounds to admit selected passages from a calendar that admittedly does not include routine entries of important meetings, allegedly recorded by a witness who admits back-dating documents, written in a style that does not at all resemble that of the witness who claims to have created them, on dates about which the Agency cannot keep its story straight between discovery responses and testimony, and concerning which the Agency refused to respond fully in discovery. Moreover, the Agency's admitted fabrication of evidence creates an inference that all such documents are fraudulent.

**5. The AJ abused his discretion in denying McCarthy's oral and written motion at hearing to admit additional exhibits, including documents that were previously unavailable and concerning which the Agency had wrongfully denied production in discovery.<sup>197</sup>**

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<sup>197</sup> See Appellant's Exhibit KKKKK. Notwithstanding the AJ's peculiar denial of Appellant's motion to admit Exhibit KKKKK at hearing, a ruling that is appealed herein, the Board may take official notice of matters that can be verified. *Moore v. Department of Justice*, 112 M.S.P.R. 382, ¶ 20 & n.6 (2009); *Woodjones v. Department of the Army*, 89 M.S.P.R. 196, ¶ 15 (2001); 5 C.F.R. § 1201.64. Exhibit KKKKK includes four such verifiable sets of documents, all published on the internet, two by the Agency, one by MSPB, and the other by multiple news outlets.

1. South Bay International Waste Water Treatment Plant documents including a *fedbizopps.gov* internet notice of the November 14, 2009 award of an \$88 million contract, and Ms. Forti's email admission and attempted cover-up of the fact that the



The first set of such documents concerned the South Bay International Waste Water Treatment Plant, including notice of a November 14, 2009 award of an \$88 million contract, a written admission by Ms. Forti that the contract violates the Antideficiency Act, and a documented attempt to cover-up the violation. McCarthy requested all such documents in discovery and received neither a single page nor any responsive answer.<sup>198</sup> The documents offered in evidence had been obtained by McCarthy from alternative sources only days prior to the hearing. One of the most serious disclosures made by McCarthy was the Agency's violation of the Antideficiency Act by issuing a contract that obligated the Agency to pay millions of dollars that had not been appropriated to the Agency.

This is the classic definition of a violation of the Act. The Agency had the documents, yet it simply refused to produce anything in response to a specific request.

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contract violates the Anti-deficiency Act. Appellant requested all such documents in discovery and received not a single page or any responsive answer. See Appellant's First Discovery Requests (1DR), 33.

2. *Fedbizopps.gov* internet notice of a Solicitation for bids to conduct a program assessment, dated September 15, 2009 and cancelled Nov. 16, 2009, including recommendations to reorganize IBWC. Appellant requested but did not receive all such documents in discovery (1DR 26; 2DR 26; 1 DR 35, 36, 37, 38.)

3. MSPB Report, *Navigating the Probationary Period after Van Wersch and McCormick*, A Report to the President and the Congress, Sept. 2006 (previously cited in Appellant's pleadings).

4. News Story concerning Agency's refusal to release information about its contract with the law firm of Jackson Lewis, and noting the firm's reputation for advising its clients to use illegal tactics.

<sup>198</sup> In response to Appellant's first set of document Requests, number (23), seeking "documents that relate in any way to certifications or other assurances by the USIBWC concerning a financial award for the South Bay International Water Treatment Plant (SBIWTP), after January 1, 2007," the Agency responded without providing any documents and objecting that the request was "not relevant", overly broad", and "unduly burdensome"; in addition, the Agency asserted that "Appellant has not made protected disclosures and therefore is not entitled to discovery regarding same. The Agency further objects to this Request as it fails to identify with particularity the documents requested.")

Commissioner Ruth had a set of the documents in his personal files, given to him by former Acquisitions Chief Burns, according to his own testimony and hers. Forti obviously had the documents, including an email she had sent to contract specialist Soto attempting to involve him in her cover-up. The AJ would not even allow McCarthy to question Ruth as to why he did not produce the documents in response to a specific discovery request.

Burns and Riera and McCarthy all testified that McCarthy was aware of the violation of the Antideficiency Act when he made his disclosure. The Agency hid documentary evidence that proves the truth of the disclosure. Yet the AJ refused to admit the documents obtained by McCarthy from Burns just prior to the hearing. This is beyond an erroneous ruling, it is also highly prejudicial and sanctionable conduct by the Agency and its counsel.

The second set of such documents concerns the Agency's solicitation for bids to conduct a program assessment, dated September 15, 2009 and cancelled Nov. 16, 2009, including recommendations to "reorganize" IBWC, which is said to be "declining significantly in overall indicators of human capital performance." Again the Agency withheld documents requested in discovery concerning consultants and organizational self-assessments (and in fact withheld actual reports known to have been written in 2009).<sup>199</sup> Again, although the Agency withheld documentary evidence specifically

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<sup>199</sup> In response to Appellant's First Set of Document Requests number (36), for "all communications between any official of the USIBWC and any consultant, contractor, or government official from outside USIBWC who was paid to investigate or report on USIBWC issues including grievances, complaints, proposals to reorganize, or efforts to improve collaboration among staff, between January 18, 2009 and present," the Agency provided no documents and objected that the request was "not relevant."

requested by Appellant, McCarthy obtained it from an alternate source – this time from the internet, where it had been posted and then removed by the Agency.

The documentary evidence offered by McCarthy shows that the Agency had contemplated a reorganization, but the Agency chose to withhold this evidence, because it had claimed McCarthy was removed essentially for making recommendations about reorganization – recommendations that were requested as part of an in-house process that was subsequently let out for bid. Moreover, the documents show the very language McCarthy used in describing the need for reorganization was adopted by the Agency itself, and put out not just to the executive committee, but to the entire world. Apparently the Agency spent too much on its high-priced law firm to be able to go forward with the contract, or perhaps it was embarrassed by having inadvertently disclosed to the world the very criticisms it says it fired its general counsel for making, but in any event it cancelled the solicitation and tried to cover it up. Once again, this is more than an erroneous ruling, it is overwhelming evidence of discovery misconduct, and it proves the Agency's stated reasons for removing McCarthy – being non-collegial in making recommendations for reorganization – were nothing more than a pretext for the true retaliatory reasons.

The third document is one previously cited in Appellant's pleadings, including Appellant's January 22, 2010 Objections and Supplements to the Summary of Status Conference. The MSPB Report, *Navigating the Probationary Period after Van Wersch and McCormick*, A Report to the President and the Congress, Sept. 2006, establishes that "probationary period" applies to competitive service employees, whereas "trial period" may apply to excepted service employees, however, unlike for competitive service

employees, there is no statutory requirement that there be a probationary or trial period for excepted service employees. The exhibit is relevant to McCarty's non-probationary status, to whether Human Capital Director Petz relied on this knowledge when concluding McCarthy was not probationary, to Board-recognized constitutional due process rights for non-probationary employees, and to retaliatory motives. Moreover, it plainly contradicts the position adopted by the Agency and assumed by the AJ that McCarthy was probationary.

The fourth document concerns the Agency's refusal to release information pursuant to a Freedom of Information Act lawsuit concerning its employment of outside counsel. The exhibit is relevant to Commissioner Ruth's retaliatory motive in employing not just outside counsel, but one of the nation's largest and most anti-worker law firms, a firm sued by its own client for advising widespread illegal conduct, then attempting to unlawfully cover up information relating to that decision. The plainly illegal refusal to release such information is strong evidence of retaliatory motive, as is the nature and expense of the employment agreement itself, not to mention the law firm's use of similar tactics in this appeal.

As noted above, Appellant recently obtained documents concerning the Agency's employment of outside counsel at up to \$450 per hour, running up a tab of over \$100,000 just through the ID, and not including this PFR.<sup>200</sup> More alarming than the amount of

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<sup>200</sup> See *Appellant's Exhibit KKKKK* (para. 4 and attachment.) See also Purchase Order and partially redacted Retainer Agreement attached hereto, which were wrongfully withheld by the Agency until after the hearing and should now be admitted as evidence of motive to retaliate. By a letter dated October 7, 2009, PEER filed a Freedom of Information Act (FOIA) request that sought a copy of the retainer agreement between IBWC and the law firm of Jackson Lewis in the matter of *Robert McCarthy v. IBWC* before the MSPB, and all documents that evidence the source of funds used to pay for

taxpayer funds spent, is what it paid for. Agency counsel filed several frivolous motions in October, seeking to dismiss the removal appeal and to gag PEER, all of which were denied. The law firm also attached several documents in support of Agency pleadings, that turned out to be secretly back-dated federal records, raising troubling issues of fraud and fabrication of evidence. Ironically, nowhere among the firm's flurry of filings was the required answer to the appeal in DA-1221-09-0725-W-1, although the AJ ultimately allowed the Agency to file that three months later.

So concerned about having this information come out before the hearing in this matter was the Agency, that it frivolously denied the FOIA request in bad faith, and lied about the source of funds. Then mere days after the hearing, the Agency paid the first installment on this Faustian bargain, and the Agency suddenly "realized" that it had no basis in law for denying the FOIA request. The Agency and its counsel should not be

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representation. By letter dated November 5, 2009, IBWC denied the request, but falsely claimed that the source of funds was the IBWC's 2009 appropriation. By letter dated December 1, 2009, PEER appealed the denial to the IBWC Commissioner. By letter dated December 22, 2009, the Commissioner denied the appeal. PEER filed suit on January 5, 2010, appealing the denial, to which the government failed to make a timely answer. PEER filed a motion for summary judgment on February 9, 2010, to which the government responded, requesting another month's time. Finally, on March 19, 2010, the government filed its answer, together with a single Purchase Order and partially redacted Retainer Agreement. See attached documents from *Public Employees for Environmental Responsibility v. United States International Boundary and Water Commission*, Civil Action No. 10-00019 EGS (filed January 5, 2010 D.D.C.) (The Agency's claim that it paid the firm from its 2009 appropriation is doubtful, at best. The costs were incurred in fiscal year 2010, not 2009, and they were not paid until after IBWC received its 2010 appropriation, pursuant to the Consolidated Appropriations Act, 2010, signed into law on December 16, 2009. Ironically, it appears also that the Agency has again violated the Antideficiency Act, contracting for services for which it had at the time of contract no appropriated funds to pay the contractor.) Ultimately, and even more belatedly, the Agency coughed up yet another invoice that shows Agency Counsel has billed approximately \$85,000 up to but not including the hearing in this matter!

rewarded for this all too familiar fraudulent conduct, by excluding the evidence of retaliatory motive.

**6. The AJ erred in finding that the Agency proved by “clear and convincing evidence” that it would have removed Appellant in the absence of his protected disclosures.**

The ID first recites, then proceeds to largely ignore the factors the Board will consider to determine whether an agency has shown by clear and convincing evidence that it would have taken the same personnel action in the absence of whistleblowing: the strength of the agency’s evidence in support of its action; the existence and strength of any motive to retaliate on the part of the agency officials who were involved in the decision; and any evidence that the agency takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated.<sup>201</sup>

The Appellant is entitled to discovery of information relating to any factor to be examined in making a determination of whether the Agency proved by clear and convincing evidence that it would have taken the same actions in the absence of the Appellant’s protected disclosures.<sup>202</sup> Given the Agency’s discovery misconduct described elsewhere, it is difficult to imagine how the Agency could even hope to meet this burden. Notwithstanding such misconduct, the Agency fails.

**a. The strength of the evidence in support of the personnel action.**

This case presents the highly unusual circumstance of a removal expressly predicated on internal disclosures of the same matters which achieved protected status

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<sup>201</sup> ID at 7, citing *Carr v. Social Security Administration*, 185 F.3d 1318, 1323 (Fed. Cir. 1999).

<sup>202</sup> *Ryan v. Dept. of Air Force*, 2009 MSPB 235 (2009).

when they were made outside of the Agency.<sup>203</sup> It is axiomatic that “[d]iscipline may not be based on a disclosure protected by the WPA.”<sup>204</sup> While the legal memoranda are not protected because they were made in the course of McCarthy’s job duties, they involve the same content as the protected disclosures. Thus it is highly doubtful that they could be permissible grounds for discipline, or could be considered “independent” grounds for the dismissal action “unrelated” to the protected disclosures which could meet the Agency’s clear and convincing burden of proof.<sup>205</sup> The actual grounds for removal were not independent or unrelated at all, but instead premised on the same protected disclosures in their internal form, which represented McCarthy’s efforts to address the issues within the chain of command before he went outside of it.

Additionally, the Federal Circuit has rejected an argument that an agency can meet its clear and convincing evidence burden of proof by claiming that disciplinary action was based on the derogatory, disrespectful or inappropriate nature of protected disclosures rather than their content.

When a disclosure is of protected subject matter, it is more likely than not to be critical of management, perhaps highly critical. The WPA protects those employees who are willing to speak out on subjects that could incur retaliation if unshielded.<sup>206</sup>

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<sup>203</sup> Because the legal memoranda were produced in the course of McCarthy’s job duties, they are not protected whistleblower disclosures pursuant to the Federal Circuit’s rulings. *E.g. Huffman v. OPM*, 263 F.3d 1341 (Fed. Cir. 2001). However, the disclosures of the same matters to the OIG, OSC, GAO, FBI and to the White House were not made in the course of McCarthy’s job duties, or at least were made outside of normal channels, and therefore *are* protected. *Id.*

<sup>204</sup> *Chambers v. Dept. of Interior*, 2010 U.S. App. LEXIS 8209 (Fed. Cir. 2010) at \*21.

<sup>205</sup> *See Greenspan v. Veterans Admin.*, 464 F.3d 1297, 1305 (Fed. Cir. 2006).

<sup>206</sup> *Greenspan v. Veterans Admin.*, 464 F.3d at 1306.

Yet, such objections to the critical form, tone and impact of the disclosures is exactly what the removal here was based upon and what the ID approved as a legitimate ground for dismissal. Commissioner Ruth claimed in the removal letter that the legal memos demonstrated a failure to support him and other members of the Executive staff in a “constructive and collegial manner,” and the AJ agreed with Ruth that the memos made personal attacks which were “divisive, unrequested, unprovoked and inappropriate”. ID at 21. Even if true, which, as discussed elsewhere herein, they are not, these characterizations of the memos cannot render them a legitimate basis for discipline.

The fact that the removal action was based on the same disclosures as the protected disclosures demonstrates that the Agency in fact had no independent or unrelated grounds on which to base its action -- i.e., McCarthy had done nothing meriting discipline, much less removal, other than disclosing violations of law, gross mismanagement and substantial and specific dangers to public health and safety. An Agency certainly should not be permitted to remove an employee based on such disclosures merely by the artifice of premising the removal only on the internal disclosures, even though the protected external disclosures had already occurred.

The claim that McCarthy failed to support Commissioner Ruth and members of the executive committee in a collegial and cooperative manner is without any support in the record. The testimony of Petz, Riera and McCarthy, taken together with documentary evidence including McCarthy’s legal opinions and personnel file, all establish that McCarthy is a capable attorney with no history of discipline or unsatisfactory performance. On the contrary, he has a record of honors and awards, has held increasingly responsible positions, including as a legal innovator, educator and scholar.



Petz and Riera both testified they enjoyed McCarthy's full cooperation and support, and Petz testified McCarthy's personnel file shows no sign of unsatisfactory performance or misconduct.<sup>207</sup>

The strength of the agency's evidence in support of its action is demonstrated, according to the ID, at 21, by four allegedly "divisive, unrequested, unprovoked and inappropriate" legal opinions. In fact, each of the legal opinions was specifically requested by Commissioner Ruth, as Ruth himself acknowledged in writing (Ruth's email/memo of July 28, 2009),<sup>208</sup> although as stated in the ID, Ruth denied it under oath. Notwithstanding this false testimony, Ruth's email/memo of July 28, 2009 (the same day that McCarthy made his disclosures), plainly acknowledges that Ruth had requested the opinions through the executive committee.<sup>209</sup> Yet according to the ID, the distribution of

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<sup>207</sup> Petz testified that McCarthy was a capable attorney who always supported Petz in a professional, cooperative and collegial manner; that his personnel file reveals no history of discipline or unsatisfactory performance. See also *Oral Deposition of Kevin Petz*, November 6, 2009 (*Petz deposition*), at 99 ("Q. And are you familiar with Mr. McCarthy's personnel file? A. Yes, pretty much. Q. And is there any -- anything in there reflecting less than satisfactory performance prior to his dismissal? A. No. Q. And is there anything reflecting any warnings or discipline? A. No.")

Riera testified that McCarthy was a capable attorney who always supported Riera in a professional, cooperative and collegial manner.

See also *Appellant Exhibits P - McCarthy Resume; Q - McCarthy Oklahoma Bar Association Award; F - Memo to Commissioner re legal update (wide array of opinions); CCCCC - McCarthy position description.*

<sup>208</sup> Appellant's Exhibit M.

<sup>209</sup> The executive committee is referred to above by its alter ego, the Management Accountability Council, a name given to a committee of the Executive committee – comprising all of its members – and headed by Principal Engineer and former Acting Commissioner Riera, to make recommendations on agency reorganization. For the sake of simplicity, "executive committee" is used hereinafter to refer to both incarnations of the combined executive staff acting as a committee, since the monikers were used interchangeably when dealing with proposals for reorganization.

the opinions to the executive committee – as requested – was itself somehow considered to be “divisive, unrequested, unprovoked and inappropriate.”

Additionally, the ID reflects Ruth’s disingenuous claim that he did not ask for the opinions to make recommendations for agency reorganization. Ruth made this claim in his testimony, and also, in a confusingly circular manner, in his email/memo of July 28. Yet virtually all of the evidence of record shows that the complete opposite is true. The opinions were requested as part of an internal agency review in order to identify functions in the agency that needed to be reorganized. Again, the fact that McCarthy complied with the request to make such recommendations for reorganization is said, by the ID and Ruth, to be “divisive, unrequested, unprovoked and inappropriate.”<sup>210</sup>

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<sup>210</sup> McCarthy testified that before he wrote the opinions in question, there was a process under way for examining the structure and effectiveness of the Agency; that part of that process was to identify programs that needed different or improved oversight; that he was not the only person who offered opinions on these programs; that even Ruth’s July 28, 2009 memo (*Appellant’s Exhibit M*) saying he wasn’t going to implement the reorganization recommendations of these particular opinions acknowledged that Ruth himself had requested them; that McCarthy showed drafts of his opinion to Riera, who was appointed by Ruth as chair of the committee to review reorganization recommendations, before they were sent to the committee as requested; that after McCarthy’s removal the Agency issued a solicitation for bids on a contract to make recommendations for Agency reorganization (*Appellant’s Exhibit KKKKK*- para. 2 and attachments), using sharply critical language in describing the need for reorganization, e.g. “rapidly declining indicators of human capital performance,” “a series of reorganizations that were not well planned out,” “a structure that was not effective;” that the solicitation was later withdrawn after being published on fedbizopps.

Ruth admitted that he did not put his instructions in writing, leading to poor communication, such as that criticized in the 2005 OIG Report (*Appellant’s Exhibit VVVV*, at 9 (“Communication within USIBWC is very poor. The Commissioner does not usually document his instructions or wishes in writing, leading to considerable confusion over what he wants”)); that after McCarthy’s removal the Agency did solicit bids for a contract to make recommendations on Agency reorganization; that the solicitation was later cancelled because “it would cost too much;” that the Agency decided not to pursue a self-assessment for reorganization either internally or externally, even after publicly acknowledging to the entire world that the Agency is in chaos and in desperate need of reorganization.

The ID completely ignores the ultimately uncontested fact that the legal opinions were designed, at the specific request of the commissioner and the executive committee, to recommend agency reorganization. The ID ignores the fact, ultimately uncontested, that Ruth initially lied both in writing and in sworn testimony that reorganization recommendations were not the intent of his request for the opinions. Although the Agency attempted unsuccessfully to hide evidence that the Agency was undergoing a

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Riera testified that there was a process under way for examining the structure and effectiveness of the Agency; that Riera was appointed by Ruth to head the committee; that part of the process was to identify programs that needed different or improved oversight and/or reorganization; that McCarthy was not the only person who offered opinions on these programs; that McCarthy ran his drafts by Riera as the committee head before submitting to them to the group; that the opinions Ruth cited in his removal letter all came out of this process. See also Exhibit J, July 22 draft disclosure with Riera recommendation that technical and diplomatic functions be transferred to the Bureau of Reclamation and Department of State, respectively. *See also Riera deposition*, at 9-10:

Q. Did you have any conversations with the Commissioner about what his thoughts were regarding Mr. McCarthy's actions, in terms of achieving or not achieving that goal of working together? A. No. Mr. McCarthy was never -- I don't recall the Commissioner ever mentioning Mr. McCarthy in any of our discussions. Q. Did the Commissioner ever talk with you about some of the legal memos that Mr. McCarthy had written and describing those as attacking the Agency? A. I don't -- I don't recall him ever telling me anything about those being attacks to the Agency.

*See Appellant's Exhibits L, M* (July 28 email and memo to executive staff from Ruth citing each of the legal opinions in question and acknowledging they were requested by Ruth through the Executive staff and that they were "to review Agency programs and determine what if any programs should be reviewed," and that, "no reorganizations or organizational changes are contemplated at this time.")

See KKKKK, McCarthy *Motion to Admit Exhibits*, February 11, 2009, para. 2 and attachment.

2. Solicitation for bids to conduct a program assessment dated September 15, 2009 and cancelled Nov. 16, 2009, including recommendations to reorganize IBWC which is "declining significantly in overall indicators of human capital performance." Appellant requested all such documents in discovery (1DR 26; 2DR 26; 1 DR 35, 36, 37, 38.) The exhibit is relevant to numerous disclosures made by Appellant, as well as allegations that Appellant's recommendations on reorganization had not been requested.

reorganization review, and in fact that it ultimately sought outside consultation on agency reorganization, after removing McCarthy, this fact too was eventually conceded, but again ignored by the ID.<sup>211</sup>

Even more disturbing than Ruth's apparent perjury, however, is that the ID gives it credence, supposedly based on documentary evidence, when in fact all of the documentary evidence proves exactly the opposite. For example, the ID states, at 15,

Ruth testified that the second memorandum sent by the appellant on June 19th also addressed matters for which he had made no request. *See Agency Exhibit MM*. Ruth asserted that he had not requested the memorandum, nor had he sought the appellant's advice on any organizational changes.

As the very Exhibit itself establishes, Ruth admits requesting the opinions, even if he disingenuously tries to disown that part of the request that was for recommendations on reorganization.<sup>212</sup>

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<sup>211</sup> Although Ruth's July 28 email/memo rather circuitously tries to deny asking for recommendations on reorganization, the record is replete with testimony and documentary evidence that Ruth requested the opinions specifically as part of a reorganization study, and that the opinions were vetted through the head of the reorganization committee, Mr. Riera. Ruth's fake outrage over the opinions being provided to the executive committee does not withstand the hard evidence that the procedure was put in place by Ruth himself, under the supervision of Mr. Riera, and that McCarthy made extraordinary efforts to have his opinions approved by Mr. Riera before they were given to the committee. Indeed, Ruth finally acknowledged under cross examination that the opinions were part of an ongoing internal reorganization study that Ruth had requested, a process that he later sought to contract out, before canceling it and giving up on what the agency publicly acknowledged - on the world wide web - was a badly-needed reorganization, due to "cost." After McCarthy's removal the Agency issued a solicitation for bids on a contract to make recommendations for Agency reorganization, publishing it on the internet website *fedbizopps (Appellant's Exhibit KKKKK- para. 2 and attachments)*, using sharply critical language in describing the need for reorganization, e.g. "rapidly declining indicators of human capital performance," "a series of reorganizations that were not well planned out," "a structure that was not effective. The ID does not seek to reconcile Ruth's conflicting testimony that he did not request opinions on reorganization and the false claim in his July 28 email that he did not request opinions on reorganization, with the documentary evidence and sworn testimony of McCarthy, Riera and ultimately Ruth himself that the opinions were written specifically as part of a reorganization review requested by Ruth.

The ID also ignores the actual conditions described in the opinions, including illegal and unethical actions being taken by executive staff members. In effect, the ID suggests and assumes that the agency's lawyer should decline to provide the legal opinions specifically requested by the agency head and executive staff, neglect his professional responsibilities and look the other way in order to preserve harmony on the executive staff. While pointing out illegal and unethical behavior by executive staff members may be "divisive," it is nevertheless the duty of the agency general counsel to do so.

The ID, at 16, cites Ruth's testimony that two June 19 legal opinions [concerning, respectively, CIO minimum qualifications and separation of budget and finance] led Chief Administrative Officer – Budget Officer – Chief Information Officer Forti to file a grievance on July 1, accusing McCarthy of "bullying" behavior. Whereas the ID accepts this testimony at face value, the so-called grievance states that it is actually filed against Riera, Petz *and* McCarthy, for allegedly "conspiring" to damage Forti's reputation. The document demands the "immediate removal of Alredo Riera, Kevin Petz and Robert McCarthy from their positions." In addition to alleged "gender discrimination" against Forti, she also accuses Riera and Petz of having discriminated against Public Affairs Officer Sally Spener and former Legal Adviser Sue Daniel, respectively.

Moreover, the allegation concerning McCarthy is explicitly "based on your [Ruth's] personal validation that you did not approach nor solicit from the above mentioned individuals their critical examination of Administration Department." Ruth

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<sup>212</sup> See Appellant's Exhibit M ("These memos were provided in respond [*sic*] to a request by me thru [*sic*] the Management Accountability Council (MAC) to review agency programs and determine what if any programs should be reviewed [*sic*].")

and Forti both knew, of course, that was not true. Forti's alleged grievance is, suspiciously, unsigned, not on letterhead, and was never delivered to McCarthy or otherwise acted upon. Not coincidentally, it recycles the same charges that were leveled against her by personnel specialist Lopez, e.g. "patterns of demands that laws and regulations be ignored, lack of respect for the Privacy Act, bully behavior and harassment against me and others."<sup>213</sup>

Finally, the document was the subject of discovery requests that the Agency, in its usual manner, refused to grant. Asked to produce any documents related to the grievance, including metadata, the Agency responded that it was "not relevant."<sup>214</sup> If it is not relevant for purposes of discovery, as decided by the Agency and implicitly by the AJ, in denying Appellant's motions to compel, then it certainly cannot be relevant for any purpose, least of all to show McCarthy is not "collegial."

Not coincidentally, each of the four opinions in question deals with a significant aspect of fraud, waste or abuse included in McCarthy's July 28 protected disclosures. The first opinion recommends separation of oversight responsibility for budget and

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<sup>213</sup> See Appellant Exhibit *IIII* –June 8, 2009, Lopez Investigation Report, at A2.

<sup>214</sup> See Appellant's *Objections and Supplements to the Summary of Status Conference*, issued on January 15, 2010 (January 21, 2010), Attachment B, *Agency Response to Appellant's First Set of Interrogatories and Second Document Requests*, request 13 ("produce documents upon which the [Forti grievance dated July 1, 2009] is based, including any notes, drafts, communications, and related documents, including documents that evidence subsequent action or communication, and including all metadata related to the referenced document.") (The Agency objects that the information is not relevant). See also *Id.*, *Appellant's Interrogatory 12*: "identify the date and place [a typed grievance memo from Ms. Forti, dated July 1 2009] was created, and the names of each person who requested, created or assisted in its creation." The Agency claims "Ms. Forti created the memo on or about the date stated and that no one 'requested' or assisted in its creation", but fails to identify the "date and place it was created."

contracts;<sup>215</sup> a second opinion recommends that the agency's Chief Information Officer (CIO) should have at least minimal information technology qualifications and should

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<sup>215</sup> See *Appellant's Exhibit AAA*, June 14, 2009, legal opinion on separation of oversight of budget and contracts. The language that the Agency and the ID claim to find offensive, in the four-page, single-spaced opinion, is the concluding paragraph, which states, in its entirety:

My legal opinion is that the OIG recommendation of 2005 should be implemented without further delay, and that additional steps should be taken to ensure that Budget and Contracts functions remain truly autonomous and separately accountable to the Commissioner or to a qualified chief executive officer or deputy commissioner.

The ID cites Brandt testimony that in mid-June Ruth asked her opinion of McCarthy's legal memorandum concerning separation of budget and contracts. Brandt testified that she told Ruth the memorandum was "mean-spirited" and misinterpreted a 2005 OIG Report. Brandt and the ID both ignore the fact that a 2006 OIG report that stated that the conflict was to be cured by the appointment of a full-time contract officer did not consider the fact that the contract officer would still report to the budget officer who would still effectively oversee contracts, because Forti would not appoint a full time permanent budget officer and release her direct control over both functions, even as late as 2009, as pointed out in McCarthy's opinion. Nor was the conflict cured by assigning even more duties to Forti as "Chief Administrative Officer" (CAO), the subject of an entirely separate issue that the OIG reports recommended be dealt with by the "competitive" appointment of a "qualified chief executive", something that was never accomplished. The existence of the conflict and its contribution to fraud, waste and abuse was also acknowledged by Riera and confirmed by the testimony of former Contracts Chief, Colleen Burns. On August 3, 2009, Human Capital Director Kevin Petz told McCarthy that OPM agreed with his analysis of the lack of separation of contracts and budget. See *Appellant's Exhibit C*, August 2, 2009 Petz email to McCarthy (OPM). The Agency refused to produce other documents involving communications with OPM about McCarthy's removal. The ID cites Ruth's testimony that he did not request the legal opinion concerning separation of budget and contracts, yet in another blow to Ruth's credibility, his testimony is inconsistent with July 28 email/memo in which he plainly acknowledges that he requested the opinion. Ruth also testified that he had "no problem" with "the budget officer supervising contracts", demonstrating the falsity of claims that the conflict had been somehow cured, and evidencing his complete failure either to grasp the issue or to cure the conflict. See also *Appellant Exhibit E – July 28 disclosures*, pp 8-9.

report directly to the agency head;<sup>216</sup> a third opinion recommends against adoption of a proposal by the “Compliance Officer” to give him absolute power and control over internal agency audits, citing his open declaration of hostility and bias toward certain executive staff and the programs they supervise;<sup>217</sup> and a fourth opinion similarly

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<sup>216</sup> See *Appellant’s Exhibit ZZ*, June 14, 2009, legal opinion concerning information management. The language that the Agency and the ID claim to find offensive, in the seven-page, single-spaced opinion, is the concluding paragraph, which states, in its entirety:

In summary, USIBWC is required to have a CIO "with the experience and skills necessary to accomplish the duties set out in law and policy," and who "reports directly to the agency head." This requirement is violated by an organizational structure that subjugates information management staff (who may or may not themselves possess the core competencies discussed above) to a mid-level administrator who does not possess these core competencies (or even an administrator who may possess these competencies but whose primary duties lie elsewhere).

The ID repeats Ruth’s misrepresentation of this paragraph as referring to CIO Forti, as a “mid-level administrator who does not possess these core [IT] competencies;” and “basically the same as that presented in May about the IT organization, which he had found to be completely wrong.” As testified to by McCarthy, the reference to “mid-level administrator” in this opinion was plainly to the position of IT supervisor (currently filled by Z Mora) and was followed by an overly generous reference to “an administrator who may possess these competencies but whose primary duties lie elsewhere”. Forti also served as Chief Administrative Officer and Budget Officer. She was described as “IT ignorant” in testimony by a ten-year agency computer specialist now employed by the Justice Department, Matt Medor.

The agency refused all discovery related to Forti’s qualifications, or lack thereof. The Agency essentially contends that by giving Forti yet another title, or two, it had cured the budget/contracts conflict, when in fact it merely exacerbated the Agency’s appalling mismanagement. See also *Appellant Exhibit E – July 28 disclosures*, pp 7-8 (e.g., “At least one IMD employee reports that Mr. Mora is unqualified to perform his duties.”).

<sup>217</sup> See *Appellant’s Exhibit EEE*, July 14, 2009, legal opinion regarding audit proposal. The language in the seven-page, single spaced opinion that the Agency and the ID claim to find offensive is taken out of context to falsely claim that McCarthy accuses Graf of being incompetent and unethical when in fact the opinion merely cites regulations governing competence and ethics, the very regulations on which the proposal purports to rely, and applies them to the proposal. The recommendations, including a widely and



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long held belief among Agency leaders that the Compliance Office should be dissolved, are set forth in their entirety below:

The Proposal should be rejected and the Compliance Office should be eliminated. More specifically:

- a. The Auditor, as provided by a current directive, should be placed in the Office of the Legal Adviser, in accordance with past practice. The Legal Adviser should provide administrative supervision and legal guidance. The auditor should report directly to the Commissioner or a chief executive, with respect to external audit recommendations and implementation. Whereas the Legal Adviser would presumably be asked by the Commissioner to review and comment on audit reports, the Legal Adviser should not control the scope of audits nor should he censor audit recommendations (in contrast to the internal audit program proposed by the Compliance Office, where the Compliance Officer would control both the scope of every audit and the content of any audit report).
- b. The EEO program should also be placed for administrative supervision and legal guidance in the Office of the Legal Adviser. The EEO Officer would report directly to the Commissioner or a chief executive. Whereas the Legal Adviser would presumably be asked by the Commissioner to review and comment on EEO reports, the Legal Adviser should not control the scope or contents of EEO reports. Alternatively, EEO could be placed for administrative supervision in the Human Capital Office.
- c. Responsibility for overseeing the workers compensation program would be more logically placed in the Security and Safety Office. Alternatively, the program could be placed for administrative supervision in the Human Capital Office or Legal Affairs Office.
- d. The strategic planning function should be placed under the Operations Department. At present, there is little value in strategic planning that is divorced from operations. Strategic Planning currently is driven by Budget and Compliance, which leads to a dangerous mismatch of budget priorities and operational needs.

According to the ID, Ruth testified the opinion criticized executive staff member Graf as incompetent and unethical, and recommended his duties be assigned elsewhere. This is a misrepresentation of the opinion, which states “The Proposal is not supported by the cited authorities;” that it “would give all the powers of an inspector general to the Compliance Officer, in addition to complete control over the scope of audits and the release of any reports, even to the Commissioner”; cites regulations that would prohibit the proponent from supervising audits of Agency programs that he has demonstrated bias against; and suggests audit “and other functions” be assigned to more appropriate functional areas. The opinion cites and quotes Graf’s own actions and words to show that the very rules on which his proposal was based (excluding a phantom federal regulation that Graf cited) would ethically and legally prohibit him from performing the duties he sought to have assigned to him. The opinion did not in fact accuse Graf of anything he

counsels against another proposal by the Compliance officer to give him complete power and control over adoption of agency policies or “directives.”<sup>218</sup>

The legal opinion of June 19, 2009, “Legal Requirements for Separation of Budget and Finance Responsibilities”, quotes from a 2005 OIG report that states “The

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had not openly bragged about, but merely noted that he would be precluded from assuming the duties he sought due to his openly stated lack of impartiality and intention to target the Human Capital Office supervised by Petz. Graf was disqualified under the auditing principles he himself cited both because he had openly prejudged Petz and because he had formerly supervised the Human Capital Office. McCarthy’s opinion also invoked a proposal that had been pending since the prior administration to reorganize the “Compliance Office” out of existence, as had been attempted by Mr. Riera, the former Acting Commissioner, whose testimony described the office as the ill-advised result of a historic grievance settlement. Riera testified that the prior Commissioner, Carlos Marin, shared his view. Riera also reviewed and approved McCarthy’s opinion, and offered the same view for himself. See also *Appellant Exhibit E* – July 28, 2009 OIG disclosure memo (e.g., pp 4-5, noting Graf conflicts of interest as “auditor”, given his intense hostility toward HR Director Petz, Graf’s announcement that Petz would be the first to be audited, and Graf’s former service as acting HR Director.)

<sup>218</sup> See *Appellant’s Exhibit SS*, July 20, 2009, legal opinion on directives proposal. It is unclear what aspect of this opinion is purported to be objectionable, since it does not contain recommendations for reorganization. The two-page opinion concludes:

In summary, we can agree the current Directives system needs an overhaul. It must not become the fiefdom of anyone official or office, however. Administration of the system must be completely divorced from policy advocacy. The Directive should not itself assign management responsibility for the system, beyond the level of DMSO. Similarly, directives should be grouped by individual functional areas, not tied to a detailed organizational structure.

McCarthy’s legal opinion of July 20, 2009, “Comments on Proposed Directive Management System” essentially challenged the legal authority claimed for the proposal. The federal regulation that Graf claimed *required* adoption of his proposal simply does not exist, nor is there any former or comparable regulation. McCarthy also disagreed with the “coding structure” and disagreed with the centralization of control over adoption of policies in the proponent. As with each opinion, it was specifically requested by Ruth through the executive staff, as part of an ongoing process to identify and make recommendations for Agency reorganization, and it was legally and factually accurate. McCarthy also showed a draft of his opinion to Riera, as chair of the committee to review reorganization recommendations, before it was sent it to the committee as requested.

Budget and Contracting Offices are reporting to the Senior Budget Officer in contravention of generally accepted practices regarding separation of duties.” The Opinion states, “The Report is highly critical of one ‘officer supervising two functions – budget and contracting – that should be under separate oversight.’” The Opinion asserts the administrative officer still continues to serve as the “acting” budget officer, and the contracts officer reports to her. The opinion cites OMB circular A-123, the Federal Managers Financial Integrity Act and other authorities, and urges prompt action to put the budget office under the supervision of a full-time permanent budget officer who would not have oversight authority over contracts. The opinion was specifically requested by Commissioner Ruth through the executive staff, as part of an ongoing process to identify and make recommendations for Agency reorganization, and it was legally and factually accurate. McCarthy showed a draft of his opinion to Riera, who was appointed by Commissioner Ruth as chair of the committee to review reorganization recommendations, before it was sent it to the committee as requested.<sup>219</sup>

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<sup>219</sup> McCarthy testified that he wrote the opinion at the request of Commissioner Ruth through the executive staff, as part of an ongoing process to identify and make recommendations for Agency reorganization, and that it was legally and factually accurate; that at the time of the memo, and for the prior five years, Forti served as the budget officer; that the 2005 OIG report said contracts must not report to the budget officer, and that as of 2009, contracts was still reporting to the budget officer – Forti, who had meanwhile acquired several more titles but was still the budget officer too; that the 2006 OIG Report mistakenly concluded the problem was resolved by appointment of a contracts supervisor, but the OIG was unaware that the contract “supervisor” still reported to the budget officer because Ms. Forti refused to fill that position with anyone but herself; that the lack of separation was a recipe for fraud, waste and abuse; that the conflict was not cured either by assigning even more duties to Forti as “Chief Administrative Officer” (CAO), the subject of an entirely separate issue that the OIG reports recommended be dealt with by the “competitive” appointment of a “qualified chief executive”, something that was never accomplished; that McCarthy asked Riera to review his opinion, as head of the committee, before McCarthy discussed his opinion with the entire executive staff.

The legal opinion of June 19, 2009, “Legal Requirements for Information Management,” questioned whether the Agency’s practices complied with such requirements, particularly with regard to having a qualified Chief Information Officer (CIO). The Opinion relies heavily on OMB Circular A-130, the OPM Handbook of Occupational Groups, and the Chief Information Officers Council (CIOC) and Small Agency Council established pursuant to Executive Order 13011 and codified into law by the E-Government Act of 2002. The Opinion states that even as compared to other small agencies in the CIOC, Agency practice is sub-par. It notes for example, that an Agency

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Burns testified Forti was completely unqualified to supervise contracts and micro-managed contracts from her position as both budget officer and CAO. Burns testified that it was a conflict of interest for the budget officer to supervise contracts; that Burns was seriously concerned about the violation and reported it to Petz and to Ruth, and that she gave Ruth written documentation.

Riera testified he had similar concerns and experiences and that he shared his concerns with McCarthy, and also discussed what Burns had told him; and that he reviewed McCarthy’s draft opinion. *Riera Testimony. See also Riera deposition at 20* (“Q: Did you agree with Mr. McCarthy’s assessment that the Agency violated those rules with the way they had structured budget and finance responsibilities? A. I believe that once I read the information, the legal opinion that he put together, I believe that what he was saying was correct.”)

Petz testified he had similar concerns and experiences and that he shared his concerns with McCarthy, and also discussed what Burns had told him.

Ruth testified that Burns did notify him about the violations and did give him the documentation that he kept in his personal files, because Burns was afraid of retaliation by Forti, and that he neither reported the violation nor took any disciplinary action. Ruth testified he had discussed all of the parties’ concerns with them, but that he “had no problem” with the budget officer supervising contracts.

*See also Appellant Exhibits VVVV – March 2005 OIG Inspection Report at 34, 45, 48; AAA June 19, 2009 McCarthy opinion regarding legal requirements for separation of budget and Finance; J- July 22, 2009 draft disclosure with Riera comment on separation of budget and finance; C - August 3, 2009 Petz email to McCarthy regarding OPM’s agreement with McCarthy’s opinion; KKKKK - Agency solicitation for bids on a contract to make recommendations for reorganization, using almost exactly the same kind of phrasing that McCarthy had used in describing the need for reorganization – rapidly declining indicators of human capital performance – series of reorganizations that were not well planned out – a structure that was not effective.*

information technology specialist rather than the CIO serves as the representative to the CIOC, in contrast to every other federal Agency. The opinion excerpts a long list of “core competencies” that the CIOC has established for CIOs. These indicate a CIO must have an extremely high level of information management technical expertise. The opinion suggests that information management staff are under the direct supervision of a “mid-level administrator who does not possess these core competencies [a reference to Mr. Mora, the IT supervisor] (or even an administrator who may possess these competencies but whose primary duties lie elsewhere) [a reference to Forti, with multiple titles, including CIO].” The opinion was specifically requested by Commissioner Ruth through the executive staff, as part of an ongoing process to identify and make recommendations for Agency reorganization, and it was legally and factually accurate. McCarthy showed a draft of his opinion to Riera, who was appointed by Commissioner Ruth as chair of the committee to review reorganization recommendations, before it was sent it to the committee as requested.<sup>220</sup>

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<sup>220</sup> McCarthy testified that he wrote the opinion at the request of Commissioner Ruth through the executive staff, as part of an ongoing process to identify and make recommendations for Agency reorganization, and that it was legally and factually accurate; that at the time of the memo, Forti served as the CIO in addition to acting budget officer and chief administrative officer; that in her role as CIO she supervised Z Mora, who in turn supervised the information technology staff, including the Agency representative to the CIOC. He testified that he was unable to ascertain any evidence that she has any information management qualifications and that the Agency denied all discovery on this topic. He testified that he provided a draft of his opinion for Mr. Riera’s review, as head of the committee.

Riera testified that he reviewed McCarthy’s opinion before it was submitted to the committee. Medor testified that Forti was “IT ignorant”. *Medor Testimony*.  
*See also Appellant’s Exhibit IIII, narrative at p. 1:*

A review of the official personnel record for Ms. Diana Forti revealed a record of little or no supervisory, managerial or executive training since

The legal opinion of July 14, 2009, “Opinion on the Draft Internal Audit Program Directive and Manual,” states “The Proposal is not supported by the cited authorities;” alleges it “would give all the powers of an inspector general to the Compliance Officer, in addition to complete control over the scope of audits and the release of any reports, even to the Commissioner”; cites regulations that would prohibit the proponent from supervising audits of Agency programs that he has demonstrated bias against; and suggests audit “and other functions” be assigned to more appropriate functional areas. The opinion was specifically requested by Commissioner Ruth through the executive staff, as part of an ongoing process to identify and make recommendations for Agency reorganization, and it was legally and factually accurate. McCarthy showed a draft of his opinion to Riera, who was appointed by Commissioner Ruth as chair of the committee to review reorganization recommendations, before it was sent it to the committee as requested. Very similar written comments on the proposal were emailed to the Commissioner and executive staff by Riera, who stated, in part,

I do not concur with the proposed directive as written given the current status of the organizational structure under discussion with the Commissioner and the implied role of a "Compliance Officer" that would provide policy and program evaluation oversight over the internal auditor. The suggested role of a position to "provide policy oversight", "review and approve specific audit plans" and "approve reports prior to release" does not guarantee impartiality and independence for internal reporting. The internal auditor as the expert must maintain a high degree of skill and independence and his audit plans/reports should be developed and submitted by him, without any filters, to the Commissioner.

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her 2002 appointment in the Agency first as Budget Officer, then as Chief Administrative Officer.

The investigative report recommended: “That appropriate supervisory, managerial and/or executive human resources training be procured for Ms. Diana Forti.” *Id.* at p. 8.

Riera also reviewed a draft of McCarthy's Legal Opinion dated July 9, 2009, and made hand-written comments on it.<sup>221</sup>

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<sup>221</sup> McCarthy testified that he wrote the opinion at the request of was specifically requested by Commissioner Ruth through the executive staff, as part of an ongoing process to identify and make recommendations for Agency reorganization, and that it was legally and factually accurate; that he believed internal audit was subject to abuse if assigned to the compliance office because that office and its director – Graf - had prejudged certain programs and especially harshly and openly expressed his deep hostility toward the Human Capital Office and Mr. Petz; that the proposal mischaracterized almost every law or regulation it cited in order to support its recommendations; that McCarthy recommended reassignment of audit and other functions from the compliance office to more appropriate functional areas; that he had showed a draft of his opinion to Riera, who was appointed by Ruth as chair of the committee to review reorganization recommendations, before he sent it to the committee as requested; that Riera made written comments on the draft; and that Riera himself made very similar recommendations in his own written comments to the committee. *McCarthy Testimony*

Riera testified that he had reviewed McCarthy's draft and that he made similar recommendations in his own comments to the committee; that the compliance office position had been created for Graf in settlement of an EEO complaint when he was passed over for Petz' job; and that Riera had attempted to abolish the office when he was acting commissioner because it served no purpose, and that its functions should be reallocated to the offices where they had been located previously. *Riera Testimony*.

*See also Appellant's Exhibits EEE - July 14, 2009, Opinion on the Draft Internal Audit Program Directive and Manual; L July 28, 2009 Email from Lisa Holguin with memo from Commissioner Ruth; M Memo from Ruth stating he had requested opinion but was not presently considering reorganization; BBB Email from McCarthy re internal audit program in response to Graf request; NNNN June 30, 2009 executive meeting minutes (Graf requests comments); U July 9, 2009 McCarthy Draft memo on internal audit program w/Riera comments.*

*Appellant Exhibits E – July 28, 2009 OIG disclosure memo (noting Graf conflicts of interest as “auditor”, given his intense hostility toward HR Director Petz, Graf's announcement that Petz would be the first to be audited, and Graf's former service as acting HR Director):*

Auditors participating on an audit assignment must be free from personal impairments to independence (including) preconceived ideas toward individuals, groups, organizations, or objectives of a particular program that could bias the audit.

.....

“Internal auditors should refrain from assessing specific operations for which they were previously responsible.

McCarthy's legal opinion of July 20, 2009, "Comments on Proposed Directive Management System" essentially challenged the legal authority claimed for the proposal. The cited regulation simply does not exist, nor is there any former or comparable regulation. McCarthy also disagreed with the "coding structure" and disagreed with the centralization of control over adoption of policies in the proponent, Compliance Officer Graf. The opinion was specifically requested by Commissioner Ruth through the executive staff, as part of an ongoing process to identify and make recommendations for Agency reorganization, and it was legally and factually accurate. McCarthy also showed a draft of his opinion to Riera, who was appointed by Commissioner Ruth as chair of the committee to review reorganization recommendations, before it was sent it to the committee as requested.<sup>222</sup>

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*RR* - Email from Riera with his comments on internal audit program

I do not concur with the proposed directive as written given the current status of the organizational structure under discussion with the Commissioner and the implied role of a "Compliance Officer" that would provide e policy and program evaluation oversight over the internal auditor. The suggested role of a position to "provide policy oversight", "review and approve specific audit plans" and "approve reports prior to release" does not guarantee impartiality and independence for internal reporting. The internal auditor as the expert must maintain a high degree of skill and independence and his audit plans/reports should be developed and submitted by him, without any filters, to the Commissioner.

<sup>222</sup> McCarthy testified that the opinion was specifically requested by Commissioner Ruth through the executive staff, as part of an ongoing process to identify and make recommendations for Agency reorganization, and that it was legally and factually accurate; that he showed a draft of his opinion to Riera, who was appointed by Ruth as chair of the committee to review reorganization recommendations, before it was sent it to the committee as requested.

Riera testified that he reviewed a draft of McCarthy's opinion, as chair of the committee to review reorganization recommendations, before it was sent it to the committee as requested.



The ID neglects to acknowledge the uncontested evidence that each of these opinions was issued in direct response to a request by Commissioner Ruth through the executive committee, which had been tasked with making and reviewing proposals to reorganize the agency; that each of the opinions was reviewed in draft form by the official appointed by Commissioner Ruth to head up the review, Principal Engineer and former Acting Commissioner Al Riera; and that each of the opinions was approved by Mr. Riera before being distributed to the committee.

The evidence of record shows that the Compliance Officer, Mr. Graf, the CIO-CAO-Budget Officer, Diana Forti, and the agency's liaison to the State Department, Ms. Brandt, all reacted vehemently to the opinions, because what McCarthy proposed, in part, would have the effect of limiting the opportunities for abuse of power by these officials. Ruth and Riera in fact both testified that these three executive staff constituted one of two adversary "camps" among executive staff, long before the arrival of Mr. McCarthy at the agency. Riera testified the three actively undermined him during his tenure as acting commissioner and as principal engineer responsible for agency operations.<sup>223</sup> Riera also

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See Appellant's Exhibit SS - July 20, 2009, "Comments on Proposed Directive Management System".

<sup>223</sup> The ID mischaracterizes Ruth's testimony about the two adversarial "camps" identified by Ruth. According to the ID, Ruth perceived that the agency had become divided into two "camps," with one group aligned with the McCarthy, and another group viewed, "at least by the appellant" (in the words of the AJ) as his antagonists. The ID states Ruth identified Petz as someone that he placed in the appellant's "camp," along with Riera. In fact, the two "camps" were identified by Ruth, as well as by Riera and Petz, as being adversarial long before McCarthy came to work at the agency, and did not develop in relation to his presence, as improperly implied by the AJ. Moreover, Ruth confessed on cross exam that the other "camp" comprised three executive staff members, Graf, Forti and Brandt, and that Riera and Petz had advised him well before McCarthy was hired of the adversary nature of relations between the two "camps." Riera also testified that all three had tried to undermine him as acting commissioner, and that Ruth

testified that he told Ruth in detail how Graf, Forti and Brandt were uncooperative and failed to support him when he was the acting commissioner.<sup>224</sup>

So weak was the evidence in support of the removal action – evidence consisting solely of the foregoing four legal opinions - that the agency felt compelled to deny discovery requests, and to fabricate evidence. It also belatedly invented three newly claimed reasons for dismissal.<sup>225</sup> These new charges were unveiled for the first time at

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was fully apprised of this fact when he came into the agency. Ruth was beholden to the Forti-Brandt-Graf camp, incidentally, because he believed they held the key to his appointment and retention of his position. The agency stonewalled all discovery requests for communications among these officials concerning Ruth's appointment or retention. The AJ refused to compel production, yet the ID gives credence to claims by Brandt and Ruth that there was no scheme to secure Ruth's post.

<sup>224</sup> See *Riera deposition*, at 6-9 (“Q. And how would you describe your time as Acting Commissioner? A. I think, in terms of our mission and the things that we needed to accomplish with regards to our responsibility as an Agency, everything went well. There was some friction amongst the executive staff while I was the Acting Commissioner, at least that was my perception. Q. What was the nature of the friction among the executive staff? A. My perception was it was very difficult to get things done that required the interaction of the other -- or participation of the other executive members. Q. Who were the members of the executive staff? A. Well, let's see. The Foreign Affairs Secretary -- I'm just going to name -- Foreign Affairs Secretary, Public Affairs Officer, the Compliance Officer, the Chief Administrative Officer, our DC Liaison and the Human Resources Director. Those are the -- and, of course, the Legal Advisor. Those are the executive members of the staff. Q. And what was the friction that you described among the executive staff? A. There was my perception. As I recall, there was a lot resistance to doing things the way I felt they needed to be done. Q. When Commissioner Ruth was appointed as Commissioner, did you talk to him about your observations of the friction among the executive staff? A. Yes, I did. Q. What do you remember telling him? A. I, basically -- as I recall, I gave him a very detailed description of what I felt was going on and the problems that I thought we were facing in terms of the friction within the executive staff.”)

<sup>225</sup> However, “[a] personnel action is reviewed on the grounds on which the agency based the action when it was taken.” *Greenspan v. Veterans Admin.*, 464 F.3d 1297, 1304 (Fed. Cir. 2006), quoting *Hawkins v. Smithsonian Inst.*, 73 M.S.P.R. 397, 401 (1997) (“the Board cannot consider or sustain charges or specifications that are not included in the notice of proposed adverse action”).

the hearing. Ironically, like the four opinions mentioned above, they involved matters that are also the subject of McCarthy's protected disclosures.

The first of these back-fill pretexts is a legal opinion in which McCarthy had recommended Senate confirmation of the commissioner's appointment. Ruth and Brandt both testified under oath that the State Department told them the opinion was wrong, when in fact it is virtually identical to the State Department's own written opinion on the topic, as ultimately conceded by Ruth under cross examination.<sup>226</sup> Yet this non-controversial opinion, supported by the State Department (and currently under review at the White House, according to documentary evidence and McCarthy's uncontested testimony) forms a significant part of the rationale offered in the ID as evidence in support of the removal action.<sup>227</sup>

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<sup>226</sup> The ID states that former agency official Mary Brandt testified that Ruth questioned the quality of the McCarthy's legal analysis and accuracy of his advice in mid-May 2009, with regard to a legal opinion that suggested the Commissioner's appointment should be made subject to the advice and consent of the Senate. The ID makes no finding of credibility with regard to Ms. Brandt's testimony, which was in any event by videotape, and thus is due no deference in this regard, nor is Brandt's testimony deserving of any credence. ID at 9-12. In fact, Brandt's testimony was cooked up after McCarthy's removal in order to provide a semblance of causation for his removal. Ruth himself admitted on cross examination that the State Department had made the exact same recommendation in a 2005 OIG report that McCarthy made in his opinion. Ruth testified under oath he was "not surprised" that the OIG had made such a recommendation. The ID does not attempt to reconcile Ruth's knowledge of the State Department's actual position with Ruth's and Brandt's sworn testimony that the OIG told them they disagreed with McCarthy's opinion. Like Ruth, Brandt was surely aware of the OIG recommendation when she falsely claimed that the State Department did not agree with McCarthy's opinion. In any event, the quality or correctness of McCarthy's legal opinions is not at issue, as the ever-shifting basis for removal was an alleged lack of collegiality.

<sup>227</sup> See *Appellant Exhibit EEEE* July 23, 2009 McCarthy memo re applying the Appointments Clause to the IBWC Commissioner; *VVVV* March 2005 OIG Inspection Report, e.g. Recommendation 2 at 51. It is unclear just who (if anyone) in the State Department allegedly told Ruth the legal opinions were "wrong." The ID states that Ruth

The second new piece of evidence in support of the removal action was an email exchange that Ruth testified included inappropriate remarks by McCarthy, but that in fact included no inappropriate remarks except those made by another executive staff member, Fred Graf, who launched a vehement and wide-ranging attack on the competence and integrity of his fellow executive staff members, as Ruth finally conceded on cross examination.”<sup>228</sup> The ID mentions neither this false testimony, nor even Graf’s intemperate, highly unprofessional, abusive and “non-collegial” remarks.<sup>229</sup>

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testified he never had a conversation with State Department counsel until after McCarthy’s disclosures, so it couldn’t have been the attorneys who suggested the legal opinions were “wrong.” Moreover, on cross examination, Ruth admitted that the State Department OIG itself had made the exact same recommendation as that made by McCarthy with regard to Senate confirmation, and that he was not surprised that the OIG had made the exact same recommendation. The ID does not explain how Ruth’s testimony can be credible on this point, when on one hand he insists the OIG told him McCarthy’s opinion was “wrong”, and on the other, he acknowledges he is “not surprised” that the OIG actually shared McCarthy’s opinion! Where a removal decision was based on a loss of confidence in the employee, made at least in part based on a misinformed belief about the legality of the employee’s actions, “it is necessary to know what conclusion the decision makers would have reached, and what penalty they would have imposed, if the possibility that the conduct was criminal was removed from consideration.” *Doe v. Department of Justice*, 565 F.3d 1375, 1382-833 (Fed. Cir. 2009).

<sup>228</sup> See *Appellant’s Exhibit UUU* -April 1, 2009 (Graf comments):

What you perceive as "insulting and alienating everyone" reflects my profound frustration over repeated failures of the current executive staff to step up and exercise true leadership. As the sole remaining member of the executive staff from the beginning of the Commissioner Bernal administration in 1998, I must observe that the current executive staff, as a group, does not come close to executive staffs in terms of earning trust and confidence in leadership. Our dysfunctional PMC is yet another indication of the executive staff’s failed leadership.

See *EX E* March 31, 2009 (Graf comments):

Speaking with ‘the manager involved’ [a reference to Mr. Petz] has been a ridiculous waste of time and effort in the past. The ‘manager involved’ will pretend to listen to other viewpoints and then proceed to do whatever

The third belatedly-identified reason for the removal action, and purportedly the real reason, is McCarthy's July 27 complaint about being excluded from a committee responsible for reporting on Recovery Act implementation to the State Department. As reflected in the ID, Brandt and Ruth testified the committee did not exist, yet in fact both eventually acknowledged that McCarthy in fact had been appointed to the committee, and that he was allowed to participate in the first committee meeting, a videoconference with the State Department OIG, a meeting set up by Brandt. Ultimately, Ruth, McCarthy, Brandt, and Riera all testified that Ruth dissolved the committee after McCarthy's complaint.<sup>230</sup>

Assuming, *arguendo*, that Ruth actually decided to remove McCarthy as a result of his objection to being excluded from the Recovery Act Committee responsible for

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he wants. If the PMC is too dysfunctional to address resource management issues such as position establishment actions, then perhaps another entity such as the Management Accountability Council should step in and take over the function.

<sup>229</sup> The ID cites Ruth testimony that in April, 2009, he became concerned about "exchanges of inappropriate e-mails between the appellant and other executive staff members." In fact, Ruth identified only a single email exchange with executive staff member Fred Graf, in which Ruth admitted that the only "inappropriate" comments were those made by Graf, and that in fact no inappropriate comments were made by McCarthy. Ruth even acknowledged that he "talked to" Graf about the incident, the full extent of disciplinary measures ever taken against similarly situated executive staff who were uncooperative, not collegial, or who committed unlawful or even criminal acts. Once again, in a belated attempt to fabricate cause for removing McCarthy, the agency bungled the task by belatedly assigning to McCarthy remarks he never made, and leaving Ruth with another large stain on his credibility.

<sup>230</sup> The ID cites Brandt testimony that McCarthy made accusations at a July 27 staff meeting that he had been excluded from a Recovery Act Committee that Brandt said did not exist. The ID fails to mention that on cross examination Brandt acknowledged that she herself set up the very first meeting of said committee, and that the meeting included McCarthy, because he was among those, in addition to herself and Forti and Graf, who were responsible for implementation of the Recovery Act. Again, in attempt to fabricate grounds for removal, the agency was caught in a web of lies concerning the existence of the Recovery Act committee, but the ID fails to take note.

reporting to the State Department, the implication is that Ruth feared McCarthy's ongoing disclosure of the Agency's fraud, waste and abuse through his participation in the committee. Indeed, McCarthy testified that he told the OIG at the first committee meeting that it should aggressively monitor the Agency, and not defer to internal audits, as the other members of the committee urged. McCarthy's disclosures make clear that his objection to being excluded from the committee was that the committee was covering up fraud, waste and abuse, and making false reports to the State Department.

Similarly, the Agency's belated claim that McCarthy was removed, in part, for his opinion on Senate confirmation of the appointment of the commissioner reflects Ruth's irritation that the opinion had been sent to the State Department months earlier. Even the reorganization recommendation concerning budget and contracts had been sent to the State Department, according to both Ruth and Brandt, and thus became a source of irritation and a cause for retaliation. Thus, the Agency's ever-shifting claims regarding the real reason for removal, weak as they are, provide only alternative retaliatory motives.

Ruth testified that he had not decided to remove McCarthy prior to July 27, notwithstanding several secretly back-dated documents that had been intended to show an earlier intent, at least they were so intended before McCarthy uncovered metadata that showed the documents were fraudulent. The Agency had relied on the fabricated evidence to win rulings on a requested Stay of the removal action and on other motions, suggesting that they were "contemporaneous" evidence of an intent to remove McCarthy, and failing to disclose that they had been created much later than the dates of the events described, and in at least one case weeks later, *after* McCarthy's removal.

Indeed, faced with incriminating metadata, Ruth acknowledged that a document that purported to describe a meeting with McCarthy on July 23 was not even created until August 2, was secretly back-dated, and was introduced into the record without disclosing the true facts about its creation. Claiming no metadata existed for another such document, and thus producing none, Ruth insisted that he created on July 20 a memo of meeting with Mr. Petz on that date. However, the Agency was again caught in its lies, having admitted in a belated response to discovery that this particular document and several others had been created “after” the dates inscribed. At the same time, the Agency resolutely refused over the course of five months to answer interrogatories that asked for the identities of persons who requested, advised or assisted Ruth in his alleged preparation of the various back-dated documents, none of which bear any resemblance to Ruth’s writing style.

The sheer malevolence of the Agency’s effort to reconstruct a fraudulent record is surpassed only by its incompetence. Ruth acknowledged on direct exam that he was not in the habit of putting his instructions in writing. Both Petz and Riera testified they did not know him to make records of important meetings or other matters, and Petz testified he had never even seen Ruth’s supposedly ubiquitous “DayTimer”, although he met with Ruth almost daily. The “Daytimer” itself, to the extent it was entered in the record, does not evidence any important meetings on the days where it reflects meetings allegedly dealing with McCarthy. Apparently, by coincidence, nothing else happened on those days. A document Ruth did write (again dated a day before it was actually sent), the July 28 email/memo, shows Ruth’s writing style, replete with grammatical errors and circular logic (nearly a dozen errors in grammar, spelling, and punctuation in as many lines, with

uncertain meaning), which does not at all equate to the style of the various back-dated meeting memoranda he claims to have authored, unaided.

Still, the Agency did not give up entirely its reliance on this fabricated evidence, and the ID embraces this perjured paper trail as proof of a plan to remove McCarthy notwithstanding his disclosures. Ruth's own testimony that he had not determined to remove McCarthy prior to at least July 27 definitively renders these documents irrelevant, or at the least unable to support any conclusion that Ruth decided to remove McCarthy before, and independently of, the purported complaint about being excluded from the Recovery Act Committee on July 27. Even assuming, contrary to fact, that the documents are authentic, at most they express Ruth's consideration of the possibility of removing McCarthy.

The agency apparently felt that it needed to come up with a firm decision date, since even the fraudulent documents did not establish anything more than an alleged desire by Ruth to determine whether McCarthy worked at the will of the commissioner, as Ruth apparently had been led to believe.<sup>231</sup> Thus, McCarthy's July 27 objection to having been excluded from meetings of the committee he had been appointed to, to oversee and report on implementation of the Recovery Act, became the stated reason he was removed. The rationale is not mentioned in the removal letter or indeed in any of the

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<sup>231</sup> The ID cites Brandt testimony that Ruth said he "was considering terminating" McCarthy, that he asked for her help in getting legal advice about whether he could do so, and that she put Ruth in touch with a State Department attorney. However, the ID states Ruth never spoke to the attorney until after Ruth became aware of McCarthy's July 28 disclosures, when he traveled to Washington to meet with State Department lawyers to seek advice on removing McCarthy.



fabricated documents, because it did not exist until shortly before the hearing, when the agency realized its fraudulent paper trail might not withstand further scrutiny.<sup>232</sup>

Paradoxically, the ID cites the back-dated documents not as fabricated evidence, but rather as documentary support for Ruth's claim that he decided to remove McCarthy on July 27. The ID also cites Ruth's testimony concerning his "Daytimer," in which he wrote about the alleged July 20 meeting with Mr. Petz. This is the same "Daytimer" that Mr. Petz testified he had never seen, although Petz testified he met with Ruth almost daily; the same "Daytimer" with regard to which McCarthy was not allowed discovery; and the same "Daytimer" that Ruth was allowed to peruse and read from at the hearing.

The "Daytimer" is claimed to corroborate a memorandum that Ruth testified he wrote on July 20, in contradiction of the agency's own discovery response that acknowledges the document was created "after July 20." The "Daytimer" strangely evidences only matters having to do with Mr. McCarthy's removal, yet not even all of them, and nothing else whatsoever happens worth recording on those dates. The alleged July 23 meeting for example, was not recorded in the "Daytimer", according to Ruth.

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<sup>232</sup> The ID cites Ruth's testimony that he decided at the July 27 staff meeting to remove McCarthy, after McCarthy complained about exclusion from a committee responsible for making Recovery Act reports to the State Department. Ruth admitted he had appointed McCarthy to be included in the team responsible for making Recovery Act reports to the State Department, but somehow distinguished that from formally appointing a committee. The agency declined to produce executive staff meeting minutes that would show establishment of the committee, further damaging Ruth's credibility. Indeed, the agency refused to produce minutes of the notorious July 27 meeting itself. Moreover, no one describes anything at the July 27 meeting that would lead to such an abrupt decision. Despite urging of Agency Counsel, Riera, for example, declined to characterize anything that transpired as rising even to the level of "argument." See Riera deposition at 24-26 ("Q. Was it a heated discussion? A. It wasn't an argument, but it wasn't a normal type of staff meeting. It was very tense.")

Ruth testified there were no other notes on July 20. All of the testimony based on the “Daytimer” lacks credibility, and should be excluded in any event due to discovery misconduct, fabrication of evidence, and apparent perjury.

The ID states Ruth testified that June 25 notes in his “Daytimer” were notes he had made to himself about questions he had concerning the rights of a Schedule A employee. Even if these were not simply fabricated back-dated notes, the ID also states that Ruth testified he talked for the first time with State Department lawyers on July 29, the day after McCarthy’s disclosures. (“Ruth testified that it was not until his trip to Washington D.C. on July 29, 2009, that he was actually able to talk with Visek.”) Thus they do not evidence any intent to remove McCarthy, and Ruth himself testified he had made no such decision.

In contradiction of Ruth’s testimony that that he first drafted the removal letter on July 18, according to the ID, Ruth also testified that he had made no decision to remove McCarthy before July 27. In fact, when shown the document dated July 18 for the very first time, on cross-examination, Ruth could not identify the document or its purpose. It is strangely-entitled “July 20 meeting with Robert McCarthy”, a meeting no one contends took place or was ever considered. The metadata attached to the document by the agency appears to describe a much shorter, different document, however, it also shows the document was changed on July 26. Ruth could not explain the metadata either. Only on re-direct, when agency counsel put the words in his mouth, did Ruth agree that the document must have been a draft of a removal memo. In reality, the document was yet another bungled attempt to fabricate evidence after McCarthy’s removal, carelessly back-

dated and inadvertently disclosed, then claimed to be a draft of a removal letter that predated by ten days the alleged removal decision date.

In its embrace of the testimony of Ruth and Brandt, to the exclusion of virtually all the evidence to the contrary, the ID concludes that Ruth is credible. Nowhere to be found in the ID is the undisputed testimony of Mr. Riera that Ruth told him on the morning of July 31, 2009, that he had “thought about it long and hard last night” and only then decided to remove McCarthy.<sup>233</sup> If Ruth struggled with the decision on July 30, two days after learning of McCarthy’s disclosures, and only then made up his mind, he obviously made no such decision on July 27, as he testified. Riera, who testified that he left the Agency months after McCarthy’s removal, to take a position as the Public Works Director at Fort Bliss, overseeing a \$6 billion expansion, clearly has no motivation to lie

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<sup>233</sup> Riera testified that Ruth told him on the morning of July 31, 2009, that he had decided to remove McCarthy; that Riera suggested he think it over; that Ruth responded “I thought about it long and hard last night and this is what I have to do.” Riera reaffirmed his deposition testimony where he was asked twice whether he was sure that Ruth had said “last night,” and he said he was sure. Riera also testified Mr. McCarthy’s performance was good, and although he testified there was evidence of personal animosity between Mr. McCarthy and Graf and Forti, Mr. McCarthy routinely asked Mr. Riera to review his draft opinions for objectivity. *Riera Testimony*.

*See also Riera deposition at p. 18 (reaffirmed in hearing testimony):*

Q. Did you have conversations with the -- directly with the Commissioner about his decision to terminate Mr. McCarthy? A. Yes.  
Q. How many? A. I believe just one -- Q. And -- A. -- if I recall correctly. Q. When? A. Day he was -- the day he was going to fire Mr. McCarthy. Q. Tell me about the conversation. A. As I recall, the Commissioner came in my office, closed the door and said, I just want to notify you that I'm terminating Robert today. Q. What was your response? A. I think -- as I recall, I think I said something along the lines of, Are you sure about this? Don't you think that you need to think about it? I believe he said, I thought about it long and hard last night, and this is what I have to do, and I don't want to discuss it. Q. Did you make any notes of the conversation that you had? A. No. Like, if I made any notes, myself? Q. Right. A. No. Q. And you recall that he specifically said, I thought about it long and hard last night? A. Yes.

under oath. Indeed, Riera's testimony was entirely consistent with his deposition testimony, when Agency counsel asked him twice to verify the date that Ruth decided to remove McCarthy. In addition, Riera, a career civil servant, testified that he himself had declined an offer from the White House to be considered for the job eventually filled by Ruth, a job Riera had been performing on an acting basis.

The ID mentions Petz's testimony only to mischaracterize it. The ID states Petz recalled being shocked at Ruth's removal action "because it was completely the opposite of the advice that he had given." In fact, that was the language of agency counsel, who the AJ allowed over objections to ask leading questions of agency officials and make arguments in the form of questions throughout the proceeding. Petz himself testified, in his words, that he felt that Ruth had simply been overly upset when he met with Petz on July 23, after Forti and Graf complained about McCarthy's opinions, but that Ruth had calmed down within the next couple of days and had stated to Petz, "I don't want to hurt anyone," causing Petz to conclude that Ruth had dropped any consideration of removing McCarthy. Petz testified that Ruth again became "upset" (the word he used in his deposition and in his hearing testimony to describe Ruth's demeanor, notwithstanding the mischaracterization of his testimony in the ID) on July 31, when he told Petz he was going to remove McCarthy. The ID also ignores evidence of emails sent by Petz to McCarthy after his removal, repeating his sense of "shock" at the removal, "because you tried to fix things."

The ID improperly implies that Petz's testimony was limited to his belief that McCarthy was wrongly deprived of due process. Indeed, the ID quotes Ruth's testimony that Petz told him McCarthy would be entitled to due process if Ruth wanted to remove

him, but that Ruth stated “that Petz’s advice conflicted with the information he had received from the State Department attorneys.” By his own account, Ruth did not have a substantive discussion with State Department attorneys until after July 28, thus the claim that he dismissed Petz’s advice as inconsistent with prior State Department advice is not credible. It is true, however, that Petz, the Human Capital Director, testified and put in writing his strongly-held view that the action violated due process, and he also expressed the unwavering opinion that it was retaliatory.

The ID states the need to make “a credibility determination related to claims that the appellant’s work performance was adequate,” finding “Ruth’s testimony to be more fully supported by the documentary evidence and, therefore, more credible.” Because this finding is based on the documentary evidence, it is due no deference by the Board, nor is it supported by the documentary evidence, all of which is tainted by the agency’s fraudulent conduct, fabrication of evidence and discovery misconduct.

Moreover, despite the agency’s reprehensible misconduct, the evidence of record simply does not support the conclusion that McCarthy’s performance was anything less than completely satisfactory. If Ruth had wanted to document performance problems, he could have used the procedures in place for just that purpose, such as the performance plans described by McCarthy and Petz. Not only did Ruth eschew such formal procedures, the agency refused discovery requests for agency policies concerning performance and conduct, including the fact, as again testified by Petz and McCarthy, that Ruth declined to conduct a performance review when it became due.

Departing ever so briefly from the testimony of Ruth, the ID mentions that McCarthy testified that his performance was “acceptable.” In fact, McCarthy testified

that his performance was beyond reproach, and that he had never been advised of any shortcomings by Ruth, even though a performance appraisal period had elapsed. The ID fails to acknowledge documentary evidence of dozens of highly technical detailed legal opinions authored by McCarthy, the complete absence of any documentary evidence to suggest the legal opinions were anything but highly professional, and testimony of the only other executive staff members to testify, Riera and Petz, that they were aware of no shortcomings in McCarthy's performance. Indeed, Riera specifically testified that McCarthy supported him in a collegial and cooperative manner, both when Riera was acting commissioner and at all other times, in stark contrast to executive staff members Graf, Forti and Brandt, who Riera said routinely sought to undermine him. Petz also testified that McCarthy was cooperative and collegial, and that nothing in McCarthy's personnel file suggested any problem with his performance or conduct.

Ultimately, the ID credits Ruth's absurd conclusion, allegedly based on documentary evidence, that McCarthy's disclosures were made in response to Ruth's inscrutable July 28 email/memo, in apparent fear that the memo portended removal. Aside from the obvious fact that the memo suggests no such thing, it is ridiculous beyond comprehension to assume McCarthy somehow cobbled together 11 single-spaced pages of detailed disclosures of fraud, waste and abuse and sent them off to five different federal agencies all within the 30 minutes or so after Ruth's secretary sent out his July 28 email/memo.<sup>234</sup>

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<sup>234</sup> Indeed, the rejection of McCarthy's legal opinions was a precipitating factor in the timing of the release, but not in the sense imagined by the AJ. Instead, McCarthy had been working on the disclosures for several weeks, had vetted them through Riera and Petz, and had made last-ditch efforts to persuade Ruth to take corrective action throughout the days before the disclosures were made. Significantly, in his alleged

The ID does not explain the discrepancy, yet acknowledges McCarthy's testimony that he shared a draft of his whistleblowing disclosures with Riera, citing a July 22 draft that included detailed handwritten comments by Riera. Apparently suggesting this iteration of the disclosures draft, which preceded the Ruth email/memo by a full week, was the one and only draft, the ID fails to acknowledge documentary evidence of a much earlier draft, and McCarthy's testimony that he discussed his disclosures with both Riera and Petz over a period of several weeks, and that both Riera and Petz acknowledged the same in their testimony.<sup>235</sup>

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preoccupation with four legal opinions concerning Agency management issues, Ruth studiously ignored the much more serious nature of two legal memoranda provided by McCarthy on July 22, Appellant Exhibits *PP* - July 22, 2009 McCarthy opinion regarding Antideficiency Act concerns in joint construction project with DHS, and *G* - July 22, 2009 McCarthy opinion regarding lack of privity of contract with design firm in levee construction. On July 27, Ruth ordered McCarthy, notwithstanding the almost certain violation of the Antideficiency Act, to finalize an interagency agreement with DHS under which IBWC would subsidize DHS costs on the joint levee – border barrier over \$1.75 million. Appellant Exhibit *HHHH*- July 27, 2009 Ruth email directing McCarthy to finalize the interagency agreement obligating IBWC to pay DHS costs that exceed \$1.75 million.

<sup>235</sup> See also Riera deposition at 14 (“... But I think he did say that -- we did talk about possibly sending some of this to the OIG, if no action was taken by the Agency. Q. When did Mr. McCarthy give you a copy of what he was drafting? A. It must have been a couple of weeks before. As I recall, it was probably two or three weeks before he was fired. Q. And you made comments and provided some comments to him? A. Yes. I read the document. He asked me to review it. I read it, and I provided some editorial comments.”) See Appellant Exhibits *UUU* - McCarthy draft disclosures dated April 10, 2009; *VVV* - Metadata for *UUU* indicates creation date July 7, 2009; *J* – July 22, 2009, draft disclosures w/ Riera comments. (Riera written notations address topics including pornographic websites visited by Graf; computer surveillance and document manipulation; remote spying by Graf on personnel offices; unlawful pay and personnel actions; failure to separate budget and finance functions; potential Antideficiency Act violations and gross waste of funds at Hidalgo and Presidio; excessive and wasteful architectural engineering contract costs for S&B; Antideficiency violation at South Bay International Wastewater Treatment plant; abusive language and conduct by Forti and Graf; Forti directing subordinate IMD staff to erase evidence of manipulation and noncompliance with Federal Information Security Management Act (FISMA); Ruth

In sum, there is little to no valid evidentiary support for removal based upon the four legal memoranda referenced in the removal letter, and no better support for removal based upon the matters belatedly raised at the hearing. The extremely weak evidentiary support for the removal action points to a conclusion that its claimed bases were mere pretexts for whistleblower retaliation, for which there was ample motive.

**b. The existence and strength of any motive to retaliate on the part of the agency officials who were involved in the decision.**

The ID largely fails to consider the existence and strength of any motive to retaliate on the part of the agency officials who were involved in the decision. The Agency simply stonewalled discovery requests for information concerning retaliatory motives, such as Ruth's salary, and communications related to efforts to obtain and retain his position, the Agency's policies and procedures regarding performance and conduct issues, and all of the other issues described herein. Yet retaliatory motive is so strong, it cannot be hidden, even if the AJ chose to ignore it.

Ruth's motivation is evidenced primarily by the nature and extent of charges against him and the Agency in McCarthy's protected disclosures. It is also evidenced by his demeanor on July 31, which was described as angry and upset, by McCarthy and Petz, respectively; his failure to provide any type of notice or opportunity to respond; his refusal to discuss the action with anyone involved; his employment of notorious and expensive outside counsel, known for urging clients to use illegal tactics; his illegal refusal to release information concerning the firm's retainer or the method used to select the firm, until after the hearing, when the Justice Department refused to defend the

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failure to take appropriate actions despite being notified. Riera also recommends transferring IBWC technical and diplomatic duties to the Bureau of Reclamation and State Department, respectively.)



refusal; his repeated use of fabricated evidence; his last-minute attempt to buttress his charges with frivolous allegations at the hearing; his apparent perjury regarding claims that he wrote various back-dated documents with no assistance; and his refusal to produce discovery on issues related to his motivation, such as his salary, which is public information by law.

Yet the ID somehow misses all of this, and instead merely states that the fact of the disclosures does not imply a motive to retaliate on the part of Ruth, because Ruth approved the hiring of McCarthy knowing that McCarthy had been a whistleblower at another federal agency. This rationale turns upside down the reasoning of the case it cites in support, which says that one who is perceived as a whistleblower is entitled to the protections of the WPA, even if he has not actually made protected disclosures.<sup>236</sup>

In fact, so pervasive was knowledge of Ruth's retaliatory motive that even the Agency's Human Capital Director could not help but cringe when he saw the disclosures, instinctively assuming a retaliatory dismissal.<sup>237</sup> Indeed, Petz immediately concluded that Ruth's response was in fact retaliatory.<sup>238</sup> Nor was Petz's fear of retaliation reserved for McCarthy, as Petz expressed fear that he himself might be the subject of retaliation

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<sup>236</sup> ID at FN 13, citing *Schaeffer v. Department of the Navy*, 86 M.S.P.R. 606, ¶ 16 (2000). In any event, the ID ignores testimony and evidence that shows the selection of McCarthy as legal adviser was made not by Ruth, who merely approved it, but rather by acting Commissioner Riera and Human Capital Director Petz, who initiated the process and winnowed the candidates down to their recommended selectee, McCarthy.

<sup>237</sup> See e.g., *Petz deposition at 53* ("I was so surprised by his e-mail to the Commissioner. I thought -- at the time when I saw the e-mail, I thought, Oh, my gosh. I hope he doesn't get fired for this.")

<sup>238</sup> *Appellant Exhibit D, Petz email to McCarthy* ("You tried hard to straighten out this office and got fired for it.")

for simply cooperating in an OSC investigation.<sup>239</sup> So afraid of further retaliation by Ruth was Petz that even to deliver such straightforward business as a change in termination date he felt compelled to use his home computer and email address.<sup>240</sup>

Each and every legal opinion cited by Ruth as a reason for removing McCarthy on July 31 deals specifically with a matter that is a significant subject of McCarthy's protected disclosures made on July 28. According to Ruth's own testimony, at least two of McCarthy's disclosures were made outside the agency with Ruth's knowledge over the course of at least two months prior to McCarthy's removal, to Ruth's admitted irritation. Ruth and Brandt testified that Ruth rushed off to Washington to seek second opinions from the State Department regarding McCarthy's opinions concerning Senate confirmation of the commissioner, and reorganization of the agency's information management functions, two opinions that form the foundation for Ruth's alleged initial displeasure with McCarthy's legal work.<sup>241</sup>

The ID cites Ruth testimony that on a trip to Washington on July 29 he requested the OIG to immediately begin an investigation of McCarthy's disclosures. However, the Agency refused repeated discovery requests to disclose documents related to agreements between the agency and the OIG to limit such investigations, which could evidence Ruth's serious concern with McCarthy's disclosures and therefore his motive to retaliate.

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<sup>239</sup> See *McCarthy Deposition Exhibit 20* (Human Capital Director Kevin Petz expressed his fear in an August 25, 2009 email to McCarthy that "I will be next" for cooperating with OSC.)

<sup>240</sup> *Appellant Exhibit B, August 3, 2009 email from Petz to McCarthy* ("Robert the Commissioner has decided to give you 30 days adm leave. We will leave you on the books for the month of August.")

<sup>241</sup> Of course, adverse action may not be based on protected disclosures themselves. *Greenspan v. Veterans Admin.*, 464 F.3d 1297 (Fed. Cir. 2006).

Yet the infamous “Daytimer” includes an inadvertent reference to an MOU with the State Department OIG, an MOU McCarthy testified was intended by Ruth to limit investigations to criminal matters and by invitation only. Even then, since the Agency would not pay for such investigations, the State Department would have to decide to spend its own funds, without a legislative mandate, to investigate fraud, waste and abuse at an Agency over which it had no enforcement authority and which had a history of noncompliance.<sup>242</sup>

The ID also cites Ruth testimony that in spite of his alleged belief and desire that his replacement was imminent, he nevertheless felt obligated to terminate McCarthy himself, since he had hired him, rather than leave the task to the next commissioner. However, on cross-examination, Ruth could not explain why he then immediately sought to fill the position, rather than waiting for the next commissioner, when he had been irritated that acting commissioner Riera had filled a position rather than wait for the appointment of Ruth, who had yet to be named. Ruth could only suggest the need to fill an attorney position. Riera had been serving as acting commissioner and filling two principal engineer positions all by himself when he decided he needed to hire a principal engineer. McCarthy had been the only attorney before he was removed, as had the attorney before him, and the agency had already hired another attorney in McCarthy’s absence, plus had an attorney working as a paralegal. Yet Ruth attempted to hire yet another attorney so that McCarthy would have no position to return to and so that Ruth’s

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<sup>242</sup> A 2006 OIG follow-up report, Agency Exhibit XX, at 6, states: “The USIBWC is out of the national limelight, but a major storm and flood could overwhelm the barriers and cause considerable damage. This would usher in bouts of finger pointing between Departments, agencies and jurisdictions concerned.” The report continues: “The Agency is simply too small, too isolated, and too vulnerable to management abuse to continue without the protection and oversight of a major government department.”

successor would have no possible vacancy to fill. This evidence of retaliatory motive further mars Ruth's credibility.

The ID fails to consider the effect of McCarthy's disclosures on Ruth's retaliatory motive, other than to assume, *arguendo*, that they are based on a reasonable belief. Yet the ID then ignores the obvious motive Ruth had in light of numerous disclosures of fraud, waste and abuse, all under Ruth's oversight, and many with his active participation or cover-up, such as his decisions to waste millions of dollars on "cosmetic" levees, to knowingly violate the Purpose Act by subsidizing the construction of a border barrier, and to actively cover up evidence of blatant violations of the Antideficiency Act.

The ID fails to consider evidence that the agency selected one of the largest, most expensive, and most notoriously anti-worker law firms in the country to defend its removal of McCarthy, while two agency attorneys sat idly by. The evidence ignored or excluded by the AJ establishes that the agency has chosen to pay this firm over \$100,000 to defend a single personnel action, *to date*, while at the exact same time dropping plans to contract for a study of the agency's admittedly dire need for reorganization (including "rapidly declining indicators of human capital performance"), which Ruth testified would cost too much.

Similarly, the AJ sided with the agency in its adamant rejection of discovery requests relevant to retaliatory motive for basic public information such as the commissioner's astronomic self-selected salary (equivalent to an armed forces secretary, according to the 2005 OIG Report), or communications concerning his appointment and efforts to retain his position.

Although McCarthy introduced substantial evidence that Brandt, Forti and Graf were involved in the decision to remove him, the ID does not even address their involvement, let alone their motive to retaliate. Human Capital Director Petz identified Brandt as the likely author of the removal letter.<sup>243</sup> On August 25, 2009, Petz also emailed McCarthy to say he had talked with OPM and told them he thought Brandt was the source of the removal letter.<sup>244</sup> Yet the Agency withheld information in discovery related to the removal letter, refusing to say who wrote it and when. Riera said Forti and Graf appeared to be lobbying Ruth for McCarthy's termination after July 28.<sup>245</sup> Forti and Graf were also identified by Ruth as the putative victims of McCarthy's so-called failure to be "collegial". Yet the Agency refused to cooperate in discovery to the extent

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<sup>243</sup> See *Petz deposition* at 51.

<sup>244</sup> *McCarthy Deposition Exhibit 20* (August 25, 2009 Petz email).

<sup>245</sup> *Riera deposition* at 16-17.

Q. And in the days between July 28th, when he made the disclosures, and July 31st, when he was terminated, did you tell Mr. McCarthy that you noticed that Mr. Graf and Ms. Forti were spending a lot of time in the Commissioner's office? A. I may have. Q. Did you observe Mr. Graf and Ms. Forti spending a lot of time in the Commissioner's office? A. I don't really -- I -- I can't recall exactly if -- if they spent a lot of time there or not. Q. Then why do you think it's possible that you told Mr. McCarthy that they did? A. Well, as I remember, probably because I felt that -- I probably saw them going in there more than usual. Q. You did or you think -- I guess I'm a little unclear. Are you speculating? A. I guess. Q. Again, my question is, did you observe Mr. Graf and Ms. Forti going into the Commissioner's office prior to his termination more than usual? A. I believe I did, yeah. Q. You believe you did? A. Yes. Q. Okay. Tell me exactly what that means, that they were in there more than usual. A. Well, normally, if -- if they have something to do in there, they'll go in there and then they'll leave. But if -- if they go in there more than usual, I don't know how to quantify what "usual" is. But, yeah, more than what I perceive as being normal.

Riera deposition at 16-17.

Appellant sought information concerning the involvement and motive of these officials, and the ID is silent.

When applying the second *Carr* factor, the Board will consider any motive to retaliate on the part of the Agency official who ordered the action, as well as any motive to retaliate on the part of other Agency officials who influenced the decision, yet the ID simply fails to address the issue.<sup>246</sup> Riera testified that Graf and Forti appeared to lobby Ruth for McCarthy's removal, and Petz testified that Brandt wrote the removal letter. Virtually undisputed evidence establishes that Forti gave herself illegal pay raises; abused her staff; abused her position for personal gain; routinely used vulgar and threatening language; intercepted, altered and destroyed electronic communications; was not competent to do her job; and violated the Antideficiency Act (and with Ruth's help, covered up the violation), and that McCarthy's protected disclosures revealed these facts. Similarly, the evidence establishes that Graf threatened to have a former commissioner assassinated; spied on private personnel offices; threatened staff; routinely used vulgar and threatening language; and falsified federal authorities for personal gain, and that McCarthy's protected disclosures revealed these facts. Even without the discovery which was denied, the evidence supports the motive these officials would have to retaliate, and that they took steps to persuade Ruth to remove McCarthy. The ID does not address evidence concerning their retaliatory motive.

Also, the Agency's unlawful termination of McCarthy's statutory right to continued health and life insurance benefits, and its refusal to pay previously agreed to

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<sup>246</sup> *Mangano v. Department of Veterans Affairs*, 109 M.S.P.R. 658, ¶ 30 (2008).

relocation costs, evidence a vengeful retaliatory attitude.<sup>247</sup> McCarthy's undisputed testimony establishes that Ruth had previously approved his leave for the first week in August to move his family to El Paso, and that McCarthy's wife had resigned her job in California with no idea there was any prospect of the Agency considering any adverse personnel action.<sup>248</sup> Those actions are the subject of a separate appeal, because they only became apparent after the removal appeal had been filed, but they were the subject of a joint hearing, and the documentary and testimonial evidence plainly establishes the Agency's retaliatory motive.

Finally, and perhaps most importantly, the ID fails to acknowledge that irregular or illegal procedure in taking action against an employee is evidence of retaliatory motive.<sup>249</sup> The Agency failed to comply with statutory procedures for removal of a non-probationary employee. There are only two sections of Federal law that authorize an

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<sup>247</sup> McCarthy testified he was forced to purchase insurance in early September to cover medical expenses because his government insurance had been terminated; that it was finally reinstated late in September but that by then he had already purchased private coverage and incurred expenses. *See also* November 20 Reply to November 9 Order to Show Cause, Attachment 8 correspondence with IBWC, FEGLI, FEHB (notice dated August 17, 2009, terminating Appellant's insurance coverage on September 1, 2009; email from the Government Employees Health Association, "GEHA", stating that "GEHA doesn't actually make this determination. Eligibility is handled through your Personnel or retirement office and you would need to contact them directly regarding your dispute.")

<sup>248</sup> *See also* ID in DA-1221-10-0078-W-1 ("the record contains a copy of a letter dated August 24, 2009, sent by the Appellant to the Agency's 'Finance Office' asking for reimbursement for moving expenses incurred in August 2009.")

<sup>249</sup> *DeFord v. Secretary of Labor*, 700 F.2d 281, 287 (6th Cir. 1983); *Cosgrove v. Sears, Roebuck & Co.*, 9 F.3d 1033, 1039 (2nd Cir. 1993); *Plotke v. White*, 405 F.3d 1092, 1102-03 (10th Cir. 2005); *Kendrick v. Penske Transp. Servs., Inc.*, 220 F.3d 1220, 1230 (10th Cir. 2000). *See also Phillips*, 2010 MSPB 8, ¶24, citing *Social Security Administration v. Carr*, 78 M.S.P.R. 313, 335 (1998) (an Agency's failure to conduct a sufficient investigation before bringing an action might indicate an improper motive), *aff'd*, 185 F.3d 1318 (Fed. Cir. 1999).

Agency to take an adverse action against a Federal employee for poor performance, 5 U.S.C. §§ 4303 and 7513.<sup>250</sup> The Agency failed even to specify which chapter it used.<sup>251</sup> Under both chapter 43 and chapter 75, the Agency must provide a notice of proposed action 30 days before any action can be taken, and must provide the employee with a reasonable opportunity to reply before a decision is made. Here, the Agency does not contend that it met this requirement; therefore the removal action is ineffective. While the AJ held in the related appeal that McCarthy did not meet the definition of “employee” under 5 U.S.C. § 7511, and therefore could not raise the violation of the statutory removal procedures, he never ruled on the separate question of whether or not McCarthy was “probationary” and thus entitled to those procedures and to constitutional due process. Even assuming McCarthy cannot make this statutory claim, as discussed above, he may make a constitutional due process claim. The improper procedure is also evidence of retaliatory motive.

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<sup>250</sup> See MSPB report, *Addressing Poor Performance and the Law* (Sept 2009).

When a law states that an employee cannot be removed except for cause, certain procedures become mandatory. The U.S. Supreme Court has held that while “the legislature may elect not to confer a property interest in public employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards.” “The right to due process is conferred, not by legislative grace, but by constitutional guarantee.” Thus, once conditions are placed upon the removal of an employee, the employee has a property right in how the job is taken away. In this context, “property” is a legal concept.”

*Id.* at 1, citing *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 541 (1985) (citing Amendment V of the U.S. Constitution).

<sup>251</sup> Under 5 CFR 315.804, termination of probationers for unsatisfactory performance or conduct, the Agency must establish that the employee is probationary, which the Agency failed to do, thus that section could not apply.



In addition to the failure to provide notice and an opportunity to reply, McCarthy's removal involved additional irregular and illegal procedures. The main difference between chapter 43 and 75 is in the Agency's burden of proof. Both "substantial evidence" (Chapter 43) and "preponderance of the evidence" (Chapter 75) use a "reasonable person" standard. However, the difference is that under the substantial evidence test, the Agency must only prove that the deciding official was *reasonable* in reaching the conclusion (a reasonable person could reach the conclusion); whereas under the preponderance test, the Agency has the burden to prove it is more likely than not that the conclusion reached was *correct*.

The requirement to first use a Performance Improvement Plan (PIP) is the primary trade-off agencies must accept if they want to use the lower burden of proof that Chapter 43 offers. The *Douglas* factors<sup>252</sup> are not required for a Chapter 43 action, but must be considered by the deciding official in a Chapter 75 action when determining the appropriate penalty. Also, under Chapter 43 the basis for the action must be a failure to perform a critical element in a performance plan, whereas a Chapter 75 action must "promote the efficiency of the service."

Here, the Agency employed neither a PIP nor the *Douglas* factors; therefore the removal action is again ineffective. Indeed, the Agency refused to produce relevant records requested in discovery, including its relevant policies with regard to discipline or removal for unacceptable performance. There is no evidence that McCarthy was ever given any written warning that his performance was unacceptable, not even a performance review. Additionally, under chapter 75, an Agency may remove an

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<sup>252</sup> *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305-06 (1981).

employee “only for such cause as will promote the efficiency of the service.”<sup>253</sup> This requires that the Agency prove three distinct elements, *i.e.*, that the charged conduct occurred, that there is a nexus to the efficiency of the service, and that the particular penalty imposed is reasonable.<sup>254</sup> Again, the Agency failed to meet the standard.

The removal action can only pass muster if it is assumed that McCarthy was a probationary employee who could be removed without cause and without otherwise required findings and procedures.<sup>255</sup> However, McCarthy’s purported probationary status is not addressed in the ID, and as discussed above, the evidence is overwhelmingly to the contrary. “Removal is the most serious penalty available to the Agency and the most harmful to the employee.”<sup>256</sup> Failure to consider a significant mitigating circumstance constitutes an abuse of discretion.<sup>257</sup> The relevant mitigating *Douglas* factors are as follows.

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<sup>253</sup> 5 U.S.C. § 7513(a); *see also* 5 C.F.R. § 752.403(a) (an Agency may take an adverse action only for such cause as will promote the efficiency of the service).

<sup>254</sup> *Pope v. U.S. Postal Service*, 114 F.3d 1144, 1147 (Fed. Cir. 1997) (citing 5 U.S.C. § 7513(a)); *Dixon v. Department of Commerce*, 109 M.S.P.R. 314, ¶ 8 (2008).

<sup>255</sup> The ID refers to Ruth’s efforts to confirm that he could fire McCarthy “without cause,” ID at 10, 18, and that Ruth claimed that a State Department attorney advised him that he could dismiss McCarthy with a letter and that McCarthy would have no appeal rights. Ruth followed this advice. ID at 18.

<sup>256</sup> *Sterner v. Department of the Army*, 711 F.2d 1563, 1568 (Fed. Cir. 1983).

<sup>257</sup> *VanFossen v. Department of Housing & Urban Development*, 748 F.2d 1579, 1581 (Fed. Cir. 1984).

*(1) The nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated.*

Nothing about the charge of being not collegial or not cooperative, as demonstrated by the four cited legal opinions, constitutes a serious offense, even if it were supported by the opinions, which it is not. There is nothing in the record to suggest the “offense” was intentional, malicious, for gain, or repeated. McCarthy went out of his way to submit each of the opinions in advance to the head of the reorganization committee, Riera, who approved them. The opinions were factually and legally accurate, and given in direct response to a request from Commissioner Ruth. They covered a period of a little over one month, immediately prior to McCarthy’s disclosures. There were numerous other opinions before, during and after these complained of opinions that apparently had no trace of not being collegial and cooperative. Ruth’s failed attempt at hearing to add two new writings to the list betrayed the pretextual nature of the charge, when he had to acknowledge that one was an opinion reflecting the position of the State Department and the second was an email exchange in which only Graf, not McCarthy, was other than “collegial.” Finally, there is no claim that Ruth ever gave McCarthy any written notice of his concerns, and Ruth created an inference that he never said a word to McCarthy about his purported complaints, when he fabricated and back-dated a document that he claimed described such a meeting with McCarthy.

*(2) The employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position.*

The four opinions in question, and the allegation of not being collegial or cooperative, relate solely to the umbrage allegedly taken by Forti and Graf, two executive

officials who would be affected by the recommendations that McCarthy was requested to make. Certainly it would be a dereliction of duty for the Agency's general counsel to fail to point out Graf's misrepresentations of law and violations of law, and violations of generally accepted practices engaged in by Graf and Forti, out of fear that they might take offense. Presumably, that is exactly why the Agency has been in chaos since at least 2005, something Ruth could not deny, and indeed something the Agency all but admitted in its solicitation for a reorganization consultant in 2009.<sup>258</sup> The opinions were directed exclusively to members of the reorganization committee and the Commissioner, with instructions that they were not to be circulated to any other Agency personnel or anyone else. Indeed, after removing McCarthy, the Agency itself went public with strident criticism of its own structure and mismanagement, in a solicitation for bids to consult on reorganization, published on the World Wide Web.

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<sup>258</sup> The 2005 OIG report, *Appellant Exhibit VVVV*, reads as if it were written today, *e.g.*, at 3 ("Internal management problems have engulfed USIBWC, threatening its essential responsibilities for flood control and water management in the American Southwest."); ("The Department of State bears clear foreign policy oversight of USIBWC. The time has come, however, for stricter Department or other U.S. government oversight of how the commission manages matters related to its personnel."); at 7 ("If anything, the internal management turmoil inherited by the Commissioner worsened dramatically under his leadership"); at 9 ("morale plummeted at USIBWC where a climate of fear and disaffection spread"); ("The Commissioner does not favor staff meetings and prefers to closet himself in his office with his 'inner circle'. Not surprisingly, an 'us versus them' atmosphere pervades the El Paso office").

The 2006 OIG follow-up report, *Agency Exhibit XX*, a document the Agency cites as redemption, actually forecasts more of the same, *e.g.* at 6 ("The USIBWC is out of the national limelight, but a major storm and flood could overwhelm the barriers and cause considerable damage. This would usher in bouts of finger pointing between Departments, agencies and jurisdictions concerned.") ("The Agency is simply too small, too isolated, and too vulnerable to management abuse to continue without the protection and oversight of a major government department.").

*See also Appellant Exhibit KKKKK.* (The contract solicitation described the Agency's "rapidly declining indicators of human capital performance," "a series of reorganizations that were not well planned out," and "a structure that was not effective.")



*(3) The employee's past disciplinary record.*

McCarthy's employment record is free of any hint of discipline or unsatisfactory performance, and indeed, Riera and Petz both testified that he was competent, cooperative and collegial.

*(4) The employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability.*

Again, Riera and Petz both testified that McCarthy was competent, cooperative and collegial. Emails from Petz after McCarthy's removal stated "most everyone" was anxious to see him come back.<sup>259</sup> Other than Ruth's claim of irritation at four legal opinions, there is no hint of any problem with performance, dependability, or ability to get along with fellow workers. Aware of hostility from Graf and Forti, McCarthy went out of his way to submit each of the opinions in advance to the head of the reorganization committee, Riera, who approved them. The summary of legal opinions and matters that is in the record shows McCarthy worked tirelessly on an exceedingly broad range of topics and gave sound professional legal advice and representation.

*(5) The effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's ability to perform assigned duties.*

McCarthy has done nothing to harm his ability to perform at a satisfactory level or affect supervisors' confidence in his ability to perform assigned duties. Ruth has been replaced by a new Commissioner, who alone supervises the general counsel. As stated by Petz, "most all employees" would like to see McCarthy return. The record shows that Forti and Graf have long bullied the staff with threats and illegal actions, but finally run

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<sup>259</sup> See McCarthy deposition Exhibit 20, August 26, 2009 email from Petz ("If I were a betting man I would put all my money on you coming back. Will certainly keep my fingers crossed as most all employees are.")

up against someone who would not be intimidated. If Graf and Forti have a problem working with McCarthy, then Agency should take appropriate action against Graf and Forti. The other member of Ruth's so-called "camp", Brandt, testified that she has retired, as has Ruth himself. In any event, McCarthy's ability to perform his job with professionalism and integrity has only been proven.

*(6) Consistency of the penalty with those imposed upon other employees for the same or similar offenses.*

McCarthy made requested recommendations for reorganization that would affect Forti and Graf, who responded with a campaign of hostility, honed by years of practice. Meanwhile, Ruth admitted his knowledge of repeated abusive practices by Forti and Graf over a long period of time, yet he hid documentary evidence of legal violations in his private files. Ruth promised Petz he was going to "take care" of problems in the form of Graf and Forti, but he did nothing except maybe "talked" to them. Both Graf and Forti have used the most foul, unprofessional language imaginable, and directed vituperative abuse at other executive officials as well as other employees. They have been caught misrepresenting and violating laws, rules and regulations. Nothing McCarthy is even accused of comes close to what the record shows these two executive officials have continued to do over the course of several years, yet there has never been any suggestion that they would be subject to any "penalty" other than perhaps being "talked to." Moreover, the Agency refused to produce its performance and discipline policies and requested in discovery.

*(7) Consistency of the penalty with any applicable Agency table of penalties.*

The Agency refused to produce any information concerning its policies regarding discipline or removal for unsatisfactory performance. As a result, there is an inference

that removal could not be supported, even if the allegations were proven, which they were not.

*(8) The notoriety of the offense or its impact upon the reputation of the Agency.*

McCarthy's purportedly objectionable opinions were directed exclusively to members of the reorganization committee and the Commissioner, with instructions that they were not to be circulated to any other Agency personnel or anyone else. Indeed, after removing McCarthy the Agency itself went public with strident criticism of its own structure and mismanagement, in a solicitation for bids to consult on reorganization, published on the World Wide Web. That the Agency may be subject to public criticism or notoriety following its removal of McCarthy has no relation to the alleged "offense" for which McCarthy was removed, and indeed is the Agency's own doing. Since at least 2005, the Agency has been notorious for its mismanagement, a reputation it has not only earned but embellished with its mishandling of this matter, and which it has since broadcast to the world with its announcement on the internet concerning its "rapidly declining indicators of human capital performance," "a series of reorganizations that were not well planned out," and "a structure that was not effective."

*(9) The clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question.*

McCarthy's four allegedly objectionable opinions covered a period of a little over one month, immediately prior to his disclosures. There were numerous other opinions before, during and after these complained of opinions that apparently had no trace of not being collegial and cooperative. Ruth claimed that he "talked to" McCarthy about his opinions but the only evidence of this is a single document fabricated by Ruth after McCarthy was removed and then back-dated to purportedly describe such a meeting with



McCarthy, a meeting McCarthy testified never took place. So embarrassed was the Agency at being caught red-handed using this fraudulent document in its pleadings, that Agency Counsel did not ask Ruth to identify it at hearing. Only on cross-examination, did Ruth have to confess to secretly back-dating the document, still incredibly denying he had any assistance. The Agency's procedures for performance reviews were never used, even though a performance review was past due. Ruth could not produce any contemporaneous documentary evidence that he had advised McCarthy of his alleged concerns, although he claimed to have detailed calendar notes of other important meetings. Finally, the Agency refused to produce discovery on this issue, including access to the notorious calendar.

*(10) Potential for the employee's rehabilitation.*

There is no indication that McCarthy has done anything to require rehabilitation. Apparently he was disliked by Forti and Graf because he shined a light on their misconduct, as it was his job to do. Forti and Graf apparently didn't like anybody, and they weren't shy about saying so, in the most abusive and vulgar manner imaginable. McCarthy has over twenty years experience as an attorney, a law school professor, and a legal scholar, including almost ten years with federal agencies. He is the recipient of several awards, including "STAR" (sustained technical achievement awards) from the U.S. Department of the Interior and a "Courageous Lawyer Award" from the Oklahoma Bar Association. He is a member of the bar in five states and has practiced in every conceivable forum, up to and including the United States Supreme Court. If indeed, rehabilitation were needed, it is hard to imagine a more promising candidate.

*(11) Mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter.*

The Agency had received, almost overnight, several times its annual budget, under the Recovery Act. The Agency's recent history of gross mismanagement, as documented, for example, in the 2005 OIG report, suggests that it was not competent to undertake such heavy responsibilities. McCarthy did everything possible to help the Agency comply with laws, rules and regulations, yet the old guard – or as termed by Ruth, the “camp” consisting of Graf, Forti and Brandt – undermined McCarthy at every turn, just as they had done to Acting Commissioner Riera. They excluded McCarthy from the Recovery Act Oversight Committee (Brandt going so far as to claim, falsely, that the committee did not exist), they covered up their own misconduct and legal violations, and they continued to treat the Agency as their fiefdom. Ruth plainly chose to cast his lot with the old guard, even as he claimed to be working toward bringing the two “camps” together. Indeed, there is no evidence that Ruth ever did anything to bring about such reconciliation. Instead he initiated abusive, invasive investigations of Riera, sheltered Forti and Graf despite their outrageous conduct, and eventually removed McCarthy due to his disclosures.

*(12) The adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.*

There is and was a perfectly appropriate alternative to address alleged unsatisfactory performance, and that is the performance appraisal system that Ruth ignored. Even short of that, Ruth could have contemporaneously documented his allegations of unsatisfactory performance, but he did not. Instead, Ruth fabricated after the fact back-dated file memos, which themselves do not even purport to give McCarthy

any written notice of performance concerns. Ruth now claims that he “talked” to McCarthy, just as he claims that he “talked” to Forti and Graf. The difference is that McCarthy was removed immediately following his disclosures, whereas Forti and Graf were coddled. The Agency did not bother to employ even the most minimal effort to address any perceived conduct problem, short of removal without notice, thus it can hardly claim that it considered or attempted any other alternatives.

**c. Evidence that the agency takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated.**

The ID completely fails to consider any evidence that the Agency takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated. Indeed, the ID makes the outrageously inaccurate claim, ID at 22, that “There was no evidence presented regarding the treatment of any other similarly situated employees.” Yet notwithstanding the Agency’s explicit refusal to produce discovery on the issue, the ID ignores a veritable mountain of evidence that executive committee staff Forti and Graf, in particular, were guilty of contemptible conduct, including abuse of their offices, spying on fellow employees, taking illegal personnel actions including pay increases, routinely cursing and threatening fellow employees, violating the Antideficiency Act and other laws, bungling Recovery Act contracts, misleading the State Department, hiding evidence of their misdeeds, and in the case of Mr. Graf, threatening to have a commissioner assassinated!

McCarthy introduced a great deal of evidence in support of allegations that Brandt, Forti and Graf were non-collegial and uncooperative, and that they committed fraudulent, unlawful and even criminal acts, all with Ruth’s full knowledge, and all without the slightest disciplinary repercussions. Although the agency again refused

discovery regarding these individuals' performance and disciplinary records, based on the legal conclusion that they were not similarly situated, the evidence nevertheless shows that Ruth even covered up for these executive staff while going after only McCarthy, the whistleblower.

The ID ignores the undisputed evidence about these similarly situated executive staff, and instead sets up a straw man, Riera, who McCarthy consistently described as "the only reason this agency is still functioning," and who was never accused of the slightest inappropriate, non-collegial or uncooperative conduct. Yet even Riera, the straw man, designated by the White House as the successor to the Commissioner, the Principal Engineer for Operations, and frequently the Acting Commissioner, was deemed not similarly situated to McCarthy, due to McCarthy's fiduciary duties. The ID also attempts to distinguish Riera's critiques of the reorganization proposals from those critiques made by McCarthy, completely ignoring the fact that Riera himself, as head of the reorganization effort, personally reviewed and approved each of McCarthy's opinions.<sup>260</sup>

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<sup>260</sup> Documentary evidence and testimony of both McCarthy and Riera establish that Riera reviewed and approved each of McCarthy's opinions before they were distributed to the executive committee. In addition, the ID attempt to distinguish Riera's own pointed criticisms seems to amount to the observation that where McCarthy provided detailed citation to laws and regulations, Riera merely stated the obvious. For example, Riera's criticism of Graf's proposal that he be given complete powers over agency audits consisted of the following (Appellant's Exhibit RR):

I do not concur with the proposed directive as written given the current status of the organizational structure under discussion with the Commissioner and the implied role of a "Compliance Officer" that would provide policy and program evaluation oversight over the internal auditor. The suggested role of a position to "provide policy oversight", "review and approve specific audit plans" and "approve reports prior to release" does not guarantee impartiality and independence for internal reporting. The internal auditor as the expert must maintain a high degree of skill and

The same logic might be applied to executive staff members Forti and Graf (but what was not, at least not in any explicit ruling by the AJ). Yet the Agency's feigned outrage that Forti may have been referred to as a "mid-level" administrator (she was not) suggests that the Agency views her as similarly situated to McCarthy, as do her multiple titles and fiduciary responsibilities for budget, contracts, and information management. More importantly, the overwhelming and uncontested evidence is that Forti was the queen of incivility, and that Graf, the Compliance Officer and self-proclaimed "Internal Auditor" was the King of non-collegiality. Ruth's backward bends to accommodate and cover up their misdeeds would suggest that he considered them his most valuable employees, even with his knowledge of their rampant hostility to co-workers.

The ID credits Ruth's alleged concerns about McCarthy's alleged lack of collegiality, yet completely ignores extensive testimony and documentary evidence that it was Forti and Graf who were guilty of such conduct. Moreover, their behavior caused Ruth no concern whatsoever. Even after Petz testified that Graf threatened to have Commissioner Marin assassinated, and after agency counsel contended (during cross-examination of McCarthy) that Graf's death threat against Commissioner Marin was made "as a joke," Ruth persisted in his stated belief that Graf had never made any such comment. Ruth actively covered up Forti's (and his own) violation of the Antideficiency Act, hid documentary evidence of her unlawful and abusive behavior, covered over her illegal pay raises, refused to allow any question about her credentials, blocked every attempt to investigate her destruction of electronic records, and declined to intervene in her routine use of abusive, threatening and profane language and threats, even as she

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independence and his audit plans/reports should be developed and submitted by him, without any filters, to the Commissioner.

drove away competent professional employees, such as Burns. Similarly, Ruth refused to permit any investigation of Graf's secret surveillance of the personnel office; his abusive, profane and threatening conduct; and his falsification of federal authorities in attempts to increase his authority. He even falsely attributed Graf's abusive profanities to McCarthy!

By skipping over the disclosures, the ID conveniently evades the undisputed evidence of rampant hostile and unlawful conduct by Forti and Graf, which dwarfs by comparison anything McCarthy was ever remotely suspected of doing, or even falsely accused of doing. Undisputed evidence shows that Forti routinely abused staff with foul language and threats such as "don't blow smoke up my ass"; that she referred to legitimate staff concerns about computer monitoring as the ravings of "paranoid employees", and described McCarthy's proposed policy – drafted at the Commissioner's request - as a "kneejerk reaction"; a personal specialist's grievance against Forti described her "patterns of demands that laws and regulations be ignored, lack of respect for the Privacy Act, bully behavior and harassment against me and others;" an external investigator found she had obtained unlawful salary increases; former Contracts chief Burns' testimony shows she even required staff to baby-sit her young son every day. If incompetence is the issue, Forti is also the clear candidate for corrective action. The outside investigator found she has had virtually no training since she came aboard the agency in 1992, as a Grade 11 budget analyst, despite her meteoric, unlawfully grade-skipping rise to a Grade 15 Chief Administrative Office-Budget Officer-Chief Information Officer. Contracts Chief Burns said she was incompetent to supervise contracts and that she routinely violated laws and regulations, including the Anti deficiency Act (with Ruth's knowledge). Former Computer Specialist Medor, a ten-year

Agency veteran now employed at the Justice Department, testified Forti was IT ignorant. The Agency simply stonewalled all requests for her qualifications, of course. But Ruth took no action and the ID is silent.

Undisputed evidence established that Graf threatened to have the late Commissioner Carlos Marin assassinated because he wouldn't give Graf a promotion; that Graf called Riera "the devil," a "motherfucker" and "a son of a bitch," among other things, and that Graf threatened he was going to "get him"; that Graf openly attacked Petz, in writing copied to the entire executive staff and Ruth, with the allegation that Petz "will pretend to listen to other viewpoints and then proceed to do whatever he wants;" that Graf openly displayed his hostility toward executive staff by his display at staff meetings of a book entitled "How to Work with Jerks"; that Graf falsely portrayed McCarthy and Petz, in a memo to Ruth regarding a personnel matter, as "one small segment of the executive staff ignoring an Agency Directive and once again attempting to control a management action at the exclusion of other, more qualified management officials"; that Graf sent emails to the entire executive staff and Ruth, in which he referred to the entire executive staff as "irresponsible" and "dysfunctional", stating that they were the reason for employees' lack of "trust and confidence in leadership", and that he alone was somehow not part of "the executive staff's failed leadership." Testimony established that Graf routinely visited pornographic websites from his office computer. Consistent with this behavior, Graf was assumed by "everyone" at the Agency (according to Petz) to have been the author of a horrific pornographic post on a public newspaper

website, libeling Human Capital Director Petz, Principal Engineer/Acting Commissioner Riera and General Counsel McCarthy.<sup>261</sup>

When Ruth told Petz on July 31, 2009 that he had decided to remove McCarthy, Petz said that Ruth was “upset”; that Petz argued that Forti and Graf were responsible for “problems” at the Agency and that Ruth acknowledged it and said he was going to “take care of those problems too.”<sup>262</sup> Of course Ruth did not “take care” of those problems in the same way he “took care” of the whistleblower, McCarthy. Instead of removing them or indeed disciplining them in any way he helped to cover up their misdeeds.

**7. The AJ erred in failing to find that Appellant engaged in activities protected under the Whistleblower Protection Act by making protected disclosures as defined by 5 U.S.C. § 2302(b)(8), instead merely assuming “arguendo.”<sup>263</sup>**

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<sup>261</sup> On September 27, 2009, Petz e-mailed McCarthy stating it was generally believed at the Agency that Mr. Graf was the person who sent the libelous pornographic comments to the El Paso Times website, shown below, attacking McCarthy, Petz and Riera, and McCarthy agreed. *Appellant’s Exhibit A*.

This complaint is simply a case of man love. McCarthy and the personnel dept. head are homosexuals and they desperately want to perform felatio on the principle engineer. He agreed to let them if they got rid of others in the organization. Read the full complaint on the PEER web site and you will see that they blame everything on others while stating that their love interest is “the only reason this organization is still afloat.” McCarthy and HR head went on an unnecessary trip to Miami Fl and came back with this scheme. Their inability to control their manginas is giving the IBWC a bad name.

*Appellant’s Exhibit W*.

<sup>262</sup> *Petz Testimony. Petz Deposition Exhibit 11, Appellant’s exhibit GG* (“I told him we had problems before Robert came and we’d have problems after he left. The Commissioner responded saying he would take care of those problems too.”)

<sup>263</sup> The AJ has already reached this conclusion in an earlier stage of these proceedings, in contradiction to the revised statement in the ID that the finding is made only for purposes of argument. On November 5, 2009, Administrative Judge Thayer issued an Order denying the Agency’s frivolous motion to dismiss, finding “that the Appellant had a reasonable belief that his disclosures were protected.” (“I find that he has provided sufficient detail, including the specific provisions of law allegedly violated, to conclude



*Whistleblowing* is the disclosure of information by an employee, former employee, or applicant that the individual reasonably believes evidences a violation of law, rule, or regulation, gross mismanagement, gross waste of funds, abuse of authority, or substantial and specific danger to public health or safety. McCarthy specified, in his August 21, 2009 supplemental disclosures to OSC, that each of his disclosures evidenced each of the following.

(a) “Violation of law, rule, or regulation.”<sup>264</sup>

(b) “Gross mismanagement.”<sup>265</sup>

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that a disinterested observer could reasonably conclude that the described actions evidenced a violation of law, rule, or regulation.”)

<sup>264</sup> See *Kalil v Agriculture*, 96 MSPR 77 (2004) (no requirement to cite specific law, rule, or regulation). Notwithstanding the foregoing, McCarthy identified in his disclosures specific violations of Federal Acquisition Regulations (e.g., 14.202-6 Final review of invitations for bids, 14.202-1 Bidding time, 14.208 Amendment of invitation for bids.); the Purpose Statute; the Antideficiency Act; 5 CFR part 2635—standards of ethical conduct for employees of the executive branch; 18 U.S.C. 1001 --- the prohibition against fraud or false statements in a Government matter; Standards for Internal Control in the Federal Government, General Accounting Office (1999); The Federal Managers’ Financial Integrity Act of 1982; The Chief Financial Officers Act of 1990; OMB Circular A-123; the privacy act; 18 U.S.C. 2071 - the prohibition against concealing, mutilating or destroying a public record; 18 U.S.C. 1030 - the prohibition against fraudulent access and related activity (including exceeding authorized access) in connection with computers; OPM regulations regarding time in grade; merit system principles; 5 U.S.C. 2302 --- the prohibition against certain personnel practices; EEO principles and rules.

<sup>265</sup> Gross mismanagement includes management action or inaction that creates “a substantial risk of significant adverse impact on an Agency’s ability to accomplish its mission.” *Schaeffer v. Department of the Navy*, 86 M.S.P.R. 606, (2000). “It is not necessary to show that the gross mismanagement is ‘blatant.’” Gross mismanagement requires that an Agency policy “be a matter that is not debatable among reasonable people.” *White v Air Force*, No. 04-3045, 104 LRP 59729 (Fed. Cir. 2004). Alleged personal motivation of the employee is irrelevant to a determination of reasonableness. *Kinan v DOD*, 87 MSPR 561 (2001); *Fickie v Army*, 86 MSPR 525 (2000); *Carter v Army*, 62 MSPR 393 (1994). “[T]he WPA does not contemplate removal of protection when protected subject matter is stated in a blunt manner. ... When a disclosure is of protected subject matter, it is more likely than not to be critical of management, perhaps

- (c) “Gross waste of funds.”<sup>266</sup>
- (d) “Abuse of authority.”<sup>267</sup>
- (e) “Substantial and specific danger to public health or safety.”<sup>268</sup>

There is no doubt that McCarthy had a reasonable belief that his disclosures evidenced a violation of law, rule, or regulation; gross mismanagement; gross waste of funds; abuse of authority; or substantial and specific danger to public health or safety. The evidence in support of each of the disclosures is very strong. McCarthy had either first hand knowledge or reliable informants for each of the disclosures, including the Director of Human Capital Petz, and the Principal Engineer / Acting Commissioner Riera, who not only confided in McCarthy but reviewed his disclosures in advance. As

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highly critical.” *Greenspan v. Veterans Affairs*, # 05-3302, 106 LRP 52325 (Fed. Cir. Sept. 8, 2006).

<sup>266</sup> A gross waste of funds is a “more than debatable expenditure that is significantly out of proportion to the benefit reasonably expected to accrue to the government.” *Van Ee v. Environmental Protection Agency*, 64 M.S.P.R. 693, 698 (1994).

<sup>267</sup> An abuse of authority means an “arbitrary or capricious exercise of power by a Federal official or employee that adversely affects the rights of any person or that results in personal gain or advantage to himself or to preferred other persons.” *Wheeler v. Department of Veterans Affairs*, 88 M.S.P.R. 236 (2001). Because there is no *de minimis* standard or threshold applied to disclosures of abuses of authority, they are substantively different from disclosures involving the other types of wrongdoing set forth in 5 U.S.C. 2302(b)(8)(A)(ii). *Wheeler*, 88 MSPR 236, 241 n., 101; *Ramos v Treasury*, 72 MSPR 235 (1996).

<sup>268</sup> Substantial and specific danger to public health or safety includes disclosures that the whistleblower “reasonably believes evidences ... a substantial and specific danger to public ... safety.” *See Braga v. Department of the Army*, 54 M.S.P.R. 392, 398 (1992), *aff’d*, 6 F.3d 787 (Fed. Cir. 1993) (Table); *Gady v. Department of the Navy*, 38 M.S.P.R. 118, 121 (1988) (a librarian’s complaint that an Agency policy allowing smoking in the library threatened the health of the staff and constituted a fire hazard was a protected disclosure under section 2302(b)(8)).

general counsel, McCarthy was in the best possible position to form a reasonable belief as to the disclosures. Evidence at trial shows that he had relevant knowledge of the facts at the time that he made his disclosures, and bears out the validity of his beliefs.

In this regard it should be noted that the OIG has certainly viewed McCarthy as a whistleblower, and his disclosures worthy of investigation.<sup>269</sup> Also, the reasonable belief standard may be met where protected disclosures include potential violations of law not carried out by the Agency.<sup>270</sup> Although disclosures may not be protected where they disclosed, at most, minor and inadvertent miscues occurring in the conscientious carrying out of one's assigned duties, this is not such a case.<sup>271</sup> Nor is the Appellant required to prove the truth of his assertion; he is only required to prove that a reasonable person in his position would believe there was such an issue.<sup>272</sup> A disclosure of

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<sup>269</sup> The OIG has begun an investigation of at least some of McCarthy's disclosures. See, e.g., Appellant's exhibit A, Sept. 27 2009 email from McCarthy to Petz stating the OIG is conducting an investigation and interviewing witnesses concerning the computer-related disclosures. See *Greenspan v. Department of Veterans Affairs*, 94 M.S.P.R. 247, ¶ 10 (2003) (disclosures rose to the level of a nonfrivolous allegation of whistleblowing in part because the Office of Inspector General considered the Appellant to be a whistleblower).

<sup>270</sup> *Reid v. Merit Systems Protection Board*, 508 F.3d 674, 677 (Fed. Cir. 2007).

<sup>271</sup> See, e.g., *Drake v. Agency for International Development*, 2009 MSPB 81 (2009), on remand from 543 F.3d 1377 (Fed. Cir. 2008) (Appellant "reported intoxication which he could reasonably believe constituted a genuine violation of a law, rule, or regulation").

<sup>272</sup> See *Huffman v. Office of Pers. Mgmt.*, 92 M.S.P.R. 429, 433 (2002) ("To establish that he held such a reasonable belief, an Appellant need not prove that the condition disclosed actually established one or more of the listed categories of wrongdoing, but he must show that the matter disclosed was one which a reasonable person in his position would believe evidenced one of the situations specified in 5 U.S.C. § 2302(b)(8).").

information reasonably believed to evidence a danger to public safety may be protected even if the alleged danger was created by a policy decision.<sup>273</sup>

McCarthy disclosed that the Agency solicited bids to construct Recovery Act levees in Hidalgo County with architectural designs in which USIBWC has no contractual rights. His disclosures were based on his personal knowledge that the Agency issued the first major Recovery Act contract solicitation on June 4, 2009, not permitting prior legal review, and not only using the county's plans but listing the county rather than the Agency as the client, and citing to state and county laws and standards rather than to federal requirements; that for over three months the Agency rejected his efforts to obtain contractual rights; that Forti and Merino actively opposed his efforts to address the problem, and that Commissioner Ruth insisted he had no problem "assuming the risk" Notwithstanding the Agency's intransigent refusal to cooperate in discovery, Appellant's Exhibits, all of which McCarthy had access to when he made his disclosures, confirm his disclosures were accurate.<sup>274</sup>

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<sup>273</sup> *Miller v. Department of Homeland Security*, 2009 MSPB 75 (2009).

<sup>274</sup> McCarthy testified that he reasonably believed that IBWC solicited bids to construct Recovery Act levees in Hidalgo County with architectural designs in which USIBWC had no contractual rights. He testified that he first warned the Commissioner and executive staff on March 30, 2009, and repeatedly thereafter, yet the June 4, 2009 solicitation of bids for North Banker Floodway Levee construction included some 500 pages of specifications that cited only to state law and not federal requirements and identified the county and not IBWC as the client. He testified this was finally amended on July 17, 2009, giving bidders inadequate time to make their bids on the actual specifications, and that even then the Agency's amended solicitation still falsely claimed ownership of design plans; that he was prohibited from going outside the Agency with his concerns because Ruth didn't want the project to be slowed down; that Ruth had decided to "assume the risk;" that as of July 27, 2009, P.E. Merino was finally, at the direction of Ruth and persistent urging of McCarthy, and well after the contract had been issued, for the very first time asking the county if it would assign the rights to IBWC, as urged by McCarthy since March. *McCarthy Testimony*.

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*See also Appellant Exhibits AAAA* – March 30-31, 2009 emails in which McCarthy alerts other IBWC officials, seeks copy of Dannenbaum contract and indicates vague statement by a county employee was inadequate to assign rights both because it didn't purport to and he didn't have the authority to; *FFFFF* – June 4, 2009 Website for Solicitation of bids on North Banker Floodway Levee – shows it included approximately 500 pages of specs that cited only to state law and identified the county as the client, failed to reference federal requirements, and violated the Federal Acquisition Regulation (FAR); *WWW* – June 30, 2009 McCarthy email to IBWC engineering and contracts officials regarding urgent need to establish privity of contract for architectural designs (“the primary reason for this action is to ensure USIBWC is protected with regard to any latent defects in the design. An additional benefit of establishing privity is that Dannenbaum would then be accountable to USIBWC and/or S&B, rather than HCDD1. An example of the problems this could cause occurred yesterday when HCDD1 instructed Dannenbaum to cease work on the Penitas/Edinburg Pump project. [The] designs would be for USIBWC rather than HCDD1, minimizing the risk of issuing solicitations with inaccurate specifications.”); *NNNN* – June 30, 2009 executive committee meeting minutes show Engineering (Merino) and Contracts (Forti) claimed it had been decided to drop the issue and just proceed with the designs as they were, so as not to slow down the process of getting a contract issued and beginning construction [“There are concerns about liability by using Dannenbaum's designs for the levees since Dannenbaum is under contract to Hidalgo County, not USIBWC (McCarthy). There was a decision by the Agency to move forward with the Dannenbaum design in light of time constraints following extensive internal discussions (Forti, Merino)”]; *ZZZ* – July 7, 2009 email from McCarthy with specific recommendations for liability language: “District or Districts Contractor will provide USIBWC the design firm representative in defense of any design issue that may arise throughout design and construction and for the designed life of the levee (30 years). District or Districts Contractor will provide USIBWC with a Certificate of Liability Insurance in the amount of \$2,000,000 and will name the USIBWC as an additional insured at no additional cost to the USIBWC”; *GGGGG*- July 16, 2009 Amendments to Solicitation for bids on North Banker Floodway Levee (still falsely claims specifications are owned by the government; replaces references to county and state requirements with federal requirements); *G* - July 22, 2009 McCarthy Memo to Ruth regarding lack of privity of contract with design firm; *XXX* - July 22, 2009 McCarthy email to Merino with instruction from Commissioner to pursue contract; *J* – July 22, 2009, draft disclosures w/ Riera comment on Hidalgo; *OOOO* - July 23, 2009 email from McCarthy to Riera regarding privity; *PPPP* - July 23, 2009 email from McCarthy to Merino regarding privity; *QQQQ* July 27, 2009 email from Merino to County, for the first time asking about contract rights, and for permission to authorize county's law firm to discuss issue with McCarthy. Further, the Agency refused to produce additional relevant records requested in discovery. Among other things, the Agency repeatedly refused and ultimately failed to produce the June 4, 2009 solicitation that it had published on the World Wide Web, listing the county as the client and citing only to state rather than federal standards, regulations and laws. This document, distributed to the whole world, was withheld by demand that Appellant first obtain a protective order to protect its alleged “confidentiality.”

McCarthy established that he had a reasonable belief that his disclosures regarding the Hidalgo County levees evidenced a violation of law, rule, or regulation,<sup>275</sup> gross mismanagement,<sup>276</sup> a gross waste of funds<sup>277</sup>, an abuse of authority,<sup>278</sup> and a substantial and specific danger to public safety.<sup>279</sup>

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<sup>275</sup> *E.g.*, the Federal Acquisition Regulation (FAR) (e.g., 14.202-6 Final review of invitations for bids, 14.202-1 Bidding time, 14.208 Amendment of invitation for bids), and the contractual rights of the parties under Texas law.

<sup>276</sup> Contractors who bid on this project based their bids on state not federal law and standards; all questions about the design that arise throughout the construction project must be funneled through the county government (which has been the USIBWC's worst critic, as newspaper accounts confirm); the Agency cannot be assured of the cooperation of the design firm; the Agency has no contractual rights to the designs; and the Agency will be completely without recourse should there be any flaws in the design.

<sup>277</sup> Rather than take the no-cost step of simply ascertaining whether the county would freely assign its rights under the design contract to the Agency, or whether the design firm would re-certify the designs for the Agency at a nominal fee, the Agency wasted funds publishing a solicitation for bids based on state standards and state law. The Agency had to spend countless hours and untold expense republishing the solicitation, and causing bidders to rewrite their bids with little notice. Instead of quickly acting to determine what if any cost might be associated with eliminating all of these potentially costly liabilities, the Agency has left itself open to the potential loss of millions of dollars in the event of contract disputes, design flaws, bid protests, etc.

<sup>278</sup> This arbitrary or capricious exercise of power by Federal officials adversely affects the rights of the contracting parties. At no point did the Agency make a serious attempt to obtain a clear assignment of rights. Indeed, only at the persistent urging of counsel, and even then after the solicitation had been issued using the designs, did the Agency take the meager step of attempting to get some minimal expression of permission from a single official of the county, an official who had no authority to grant such rights to the Agency. Taxpayers, of course, are left with potential liability for any number of possible claims. Contract bidders are deprived of the right to bid on a properly noticed solicitation with correct specifications. The reason for plunging ahead is a self-imposed deadline for issuing a solicitation for a construction contract so that the Agency might look good to the State Department and the commissioner might hold onto his job a little longer.

<sup>279</sup> By blindly adopting plans created for a local government, not to Federal standards and in accord with federal laws, the citizens whose homes and lands and communities are supposedly protected by levees built with these plans are placed at risk of design failures

McCarthy disclosed that the Agency planned to misuse Agency funds to subsidize a border barrier in Hidalgo County. His disclosure was based on his personal knowledge that the Agency had rejected his advice that IBWC could not subsidize the Department of Homeland Security (DHS) border barrier, after DHS said it would not pay the full cost of its share of a joint project, already estimated to exceed \$2 million. He was personally aware of numerous newly identified and still unidentified costs to the joint project and that the only way to ensure IBWC would not subsidize DHS was for each side to agree to pay its full share rather than DHS arbitrarily capping its costs as DHS did at \$1.75 million. Again notwithstanding the Agency's discovery misconduct, Appellant's Exhibits, all of which McCarthy had access to when he made his disclosures, confirm his disclosures were accurate.<sup>280</sup>

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or contractual disputes that could leave the levees un-built or destroyed with no ready recourse to reconstruction funds.

<sup>280</sup> McCarthy testified that he had a reasonable belief that IBWC Planned to misuse Agency funds to subsidize a border barrier in Hidalgo County; that as early as June 30 he began to warn that IBWC could not subsidize the Department of Homeland Security (DHS) border barrier, after DHS said it would not pay more than \$1.5 million for its share of a joint project, already estimated by DHS itself to exceed \$2 million; that McCarthy wrote several legal opinions cautioning about violation of the Purpose Statute and Antideficiency Act; that there were numerous newly identified and still unidentified costs to the joint project and that the only way to ensure no subsidy was for each side to agree to pay its full share rather than capping its costs as DHS ultimately did at \$1.75 million; that Ruth did not want any delay and on July 27 ordered McCarthy to finalize an interagency agreement with DHS under which IBWC would subsidize DHS costs over \$1.75 million; that this order was at least one of the last straws for McCarthy, forcing him to proceed with his disclosures the next day. *McCarthy Testimony*.

*See also Appellant Exhibits BBBB* – May 7, 2009 email from McCarthy stating IBWC cost will be the same with or without a border barrier because DHS must pay its own costs; *NNNN* – June 30, 2009 executive committee minutes when McCarthy warned that DHS might pull out of the joint border barrier / levee project due to rising costs); *GGGG* – July 15, 2009 emails show Merino and Forti initially acknowledge IBWC may not subsidize DHS; *HHHH* - July 15, 2009 email from DHS stating that although DHS share of cost is \$2 million, DHS will only pay \$1.5 million and IBWC must cover the rest

McCarthy established that he had a reasonable belief that his disclosures regarding the Hidalgo County border barrier evidenced an Agency plan that would violate laws, rules and regulations;<sup>281</sup> evidence gross mismanagement;<sup>282</sup> and constitute a

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including full responsibility for construction oversight (with Hidalgo County to cover real estate acquisition costs); McCarthy email to “All” stating DHS cost is \$2 million and IBWC may not subsidize; Dr. Aguire (senior engineer) email stating that IBWC would also have unforeseen pumping costs due to DHS security grating, pumping costs that IBWC would not have in a levee-only design; July 17, 2009 emails show DHS increased its cap to \$1.75 million, to which McCarthy still protests that it doesn’t matter that they raised their contribution because it still won’t cover their known cost of \$2 million, and that the only way to ensure no violation of law is for each Agency to commit to its costs, because the costs on each side are unknown; Merino states: “I do not anticipate any problem with IBWC violating the Antideficiency Act. DHS will contribute towards their fair share of the project;” and July 27, 2009 Ruth email directing McCarthy to finalize the interagency agreement obligating IBWC to pay DHS costs that exceed \$1.75 million; *PP* July 22, 2009 McCarthy memo re Antideficiency Act concerns in joint construction project; *J* – July 22, 2009, draft disclosures w/ Riera comment on Hidalgo; *OOOO* - July 23, 2009 email from McCarthy to Riera re deficiency issue; *PPPP* July 23, 2009 email from McCarthy to Merino re deficiency.

Further, the Agency refused to produce additional relevant records requested in discovery. See below, Part IV.6, notes 85, 102, 116, 122 and related text. Among other things, the Agency refused to produce communications with DHS, and any evidence of IBWC levee-only design costs.

<sup>281</sup> E.g., the Purpose Statute and the Antideficiency Act; 5 CFR part 2635—standards of ethical conduct for employees of the executive branch; 18 U.S.C. 1001 --- the prohibition against fraud or false statements in a Government matter.

<sup>282</sup> This act of gross mismanagement creates a substantial risk of significant adverse impact on the Agency’s ability to accomplish its mission, because the Agency was funded to build flood control levees, not border barriers. Whether the Agency diverted a mere quarter-million dollars from its intended purpose as estimates projected, or whether that figure ballooned as such border barrier estimates inevitably did, those misdirected funds would be taken away from the Agency’s ability to accomplish its mission.



gross waste of funds,<sup>283</sup> an abuse of authority,<sup>284</sup> and a substantial and specific danger to public safety.<sup>285</sup>

McCarthy disclosed that the Agency planned to misuse funds for cosmetic repairs to levees in Presidio, Texas, that are located on unsafe ground, to unsafe specifications. His disclosures were based on personal knowledge that the existing levee could not be rebuilt to appropriate standards according to Agency geotechnical consultants. He heard Agency planners and the Commissioner discuss rebuilding a levee that they knew would not hold up to a flood like the kind that destroyed it in 2008. Again notwithstanding the Agency's discovery misconduct, Appellant's Exhibits, all of which McCarthy had access to when he made his disclosures, confirm his disclosures were accurate. Although the Agency refused to produce the geotechnical reports cited in its own Environmental Impact Statement (EIS), released on February 19, 2010, the EIS includes several citations

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<sup>283</sup> *Id.* Experience has shown that DHS costs in other joint structure projects have been much higher than USIBWC costs, simply because it is more expensive to pour an eighteen-foot high reinforced concrete wall than to build an earthen levee. In addition, new costs were still being identified, such as the unaccounted for extra pumping costs due to security grating, as identified by Dr. Aguirre just days before the final decision was made.

<sup>284</sup> This arbitrary exercise of power by a Federal official that adversely affects the rights of communities all along the Rio Grande who are deprived of funds misappropriated to construction of a border barrier. Congress decides what purpose funds are to be used for, and officials are not free to change those purposes because they want to meet self-imposed arbitrary deadlines for spending those funds, or because they think they know better the needs of border communities.

<sup>285</sup> A substantial and specific danger to public safety is created by this arbitrary decision to forego additional levee construction in favor of subsidizing a border barrier.

to geotechnical reports that confirm exactly the conditions described in McCarthy's disclosures and his testimony.<sup>286</sup>

McCarthy established his reasonable belief that the Agency plan disclosed by McCarthy would violate laws, rules and regulations;<sup>287</sup> and evidence gross

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<sup>286</sup> McCarthy testified that he had a reasonable belief that IBWC planned to misuse funds for cosmetic repairs to levees in Presidio, Texas, that are located on unsafe ground, to unsafe specifications, in order to deceive adjacent landowners to permit access to build a real levee across their lands to protect the town (but not the landowners). McCarthy testified that IBWC had received emergency funds to repair the Presidio levees - \$37 million – but it was not enough to do the job so a preliminary decision was made to build a spur levee to protect the town and not to rebuild the agricultural levees; but that the landowners wouldn't let IBWC environmental survey crews on their land to survey for a spur so IBWC decided it would build a "cosmetic" levee for the landowners, knowing it would not be a real flood control measure because geo-technical reports said the levee could not be rebuilt – even if they had the money the spot it was located and the materials were no good, so they would have to move it 500 feet and this raised additional concerns with both the landowners and the Mexican section – so they decided to just cover it up with a cosmetic levee and hope everybody would be happy, at least until it breaks in the next flood. He said he wrote legal opinions stating that IBWC can't spend money to rebuild the levee unless they intended to do it right – that a cosmetic levee is a waste of funds.

IBWC would not produce in discovery the specifically requested geo-technical reports which established the folly of rebuilding the levee as planned. Not coincidentally, the week after the hearing in this case, on February 19, 2010, IBWC released a Final Environmental Impact Statement (FEIS) that selected a construction alternative that would forego the spur or any effort to build a levee to protect the town beyond the 25-year flood protection provided by the pre-existing levee, and that the agricultural levee would also be rebuilt in the same place, to the same standards, notwithstanding geo-technical reports stating that it will be destroyed by the next flood. The FEIS includes several citations to geo-technical reports that suggest exactly the conditions described in McCarthy's disclosures and his testimony. See [www.ibwc.gov](http://www.ibwc.gov).

See also *Appellant Exhibits LL* – May 1, 2009 McCarthy Opinion that repair of sinkhole created by broken levee would violate Purpose Statute and Antideficiency Act unless Agency was repairing levee as well; *NN* – July 10, 2009 McCarthy memo regarding maintenance of levees in Presidio; *UUUU* McCarthy opinion that IBWC wasted \$2 million of emergency appropriations for Presidio Levees by using the wrong method that had been ruled out by a geo-technical report; *LLLL* – July 13, 2009 executive meeting minutes show Presidio landowners wouldn't allow IBWC to access their lands to build a spur levee to protect the town unless the Agency also rebuilt an agricultural levee that geo-technical reports said was impossible, except to cosmetic standards; *J* – July 22, 2009, draft disclosures w/ Riera comment on Presidio.

mismanagement,<sup>288</sup> a gross waste of funds,<sup>289</sup> an abuse of authority,<sup>290</sup> and a substantial and specific danger to public safety.<sup>291</sup>

McCarthy disclosed that the Agency pledged appropriated funds in connection with a financial award for the South Bay International Water Treatment Plant (SBIWTP), when such funds had not yet been appropriated for the Agency. His disclosures were based on information obtained from Principal Engineer / acting commissioner Al Riera, who even wrote in a comment concerning the violation on a draft of McCarthy's disclosures. Riera in turn testified that he had discussed the details of the violation with

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<sup>287</sup> E.g., the Purpose Statute and Antideficiency Act, as advised by counsel in a written opinion; 5 CFR part 2635—standards of ethical conduct for employees of the executive branch; 18 U.S.C. 1001 --- the prohibition against fraud or false statements in a Government matter.

<sup>288</sup> Congress allocated \$37 million for emergency repairs to the Presidio levee destroyed by a flood in 2008. Granted the funds were insufficient to replace the entire levee, and granted, the conditions were such that it would be foolhardy to rebuild the levee along the same location, where it will be washed away again. But that is the course of least resistance that the Agency chose, failing to meaningfully consider alternatives.

<sup>289</sup> Congress allocated these funds for flood control, and when it becomes apparent that a significant portion was spent on a cosmetic levee that washes away in the first flood Congress is going to think twice before similarly funding the Agency in the future. Not only Congress, but the citizens and communities along the Rio Grande, and the taxpayers of America will rightfully condemn this gross waste of funds. Penalties for violation of the Purpose Statute and Antideficiency Act will eat into the Agency's budget. Presidio landowners will rightfully demand compensation for damages, reconstruction of a real levee, and payment for the right of way given up for the spur levee.

<sup>290</sup> This decision also constitutes an arbitrary and capricious exercise of power that adversely affects the rights of the citizens of Presidio and the landowners "protected" by the cosmetic levee, who will suffer another devastating flood without the funds to make meaningful repairs.

<sup>291</sup> Citizens, residents, communities and adjacent landowners have unknowingly been subjected to serious flood dangers, virtually certain to recur, of the same type that wiped out their levee just last year.

former Acquisitions chief Colleen Burns, and shared that information with McCarthy. Again notwithstanding the Agency's discovery misconduct, Appellant's Exhibits and testimony of Burns and Ruth not only confirmed the accuracy of the disclosure, but added evidence that CAO Forti and Commissioner Ruth were aware of the violation and attempted to cover it up.<sup>292</sup>

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<sup>292</sup> McCarthy testified that he had a reasonable belief that IBWC pledged appropriated funds in connection with a financial award for the South Bay International Water Treatment Plant (SBIWTP), when such funds had not yet been appropriated for the Agency, resulting in a violation of the Antideficiency Act; that the Agency issued a contract for \$88 million, but the Agency was on continuing appropriation and didn't have \$88 million; that email from contract officer Soto said the Agency had only \$66 million, and suggested the Agency amend the contract to that amount (which would not cure the Antideficiency Act violation that had already occurred, even if the contractor agreed to the amendment which they would not have done); that responding email from Forti acknowledged violation of the Antideficiency Act and said essentially, no we'll stick with the \$88 million even though it may not provide sufficient cover for us but it's the best we can do now; that this was a blatant violation of the Antideficiency Act, specifically disclosed by McCarthy, and covered up by the Agency; that when he made his disclosures McCarthy had discussed the matter with Riera, who said he had discussed it with Burns; that even in discovery McCarthy received not a single document in response to very specific requests (RFP 33, See below, Part IV.6, note 106, 121 and related text.)

Former Chief Acquisitions Officer Colleen Burns testified Forti had ordered that the SBIWTP contract be issued, that Forti then tried to cover up the Antideficiency Act violation, but that Burns was so upset and concerned about it she reported it to Riera and also to Ruth, to whom she gave documentary evidence.

Riera testified that he was aware of the problem and that he had discussed Burns' concerns with her at the time, and that he later discussed them with McCarthy, before McCarthy made his disclosures, and in fact that Riera even made a written notation about it on a draft of McCarthy's OIG disclosures.

Ruth testified that Burns did notify him about the violation and did give him the documentation that he kept in his personal file, because Burns was afraid of retaliation by Forti, and that he neither reported the violation nor took any disciplinary action.

See also *KKKKK, McCarthy Motion to Admit Exhibits*, February 11, 2009, para. 1 and attachment. "South Bay International Waste Water Treatment Plant documents including notice of November 14, 2009 award of \$88 million contract, admission by Ms. Forti the contract violates the Antideficiency Act, and attempt to cover-up the violation. Appellant requested all such documents in discovery and received neither a single page nor any responsive answer. See Appellant's First Discovery Requests (1DR), 33." AJ designated four attached exhibits collectively as *Appellant Exhibit KKKKK* and denied

McCarthy had a reasonable belief that his disclosures evidenced a violation of law, rule, or regulation;<sup>293</sup> gross mismanagement;<sup>294</sup> gross waste of funds;<sup>295</sup> abuse of authority;<sup>296</sup> and substantial and specific danger to public health or safety.<sup>297</sup>

McCarthy disclosed that Agency officials conspired to improperly influence the Commissioner and conceal the Agency's mishandling of \$220 million in Recovery Act

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admission as evidence (over objection that Agency provided no response at all to a request for production of documents related to exhibits, and specifically this contract which Appellant obtained by independent means only days before the hearing); *Fedbizopps* Contract Award, shows a contract was issued for \$88 million while the Agency was funded by a continuing appropriation and didn't have \$88 million; an email from contract officer Soto says the Agency had \$66 million, recommending the Agency amend the contract it had already issued to reduce the amount; email from Forti acknowledges the violation of ADA and says to stick with the \$88 million even though "it may not cover us but it's the best we can do". *See also J* – July 22, 2009, draft disclosures w/ Riera comment on SBIWTP.

Further, the Agency refused to produce any relevant records requested in discovery.

<sup>293</sup> E.g., the Antideficiency Act, this decision again represents violations of 5 CFR part 2635—standards of ethical conduct for employees of the executive branch; 18 U.S.C. 1001 --- the prohibition against fraud or false statements in a Government matter.

<sup>294</sup> The Agency was under a court order to make improvements to the SBIWTP, and risked not only penalties for the aforesaid legal violations but also court-imposed penalties for contempt and lack of candor. The decision jeopardized both appropriated funds and the award funds, which would have left the Agency incapable of meeting its mandated duties.

<sup>295</sup> Should the Agency be found to have violated the law, it will constitute a gross waste of funds, for the expenditure of \$88 million without spending authority cannot be justified, nor can the effort taken to hide the fact.

<sup>296</sup> This is an abuse of authority because the Agency made an arbitrary or capricious decision that adversely affected the rights of Congress, funding agencies, competitors for funds, and millions of people who depend on effective wastewater along the United States-Mexico border.

<sup>297</sup> It constitutes a substantial and specific danger to public health because the plant serves millions of border residents whose future reliance on congressional appropriations and court rulings is jeopardized by such illegal conduct.

funds intended for flood control projects. His disclosures were based on personal knowledge that he was appointed to a Recovery Act oversight committee but then excluded by Forti, Graf, Brandt and ultimately, Ruth, due to his efforts to identify and avoid fraud, waste and abuse. He had first hand knowledge of the Agency's desire to rapidly implement the Recovery Act, sacrificing legal compliance when it threatened to cause delays. He documented false legal authority cited in proposals by Graf to internalize Agency auditing and fend off State Department inspections.<sup>298</sup>

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<sup>298</sup> McCarthy testified that he had a reasonable belief that the IBWC officials conspired to conceal the Agency's mishandling of \$220 million in Recovery Act funds intended for flood control projects. McCarthy was appointed to a Recovery Act oversight committee that originally was going to be just Forti, Graf and Brandt. Ruth added McCarthy at his request yet he was never allowed to attend any meetings and he was concerned that the issues he was raising were being ignored and covered up. He found out about and attended a video-teleconference with OIG that Brandt set up as the first joint meeting and he discovered the "committee" had given OIG a report on IBWC internal oversight plans that he had never seen and didn't agree with. OIG said due to the IBWC's purported plans for aggressive internal monitoring it wouldn't need to audit, to which McCarthy objected and called for all the scrutiny OIG can bring to ensure there is no fraud, waste or abuse. Thereafter, McCarthy was again excluded from all meetings and discussions of OIG reports. When he brought up his exclusion at a meeting of Ruth and the executive staff, Forti and Graf said they didn't need his help, Brandt denied there was ever any committee, and Ruth said the committee is dissolved.

Brandt testified there was no such Recovery Act Oversight Committee and that McCarthy was upset without cause; however, she contradicted this claim when she acknowledged on cross-examination that she set up the VTC oversight committee and McCarthy attended because he was to be involved in the implementation and reporting on the Recovery Act.

Ruth also contradicted Brandt when he testified he had appointed the committee but decided to dissolve it at a meeting on July 27 when McCarthy objected to his continuing exclusion.

Further, the Agency refused to produce additional relevant records requested in discovery. The Agency refused, among other things, discovery regarding reports to the State Department concerning implementation of the Recovery Act, claiming they were "confidential."

McCarthy had a reasonable belief that his disclosures evidenced a violation of law, rule, or regulation;<sup>299</sup> gross mismanagement;<sup>300</sup> gross waste of funds;<sup>301</sup> abuse of authority;<sup>302</sup> or substantial and specific danger to public health or safety.<sup>303</sup>

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<sup>299</sup> Most of the disclosures McCarthy made were exacerbated by the Agency's Recovery Act cover-up. Graf misrepresented numerous laws and regulations. The Agency misled the President about its implementation of the Recovery Act and its deceptive claim of self-auditing. In addition to the requirements of the Recovery Act, these acts violated 5 CFR part 2635—standards of ethical conduct for employees of the executive branch; 18 U.S.C. 1001 --- the prohibition against fraud or false statements in a Government matter.

<sup>300</sup> They create a substantial risk of significant adverse impact on an Agency's ability to accomplish its mission, when the same officials are in charge of internal controls and audit, two functions that the OIG also strongly recommended be separated, and which the Agency falsely claimed had been separated; when said officers actively and with great hostility opposed every proposal to strengthen internal controls and comply with OIG recommendations; when the officials cover up the Agency's gross mismanagement and provide false reports to the Commissioner and the State Department; when the officials abuse their his office for personal motives, including revenge.

<sup>301</sup> A gross waste of funds is established by creating a façade of Recovery Act oversight and internal controls, while in fact sabotaging every effort to create real oversight and honest internal controls, for effective implementation of the Recovery Act rather than cosmetic appearances through carefully crafted reports and meeting artificial deadlines. The Agency essentially received several years funding at once, and wasted the greatest part of it.

<sup>302</sup> The arbitrary or capricious exercise of power by Federal officials or employee to retain personal control over functions that are required by generally accepted practice to be under separate oversight, to limit access to information to a self-selected group of co-conspirators, to lie to the Commissioner and the State Department, to cover up gross mismanagement, all were conducted for no other reason than to enhance their bureaucratic power, at the expense of the Agency and its mission. The Commissioner was led to believe that Mr. Graf had a firm grip on internal controls and oversight, that Ms. Forti was the only person he could turn to concerning money matters, and that Ms. Brandt – the USIBWC State Department liaison – was responsible for his appointment and held his fate in her hands.

<sup>303</sup> The Agency operates several international wastewater treatment plants, international dams, and other flood control facilities, all of which are put at greater risk by this tiny cabal that sees no further than their own parochial bureaucratic interests, jeopardizing the health and safety of millions of border residents.

McCarthy disclosed that the Agency refused to properly separate responsibility for oversight of Budget and Contract functions within the Agency. His disclosures were based on personal knowledge that five years after the State Department OIG strongly recommended that the Agency separate responsibility for budget and contract functions, and four years after the Agency claimed to have done so, the Acquisitions Division continued to report to the Budget Director, a virtual invitation to fraud, waste and abuse. His concerns were shared and discussed with Riera and Petz, among others. Former Acquisitions Chief Burns testified that she also shared those concerns with Riera, Petz and Ruth. Again notwithstanding the Agency's discovery misconduct, Appellant's Exhibits confirmed the accuracy of the disclosure, including the 2005 OIG report, OPM's agreement with McCarthy's analysis, and even the Agency's subsequent solicitation for bids to address the reorganization needs that McCarthy had identified.<sup>304</sup>

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<sup>304</sup> McCarthy testified that he reasonably believed that IBWC refused to properly separate responsibility for oversight of Budget and Contract functions within the Agency; that he was requested to write an opinion on the matter, pursuant to Ruth having appointed a committee including all of executive committee members to review the Agency and make recommendations for reorganization; that the 2005 OIG report said contracts must not report to the budget officer, and that as of 2009, contracts was still reporting to the budget officer – Forti, who had meanwhile acquired several more titles but was still the budget officer too; that the lack of separation was a recipe for fraud, waste and abuse; that McCarthy discussed his concerns with the entire executive staff, including Riera and Petz, who had similar concerns and also shared Burns' concerns.

Burns testified Forti was an abusive micro-manager who was also completely unqualified to supervise contracts. Burns testified that it was a conflict of interest for the budget officer to supervise contracts; that Burns was seriously concerned about the violation and reported it to Petz and to Ruth, and that she gave Ruth written documentation.

Riera testified he had similar concerns and experiences and that he shared his concerns with McCarthy, and also discussed what Burns had told him. *See also Riera deposition, p. 20* (“Q. Did you agree with Mr. McCarthy's assessment that the Agency violated those rules with the way they had structured budget and finance responsibilities? A. I believe that once I read the information, the legal opinion that he put together, I believe that what he was saying was correct.”)



McCarthy had a reasonable belief that his disclosures evidenced a violation of law, rule, or regulation;<sup>305</sup> gross mismanagement;<sup>306</sup> gross waste of funds;<sup>307</sup> abuse of authority;<sup>308</sup> and substantial and specific danger to public health or safety.<sup>309</sup>

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Petz testified he had similar concerns and experiences and that he shared his concerns with McCarthy, and also discussed what Burns had told him.

Ruth testified that Burns did notify him about the violations and did give him the documentation that he kept in his personal files, because Burns was afraid of retaliation by Forti, and that he neither reported the violation nor took any disciplinary action. Ruth testified he had discussed all of the parties' concerns with them, but that he "had no problem" with the budget officer supervising contracts.

*See also Appellant Exhibits VVVV – March 2005 OIG Inspection Report at 34* ("the budget and contracting offices are reporting to the senior budget officer, in contravention of generally accepted practices regarding separation of duties") 45, 48 ("the present setup is not in keeping with government guidelines on separation of duties... The U.S. Section of the International Boundary and Water Commission should separate responsibility for its budgeting and contracting functions"); AAA June 19, 2009 McCarthy opinion regarding legal requirements for separation of budget and Finance; C - August 3, 2009 Petz email to McCarthy regarding OPM's agreement with McCarthy's opinion; KKKKK - Agency solicitation for bids on a contract to make recommendations for reorganization, using almost exactly the same kind of phrasing that McCarthy had used in describing the need for reorganization – "rapidly declining indicators of human capital performance" – series of reorganizations that were not well planned out – a structure that was not effective; July 22, 2009 draft disclosures with Riera comment on separation of budget and finance.

Agency exhibit XX-2006 OIG follow-up report does not state that the problem is resolved, as the Agency contends. It says that Recommendation 13 was closed "on the basis of the Agency's commitment to proceed." The Agency did not in fact recruit a qualified chief executive officer to be filled through competitive procedures. Instead, it gave the unqualified budget officer yet another title and illegal pay increase, and the contracts office continued to report to the budget officer. Similarly, Recommendation 22 to separate budget and contracts was not accomplished by appointing a contract officer where the contract officer continued to report to the budget officer, who continued to micro-manage contracts.

Further, the Agency refused to produce additional relevant records requested in discovery, including specifically requested formal or informal complaints by Burns against Forti. The agency also objected that the requests were "not relevant."

<sup>305</sup> These actions, again passively condoned by the Commissioner, violate generally accepted practices regarding separation of duties; explicit recommendations from the OIG; Standards for Internal Control in the Federal Government, General Accounting Office (1999); The Federal Managers' Financial Integrity Act of 1982; The Chief Financial Officers Act of 1990; OMB Circular A-123; 5 CFR part 2635—standards of

McCarthy disclosed that Compliance Officer Graf illegally conducted secret surveillance of USIBWC personnel offices. McCarthy's disclosures were based on his own investigation, as well as the equipment he observed, the equipment manual, and the statements of every single staff person in the personnel office. His conclusions were reasonable based not only on the foregoing, but also because Graf, a disgruntled executive staff member who had been passed over for the job of Human Capital Director, made no secret of his animosity toward Human Capital Director Petz, his incivility and unprofessional conduct, his desire to make Petz the first target of his "internal audit" program, and his antagonistic response to the inquiry. Moreover, Petz testified that he

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ethical conduct for employees of the executive branch; 18 U.S.C. 1001 --- the prohibition against fraud or false statements in a Government matter.

<sup>306</sup> This constitutes gross mismanagement because it creates a substantial risk of significant adverse impact on an Agency's ability to accomplish its mission, when the budget officer oversees the contracting office in direct "contravention of generally accepted practices regarding separation of duties," even several years after exposed and condemned by the OIG and after the Agency had falsely claimed to have fixed the problem.

<sup>307</sup> A gross waste of funds is established by budget and contract transactions that essentially have no independent oversight, and no way to accurately calculate the waste of funds, in addition to the incompetent performance of budget and contract functions, that frequently result in contract appeals and lack of funds for essential operations.

<sup>308</sup> The arbitrary or capricious exercise of power by a Federal official or employee to retain personal control over these two functions, while claiming to have fixed the problem, is for no other reason than to enhance her bureaucratic power, at the expense of the Agency and its mission.

<sup>309</sup> As noted above, the Agency operates several international wastewater treatment plants, international dams, and other flood control facilities, all of which are put at greater risk by incompetent budget and contract functions, lack of internal controls, and an open invitation to fraud, waste and abuse, jeopardizing the health and safety of millions of border residents.

and his staff were entirely convinced that they were being spied on by Graf, and that they strongly urged McCarthy to report the matter.<sup>310</sup>

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<sup>310</sup> McCarthy testified that he reasonably believed that IBWC Illegally conducted secret surveillance of USIBWC personnel offices. He testified that he had been warned by a former attorney never to have a confidential conversation in the personnel offices; that Mr. Petz and every single member of personnel staff came to him with complaints they believed they were being spied on by Graf through a remote camera and monitor; that at first McCarthy didn't know whether there was an audio component but later saw the manual which said there was, and he was told by some of the staff that they heard sounds on occasion; that the discovery reportedly happened when Sylvia Reyes adjusted a monitor in her private office – which she thought was just set to be able to see who came in the front door – and realized she could see into the private office of Mr. Graf, an unsuccessful and very bitter candidate for Petz's job; that McCarthy advised Ruth, who didn't investigate, other than talking to Graf. McCarthy testified he wrote several opinions on the matter, one of which suggested investigating whether Graf was a danger, because he had made threatening comments, seemed to be on the verge of violence, and was known to carry a gun; that acting commissioner Riera directed the security officer to talk to Graf; that Agency policy says if a person reacts aggressively to such an inquiry then further investigation should be aggressively pursued; that Graf was very aggressive, even filing a grievance against Petz, who he thought had initiated the investigation, yet Ruth said there would be no further investigation, and no new policies as recommended by McCarthy would be adopted.

Petz essentially confirmed McCarthy's testimony. Petz testified that he was aware of Mr. McCarthy's concerns that Mr. Graf Illegally conducted secret surveillance of USIBWC personnel offices; that Petz was first to complain to McCarthy, along with entire HR staff; that they were very upset; that every single one believed Graf was spying and listening in; that Sylvia Reyes discovered she could see into Graf's office and they realized he had been looking in at them; that they later determined there was audio too; that some of his staff heard it and they also found the manual which said it had audio; that the equipment was installed by Graf when he was acting then he took the monitor with him to his other office when Petz got the permanent HR job; that Petz and his staff all urged McCarthy to investigate and disclose. *See also Petz deposition*, pp 52-66.

*See Riera deposition* at 20 (“Q. Okay. Do you know of any personal knowledge of Mr. Graf using a camera to remotely access the Human Capital Office? A. I have personal knowledge of seeing a monitor in his office and a camera in the human resources office.”) *Appellant's Exhibit J* – July 22, 2009 draft disclosures with Riera comment on camera surveillance.

*See also Appellant's Exhibits DDDD* - April 1, 2009, email from McCarthy to Commissioner with proposed directive on electronic monitoring; *KKKK* - April 1, 2009, McCarthy memo to Commissioner re recommended policy (“these actions would appear to violate federal criminal law, the Privacy Act, and possibly other federal civil statutes... FN1- Visual inspection of the camera equipment does not confirm that there is an audio component, although the manual for that model states that it has audio function. I have

Again notwithstanding the Agency's discovery misconduct, McCarthy established that he had a reasonable belief that his disclosures evidenced a violation of law, rule, or regulation;<sup>311</sup> gross mismanagement;<sup>312</sup> gross waste of funds;<sup>313</sup> abuse of authority;<sup>314</sup> or substantial and specific danger to public health or safety.<sup>315</sup>

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seen only the equipment in HCO"); *JJJJ* - April 10, 2009, McCarthy memo to Commissioner re Graf's complaint (hostile response to inquiry); *FFFF* - April 21, 2009, Graf email re comments on monitoring directive; *I* - May 6, 2009, McCarthy Memo to Commissioner re policy amendment, electronic Monitoring; *H* - May 7, 2009, McCarthy Draft Memo to Commissioner re limits on electronic monitoring.

Further, the Agency refused to produce additional relevant records requested in discovery.

<sup>311</sup> Among other statutes, this activity violates a criminal statute at 18 U.S.C. §§ 2510-2520; 5 CFR part 2635—standards of ethical conduct for employees of the executive branch; 18 U.S.C. 1001 --- the prohibition against fraud or false statements in a Government matter. It also violates USIBWC rules.

<sup>312</sup> This constitutes gross mismanagement because it creates a substantial risk of significant adverse impact on an Agency's ability to accomplish its mission. USIBWC perennially ranks at the very bottom of all small Federal agencies when it comes to employee morale, according to surveys done for the Partnership for Public Service "Best Places to Work" in the Federal Government. When it comes to trust in Agency leadership, the Agency ranks dead last. When McCarthy advised the Commissioner to investigate this matter, he declined, and directed that no one else do so either. He did not bother to talk to the individuals who reported the surveillance.

<sup>313</sup> A gross waste of funds is established by expenditure of Federal funds made by a single Federal employee for his own purposes, to spy on colleagues and invade the rights of privacy of innumerable individuals.

<sup>314</sup> Similarly, the arbitrary or capricious exercise of power by a Federal official or employee to acquire surveillance equipment and install it for purposes of spying on colleagues in highly confidential personnel offices adversely affects the rights of every person whose privacy was invaded. Moreover, the individual who perpetrated these acts did so for his own personal gain or advantage. He had been passed over for the job of Human Capital Director and had filed a discrimination complaint, and used this method to try to gather evidence that would somehow support his claim.

<sup>315</sup> Graf's espionage, combined with his abusive verbal conduct created sufficient fear among staff that McCarthy felt compelled to report the potential for violence.

McCarthy disclosed that Agency officials unlawfully conducted computer surveillance of USIBWC staff for improper reasons; intercepted, altered or destroyed official communications; and failed to comply with Information Management laws and regulations. McCarthy's disclosures were based on reports from a large number of staff and program managers and on his subsequent investigations. Testimony at the hearing confirmed that concerns about improper monitoring and alteration or destruction of documents and communications had been expressed to McCarthy by Mr. Riera, Mr. Petz, and indirectly, Ms. Burns. They all testified to personal knowledge of such improper manipulation of documents, as well. Riera confirmed that his staff, including security officer James Leiman, had made reports to him concerning the problem, and that he also heard about computer misconduct by Graf involving pornography. Former IBWC computer specialist Matt Medor, a ten-year IBWC employee up until 2008, testified that Forti was "IT ignorant", although McCarthy was removed, in part, for suggesting in a legal opinion that the CIO should have a minimum level of IT expertise. Medor was prevented from completing his testimony about computer misuse, including pornography downloading by Mr. Graf, when the AJ refused to permit the testimony. Ruth testified he was aware of such concerns. Appellant's Exhibits, including his legal opinions and a report of investigation that concluded Forti required training, also confirmed the accuracy of the disclosure.<sup>316</sup>

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<sup>316</sup> McCarthy testified that he reasonably believed that IBWC unlawfully conducted computer surveillance of USIBWC staff for improper reasons; intercepted, altered or destroyed official communications; and failed to comply with Information Management laws and regulations. McCarthy testified he heard an increasing number of complaints from staff that felt they were being monitored and that documents were being altered or deleted without their knowledge; that in addition to complaints from Field Offices he discussed the issue with other management officials who had similar concerns, including

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security officer James Leiman, Principal Engineer Riera and Human Capital director Petz; that he reported this to Ruth and investigated himself, becoming more concerned that Information Management Division (IMD) staff felt entitled to do such things; that he felt the response of Forti and IMD was not appropriate – accusing employees of being paranoid, asking who felt “nervous about being watched” and why, saying Ruth’s request that McCarthy draft a directive was a “kneejerk” reaction, and instructing IMD staff to clam up and withdraw any “extra” help they were offering to “certain” members of the executive committee who were “out to discredit IMD for their own purposes”. McCarthy also testified that he wrote legal opinions on shortcomings in the IMD, including one written at the request of Commissioner Ruth that suggested the Chief Information Officer (CIO) position occupied by Forti required that the incumbent have a high degree of information technology (IT) skills and knowledge.

Similar testimony regarding improper monitoring and alteration or destruction of documents and communications was offered by Mr. Riera, Mr. Petz, and Ms. Burns. Burns testified that Ms. Forti directed the surreptitious alteration of electronic documents from Ms. Burns’ computer; that she discussed her concerns with Petz and Riera and Ruth.

Petz testified that he discussed these concerns with McCarthy. Petz testified that some emails that Forti sent him that were abusive were deleted from his computer after he had opened them so he knew someone was going into his computer without his permission; that he also got lots of complaints like this from staff, including security officer James Leiman, Principal Engineer Riera and Chief Acquisitions Officer Burns; that he told McCarthy everything.

Riera testified that he got a lot of complaints from his staff both in HQ and field offices that they were being monitored and also that documents were being changed; that he reported these problems to Ruth and Forti and sought explanations but never got anything to his satisfaction; that his security officer Leiman wrote him a long memo of his concerns, especially about IMD and Forti having access to sensitive security information, and violation of the Federal Information Security Management Act; that Riera also had a written report from another official; [neither document was produced in discovery despite specific requests]; that one of his staff, Cliff Regensberg, told Riera that computer specialist Matt Medor had found a large amount of pornography on Graf’s computer; that Riera discussed all of this with McCarthy, even making notations on a draft of his disclosures, including one specifically with respect to the Graf pornography.

Former IBWC computer specialist Matt Medor, a ten-year IBWC employee up until late 2008, testified that Ms. Forti was “IT ignorant”. Medor was prevented from completing his testimony about computer misuse, including pornography downloading by Mr. Graf, when the AJ refused to permit the testimony because the AJ erroneously believed McCarthy would not have known of Medor’s findings, when in fact McCarthy had known through Riera.

Ruth testified he was aware of such concerns.

*See also Appellant’s Exhibits DDDD* - April 16, 2009 email from McCarthy to Ruth (“I continue to hear complaints even from the Field Offices”); *RRR* - April 20, 2009 emails between Forti, Graf, and Z Mora re computer monitoring (Mora: “I wonder who is feeling nervous about being watched and has the power to compel Legal to go out with something like this?”); *KK* - April 22, 2009 Riera memo re computer monitoring; *LLL*,

Again notwithstanding the Agency's discovery misconduct, McCarthy established that he had a reasonable belief that his disclosures evidenced a violation of law, rule, or

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RRR (Forti references to computer policy drafted by McCarthy as requested by Ruth as a "kneejerk reaction" to "paranoid employees") (Graf: "It appears to be yet another kneejerk reaction to something"); *MMM* - April 22, 2009 Emails between Forti and Riera re computer monitoring; *ZZ* - June 19, 2009 McCarthy legal opinion, "Legal Requirements for Information Management"; *YY* - June 24, 2009 Email from Z Mora regarding IMD user monitoring; *J* - July 22, 2009 draft disclosures with Riera comment on computer surveillance.

Further, the Agency refused to produce additional relevant records requested in discovery.

regulation;<sup>317</sup> gross mismanagement;<sup>318</sup> gross waste of funds;<sup>319</sup> abuse of authority;<sup>320</sup> and substantial and specific danger to public health or safety.<sup>321</sup>

McCarthy disclosed that Agency officials conspired to award unlawful pay increases for themselves and favored others, and that Graf and Forti, in particular, conspired to award pay increases that violated OPM regulations concerning time in

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<sup>317</sup> The abuse of computer monitoring violates both civil and criminal statutes; the privacy act; 5 CFR part 2635—standards of ethical conduct for employees of the executive branch; 18 U.S.C. 1001 --- the prohibition against fraud or false statements in a Government matter; 18 U.S.C. 2071 - the prohibition against concealing, mutilating or destroying a public record; 18 U.S.C. 1030 - the prohibition against fraudulent access and related activity (including exceeding authorized access) in connection with computers.

<sup>318</sup> This constitutes gross mismanagement because it creates a substantial risk of significant adverse impact on an Agency's ability to accomplish its mission. Of course the employees further distrust management when they realize their every keystroke is being scrutinized, and their documents and emails are subject to alteration or deletion. Many avoid use of the computers whenever possible, including routine email communications, rather than assume these risks, resulting in a sharp decline in productivity. The actual loss or alteration of documents is devastating to the Agency's substantive work.

<sup>319</sup> A gross waste of funds is established by expenditure of Federal funds for purposes of computer monitoring that is unrelated to legitimate Agency purposes, but rather in search of ammunition for bureaucratic in-fighting and undermining imagined foes.

<sup>320</sup> The arbitrary or capricious exercise of power by a Federal official or employee to monitor computers for personal and illegitimate reasons, to alter and destroy documents and communications, and to put every employee in fear of using their computers adversely affects the rights of every person whose privacy is invaded and whose productivity is impeded, while providing private advantage to those officials who use their control of the computer network to sustain their bureaucratic advantages.

<sup>321</sup> The Agency operates several international wastewater treatment plants, international dams, and other flood control facilities. Two of the large storage dams were rated unsafe in 2009 by the Federal Emergency Management Agency. Two international wastewater treatment plants are under court orders to clean up their effluent. Employees who operate and maintain these facilities, both in the central office and in field offices, must have confidence that data and communications they enter on their computers are not being tampered with. Unfortunately, this is no longer the case, jeopardizing the health and safety of millions of border residents.



grade. McCarthy's disclosures were based on personal knowledge of personnel forms that showed the illegal pay raises. He had also discussed the issue with Human Capital Director Petz, who shared his belief that the pay raises were illegal. Petz's testimony and Appellant's Exhibits, including a report of an independent investigator, confirmed that the pay increases were in violation of law.<sup>322</sup>

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<sup>322</sup> McCarthy testified that he reasonably believed that certain officials at IBWC conspired to award unlawful pay increases for themselves and favored others; that he came across several personnel documents that led him to believe there had been illegal pay raises so he went to Petz to ask his opinion; that Petz said he was aware of it and said he had told Ruth but nothing would be done. McCarthy testified Petz asked for an opinion as to whether the overpayments could be waived and McCarthy found that it was too late to request a waiver. McCarthy testified that Ms. Lopez had filed a grievance against Forti alleging a wide range of abusive and illegal conduct including some illegal pay raises; that Ruth hired an investigator who by report dated June 8, 2009 found that the allegations of illegal raises were true and that the money should be repaid; that Forti had improperly set pay for Ms. Serrano at a Step that far exceeded what Lopez had said was legal; that Forti had improperly put in for pay raises on SF 52s for Commissioner Marin; that one pay raise not included in the Lopez complaint was one that Forti received after Marin reciprocated with an SF 52 that resulted in Forti going from a grade 13 to 15 with no time at 14, in violation of 5 CFR time in grade requirements; that it should be repaid. Although McCarthy did not recall seeing the report prior to his disclosures, the report included the same SF 50s and 52s McCarthy had cited, which showed that Marin had recommended a raise from 13 to 14, but 14 was crossed out and someone wrote in 15, that there were initials by the 15 that belonged to Fred Graf and another set that were not clear, but did not match those of Marin; that neither set of initials were dated. McCarthy said it is not possible that Forti was made an exception to the CFR time in grade requirement due to some extraordinary qualifications because there is no reason to believe such an exception can be made; that even if it could be made there is no evidence it was; and finally, if it was, there is no documentation of any superior qualifications, and in fact the Lopez report shows she did not have such superior qualifications and likely did not have even the minimum qualifications for a 14.

Petz essentially confirmed Mr. McCarthy's testimony, and added that there was nothing in Ms. Forti's personnel file to indicate that any exceptional circumstances or qualifications were considered when her grade was increased from 13 to 15. Petz testified he had discussed the matter in detail with McCarthy. Petz could not state for certain whether the initials on the change were those of Marin. Petz also testified that it is not permissible to make an exception to time in grade because it is required by Title 5 CFR; that Title 5 has been adopted by the Agency so it is required. *See also Petz deposition*, at 66-69.

Again notwithstanding the Agency's discovery misconduct, McCarthy established that he had a reasonable belief that his disclosures evidenced a violation of law, rule, or regulation;<sup>323</sup> gross mismanagement;<sup>324</sup> gross waste of funds;<sup>325</sup> abuse of authority;<sup>326</sup> or substantial and specific danger to public health or safety.<sup>327</sup>

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*See also Appellant exhibit VVVV, 2005 OIG Report at 38-39* ("Most exempt agencies have developed policies and practices that mirror Title 5 requirements. This is also true at USIBWC [however] USIBWC is failing to adhere in many cases to its own policies.") *MM* - July 22, 2009 McCarthy memo re waiver of overpayment recovery; *IIII*, June 8, 2009 Lopez Investigation Report (P 1 of narrative report states Serrano was placed at excessive step by Forti and that Forti lacked supervision, management, and executive training; P2 says Forti improperly skipped from grade 13 to 15; P8 recommends Serrano and Forti repay, and that Forti get needed training; G-1 is Forti SF 50 showing skip from 13/4 to 15/1; G-2 is Forti SF 52 signed by Marin requesting promotion to 14/1); BB is another form that has Marin's initials –easily distinguished from the forged initials on G-2; J – July 22, 2009 draft disclosures with Riera comment on illegal pay setting.

Further, the Agency refused to produce additional relevant records requested in discovery.

<sup>323</sup> These actions violate OPM regulations regarding time in grade; merit system principles; 5 CFR part 2635—standards of ethical conduct for employees of the executive branch; 18 U.S.C. 1001 --- the prohibition against fraud or false statements in a Government matter; 5 U.S.C. 2302 --- the prohibition against certain personnel practices; and Agency rules.

<sup>324</sup> This gross mismanagement creates a substantial risk of significant adverse impact on an Agency's ability to accomplish its mission. Again, employee morale could not possibly be any lower at USIBWC, as measured by objective external standards. The Agency is small, and it is no secret what grades employees occupy, or when an employee illegally skips a grade in jumping to an even higher grade. It instills disrespect for Agency personnel management when certain officials operate outside the rules that apply to everyone else. A 2005 OIG report described an exodus of the best and brightest from USIBWC due to this kind of corruption.

<sup>325</sup> Looking just at three of the inarguably unlawful pay increases in which certain USIBWC officials were involved, approximately \$20,000 in wages were paid out over and above the very highest amounts that the recipients could have qualified for. This is surely a gross waste of funds. No attempt was made to recover these funds, although a

McCarthy disclosed that Agency officials unlawfully circumvented Agency hiring practices for improper purposes. His disclosures were based on information provided to him by the Human Capital director, Petz, as well as through his investigation of a complaint by a human resources specialist. Appellant's Exhibits, including a report of an independent investigator, confirmed that the disclosures regarding Forti were largely true. Graf's own emails and attempts to manipulate the "PMC", as well as McCarthy's uncontested testimony that Graf took an approved hiring action from the EEO officer under false pretenses, confirm the allegations regarding Graf.<sup>328</sup>

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written legal opinion explained that the time to request a waiver of repayment had long since lapsed.

<sup>326</sup> Similarly, the arbitrary or capricious exercise of power by these Federal officials resulted in personal gain or advantage to themselves or to preferred other persons. Human Capital staff who were forced to process these pay raises over their own objections were made to commit acts they knew to be unlawful. USIBWC rank and file employees' cynicism and distrust for management was reinforced.

<sup>327</sup> As an Agency with responsibility for protecting the health and welfare of millions of border residents, acts such as these that undermine the integrity of the organization jeopardize that mission.

<sup>328</sup> McCarthy testified that he reasonably believed that certain officials at IBWC unlawfully circumvented Agency hiring practices for improper purposes; that he had heard many complaints from Petz, Lopez and others regarding interference by Graf and Forti in personnel matters, such as Forti taking the personnel files from Marin's office after his death and refusing to turn them over to personnel; setting pay for Serrano; hiring Lechuga, an employee fired for cause, and telling her she could keep her retirement; Graf taking an EEO certification after it was signed and after Ruth had approved a hiring decision and falsely claiming he was taking them to personnel then taking them to Ruth to lobby to undo a hiring decision.

Burns and Petz confirmed McCarthy's testimony regarding Forti. Burns testified that she had discussed her concerns with Petz.

Petz said he had discussed such concerns with McCarthy.

*See also IIII* –June 8, 2009, Lopez Investigation (P7 says Forti took personnel file for attorney hires; at bates 356 Forti email to Lopez says she was keeping them to go through them to see what actions were taken; abusive Forti email to Petz at 358; Forti led

Again notwithstanding the Agency's discovery misconduct, McCarthy established that he had a reasonable belief that his disclosures evidenced a violation of law, rule, or regulation;<sup>329</sup> gross mismanagement;<sup>330</sup> gross waste of funds;<sup>331</sup> abuse of authority;<sup>332</sup> or substantial and specific danger to public health or safety.<sup>333</sup>

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Lechuga to believe she would be hired and keep getting retirement; Lopez grievance full of allegations of abusive behavior (e.g., "patterns of demands that laws and regulations be ignored, lack of respect for the Privacy Act, bully behavior and harassment against me and others"); GGG- Graf took EEO certification and gave July 14, 2009 memo to Ruth complaining about selection process he chose not to participate in, falsely and maliciously charging McCarthy and Petz with being "one small segment of the executive staff ignoring an Agency Directive and once again attempting to control a management action at the exclusion of other, more qualified management officials. This is most troubling"; UUU and E – Graf's abusive "PMC" rhetoric about hiring practices; J – July 22, 2009 draft disclosures with Riera comment on illegal personnel practices.

In addition, the Agency withheld information in discovery.

<sup>329</sup> These activities represent violations of OPM regulations, Agency rules, the privacy act, EEO principles and rules, and merit system principles; 5 CFR part 2635—standards of ethical conduct for employees of the executive branch; 18 U.S.C. 1001 --- the prohibition against fraud or false statements in a Government matter; 5 U.S.C. 2302 --- the prohibition against certain personnel practices.

<sup>330</sup> They constitute gross mismanagement that creates a substantial risk of significant adverse impact on the Agency's ability to accomplish its mission, which requires a merit system based hiring process that is free of manipulation by powerful executive staff.

<sup>331</sup> As noted above, unauthorized promises of exorbitant double dipping constitute a gross waste of funds, as would the efforts to require a new hiring process and a continued legal position vacancy when the Agency has many millions of dollars at stake in pending litigation, not to mention needed legal counsel for implementation of the \$220 million Recovery Act projects.

<sup>332</sup> These acts constitute an abuse of authority, an arbitrary and capricious exercise of power by two long-term executive officials who knew their actions were illegal and yet who undermined the credibility of the Agency's personnel system for their own reasons (patronage and seeking to undermine Human Capital and the Office of Legal Affairs). They prejudiced the rights of job applicants and selectees while further undermining USIBWC staff morale and trust in management.

<sup>333</sup> As an Agency with responsibility for protecting the health and welfare of millions of border residents, acts such as these that undermine the integrity of the organization

McCarthy disclosed that Agency officials maliciously reported to OIG false allegations of misconduct and cronyism by the USIBWC Principal Engineer for Operations. McCarthy's disclosures were based on personal knowledge from his involvement in persuading the Commissioner not to repeat an investigation pursuant to a second anonymous complaint, which one investigation had already concluded was completely groundless. McCarthy was also aware of Graf's manipulative behavior and hostility toward Riera. McCarthy was also told by Riera that he believed it was Graf and Forti. Forti had implied her knowledge and involvement in a conversation with Petz, and Riera testified that security officer Leiman told Riera that Graf had admitted he was the source of the "anonymous" complaints. Testimony at the hearing, particularly from Riera, confirms Graf's intense hostility toward Riera. Appellant's exhibits, including hostile emails and a pornographic "anonymous" letter to the editor about Riera, Petz and McCarthy, which was widely attributed to Graf, also support McCarthy's disclosures.<sup>334</sup>

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jeopardize that mission. Performance of many Agency jobs requires a degree of skill and professionalism that is undermined by such unlawful personnel practices, jeopardizing the health and safety of those who depend on those workers.

<sup>334</sup> McCarthy testified that he reasonably believed that certain officials at IBWC maliciously reported to OIG false allegations of misconduct and cronyism by Riera; that when McCarthy first started at the Agency, a first investigation of Riera was being completed and found nothing to support the allegations; that Ruth wanted McCarthy to start a second investigation due to an almost identical anonymous complaint; that McCarthy said it was a bad idea because Ruth again wanted a committee of employees to investigate Riera, who McCarthy thought was rightfully upset over the invasive investigation based on groundless anonymous charges. McCarthy testified he told Ruth it looked like the work of Graf, because it was obvious Graf hated Riera and this seemed to be his sort of "MO"; and that Riera thought it was Graf and had told McCarthy that Forti inadvertently implied that it had been she and Graf.

Riera testified that security officer Leiman had told him that Graf admitted he was the source of the anonymous complaints, and that Graf was out to "get" Riera, who he reportedly called a "motherfucker", a "son of a bitch", "the devil" and similar names.

Again notwithstanding the Agency's discovery misconduct, McCarthy established that he had a reasonable belief that his disclosures evidenced a violation of law, rule, or regulation;<sup>335</sup> gross mismanagement;<sup>336</sup> gross waste of funds;<sup>337</sup> abuse of authority;<sup>338</sup> or substantial and specific danger to public health or safety.<sup>339</sup>

McCarthy disclosed that Agency officials made threats, including a death threat against a former Commissioner, creating a Dangerous and Hostile Workplace.

McCarthy's disclosures were based in part on his personal knowledge of abusive behavior and comments from Graf and Forti, as well as from information he received from Human Capital Director Petz, Principal Engineer Riera, Security Officer Leiman and Former Acquisitions Chief Burns. Testimony at the hearing confirmed that

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*See also Exhibit J – July 22, 2009 draft disclosures with Riera comment on OIG report and investigation.*

In addition, the Agency withheld discovery on this topic.

<sup>335</sup> Knowingly making false reports to an OIG is prohibited by 5 CFR part 2635— standards of ethical conduct for employees of the executive branch; 18 U.S.C. 1001 --- the prohibition against fraud or false statements in a Government matter; 5 U.S.C. 2302 -- - the prohibition against certain personnel practices.

<sup>336</sup> These officials were guilty of gross mismanagement that created a substantial risk of significant adverse impact on an Agency's ability to accomplish its mission, which Mr. Riera alone was in a position to lead.

<sup>337</sup> These officials and the Commissioner committed a gross waste of funds by pursuing a witch hunt against Mr. Riera, creating an employee committee including some with potential biases against Mr. Riera to investigate all charges against him and to interview a large number of employees in the process.

<sup>338</sup> This entire episode constitutes an arbitrary or capricious exercise of power by Federal officials or employees that adversely affected the rights of Mr. Riera and served only the secret agendas of the perpetrators on the executive staff.

<sup>339</sup> This virtual mutiny jeopardized the health and safety of millions of border residents who depend on the flood control and wastewater management of the Agency, and the maintenance of dams under the authority of Mr. Riera.

McCarthy was aware that Petz had heard Graf threaten to have former Commissioner Marin assassinated; that Graf referred to Riera as a “motherfucker”, a “son of a bitch” and “the devil”, and threatened to “get him”; and that Forti routinely abused her staff as well as other executive officers, telling the Acquisitions Chief, “don’t blow smoke up my ass” and forcing employees to baby-sit her son. Appellant’s Exhibits, including emails and a pornographic “anonymous” letter attributed to Graf also confirm McCarthy’s disclosures.<sup>340</sup>

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<sup>340</sup> McCarthy testified that he reasonably believed that certain officials at IBWC made threats, including a death threat against a former Commissioner, creating a dangerous and hostile workplace. McCarthy testified Graf was extremely abusive in emails that he sent out, sometimes to the entire executive staff and even to Ruth; that McCarthy heard Graf make abusive comments, sometimes directed at McCarthy; that Graf’s hatred of Riera and Petz was “palpable”; that McCarthy was told by Petz and security officer Leiman that Graf routinely used abusive language and made threats of both physical and career/professional harm; that Graf was normally uncooperative, not collegial and abusive. McCarthy also testified that Forti was also very uncooperative, not collegial and abusive; that she would send nasty emails and call people bad names; that she called McCarthy insulting names to his face; that she had IMD retract and destroy electronic copies of abusive emails that had already been sent and read. McCarthy also testified he had discussed similar concerns with Petz, Leiman and Riera.

Burns testified Forti was extremely abusive to employees, using language such as “don’t blow smoke up my ass”; that Forti required budget staff to baby-sit her young son every day over the course of a long period of time; that Burns reported all of this to Ruth, Petz and Riera.

Petz testified Graf was routinely abusive toward Petz and other employees of the IBWC; that Graf threatened to have the late Commissioner Carlos Marin assassinated, a statement Petz found quite disturbing; that Forti was also abusive and had IMD delete from his computer abusive emails she sent him after he had read them; that Petz had discussed these matters with McCarthy prior to his disclosures.

Riera testified that Leiman, the security officer, told him Graf called Riera “the devil,” a “motherfucker” and “a son of a bitch,” among other things, and that Graf threatened he was going to “get him”; that Burns and Petz told Riera all about Forti’s abuse; that Riera also saw and heard it himself and also from others; that Riera told McCarthy all about this.

Ruth testified he was aware of the complaints of abusive conduct by Forti and Graf; that he heard it from many sources; that he took no disciplinary action. That, at most, he “talked” to them.

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*See also Appellant's Exhibits TTTT* March 31, 2009 email from Graf to executive staff (this is the portion of the email requested in discovery that the Agency actually produced, editing out the most abusive comments); *UUU* April 1, 2009, excerpted from disclosures (Graf: "What you perceive as "insulting and alienating everyone" reflects my profound frustration over repeated failures of the current executive staff to step up and exercise true leadership. As the sole remaining member of the executive staff from the beginning of the Commissioner Bernal administration in 1998, I must observe that the current executive staff, as a group, does not come close to executive staffs in terms of earning trust and confidence in leadership. Our dysfunctional PMC [personnel management committee] is yet another indication of the executive staff's failed leadership."

Graf, March 31, 2009: "The PMC has not met for several months, with virtually no meaningful exchange of views regarding numerous personnel actions. The authorization of just "one entry level position" represents a substantial investment of S&E funds. Frankly, I am deeply concerned about what appears to be a cavalier attitude regarding the establishment and of positions regardless of their grade and their impact on the Agency's position management structure. It appears that some executive officials are under the impression the Agency has deep S&E pockets. As a result of this irresponsible approach, many of us don't have adequate funds in our cost centers to carry out essential program activities."

*See EX E*, Graf: "Speaking with 'the manager involved' [a reference to Mr. Petz] has been a ridiculous waste of time and effort in the past. The 'manager involved' will pretend to listen to other viewpoints and then proceed to do whatever he wants. If the PMC is too dysfunctional to address resource management issues such as position establishment actions, then perhaps another entity such as the Management Accountability Council should step in and take over the function."

*JJJ* - April 10, 2009, McCarthy memo to Commissioner re Graf's complaint (Graf's hostile response under policy indicates threat); *TTT* - "Jerks at Work" cover page of book Graf carried to executive staff meeting; *GGG* July 14, 2009, Graf memo regarding selection process for staff attorney, attempting to undermine McCarthy and Riera ("one small segment of the executive staff ignoring an Agency Directive and once again attempting to control a management action at the exclusion of other, more qualified management officials. This is most troubling"); *RRRR* April 22, 2009 emails from Forti with comments on monitoring directive-"paranoid employees", "kneejerk"; *IIII* June 8 2009 Lopez Investigation Report (voluminous complaints about Forti's abusive behavior, e.g., "patterns of demands that laws and regulations be ignored, lack of respect for the Privacy Act, bully behavior and harassment against me and others"); *J* - July 22, 2009 draft disclosures with Riera comment on abusive language and conduct by Forti and Graf.

Further, the Agency refused to produce additional relevant records requested in discovery. In addition, the Agency flatly refused to respond to a request for Forti and Graf disciplinary records, relevant to treatment of similarly situated executive staff accused of non-collegial behavior.



Again notwithstanding the Agency's discovery misconduct, McCarthy established that he had a reasonable belief that his disclosures evidenced a violation of law, rule, or regulation;<sup>341</sup> gross mismanagement;<sup>342</sup> gross waste of funds;<sup>343</sup> abuse of authority;<sup>344</sup> and substantial and specific danger to public health or safety.<sup>345</sup>

McCarthy disclosed that Commissioner Ruth was unconstitutionally appointed to his position. McCarthy's opinion was based on his original research, and had been vetted by attorneys at the State Department. Its recommendations were similar to those made by the State Department itself, although rejected by Ruth and Brandt as "strange."<sup>346</sup>

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<sup>341</sup> Certainly making a death threat against the former Commissioner based on his official acts was a violation of law. Consistent use of abusive, insulting, slanderous, malicious, derogatory, discourteous, or otherwise inappropriate language, and creation of a hostile workplace, all violate Agency rules, as documented in legal opinions; 5 CFR part 2635—standards of ethical conduct for employees of the executive branch; 5 U.S.C. 2302 --- the prohibition against certain personnel practices.

<sup>342</sup> These acts and the Commissioner's bland toleration of this conduct constitute gross mismanagement that creates a substantial risk of significant adverse impact on an Agency's ability to accomplish its mission, as the executive staff could no longer function as a group in the context of such open hostility and abuse.

<sup>343</sup> Everything connected to this disruptive anti-social abusive conduct constitutes a gross waste of funds, as no conceivable benefit could reasonably be expected to accrue to the government.

<sup>344</sup> They also constitute an arbitrary or capricious exercise of power by a Federal official or employee that adversely affects the rights of every co-worker who must suffer such abuse, including those who quit their jobs rather than continue to be so abused, while it perversely consolidated more power in the hands of the perpetrators. Of course, such conduct is a prime reason for overall employee distrust of leadership and lack of satisfaction with the Agency as a workplace.

<sup>345</sup> McCarthy disclosed that this angry, volatile official, Mr. Graf, known to carry a gun in his vehicle at all times, created a substantial and specific danger to public safety.

<sup>346</sup> McCarthy testified he reasonably believed that Mr. Ruth was unconstitutionally appointed to his position; that he wrote an opinion recommending senate confirmation and/or subjecting the Agency to State Department oversight; that neither Ruth nor anyone

McCarthy had a reasonable belief that his disclosures evidenced a violation of law, rule, or regulation;<sup>347</sup> gross mismanagement;<sup>348</sup> gross waste of funds;<sup>349</sup> abuse of authority;<sup>350</sup> and substantial and specific danger to public health or safety.<sup>351</sup>

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else ever objected to the opinion until Brandt's deposition testimony where she claimed Ruth had been bothered by it. McCarthy testified that the State Department lawyers recommended he forward his opinion to the White House.

Brandt testified that Ruth told her he was bothered by the opinion and began to doubt McCarthy's counsel; that Brandt thought the opinion was "strange" and had been rejected by the State Department.

Ruth testified that he was bothered by the opinion and that he thought it was strange and had been rejected by the State Department. On cross - examination he acknowledged, however, that he was not surprised that the 2005 OIG report had actually made the same recommendation.

*See also Appellant Exhibit EEEE* July 23, 2009 McCarthy memo re applying the Appointments Clause to the IBWC Commissioner; X- July 28, 2009 McCarthy email to White House including opinion on Senate confirmation of Commissioner; VVVV March 2005 OIG Inspection Report Recommendation 2 at 51 ("The Bureau of Western Hemisphere Affairs, in coordination with the Bureau of Legislative Affairs, should request that the position of Commissioner, U.S. Section of the International Boundary and Water Commission, be made subject to the advice and consent of the Senate.").

<sup>347</sup> *I.e.*, the Appointments Clause of the United States Constitution.

<sup>348</sup> Continuing failure to recognize this legal lapse jeopardized the legal effect of every action taken by the Commissioner, coincidentally, including Mr. McCarthy's removal.

<sup>349</sup> The Agency has seen the appointment of incompetent, unqualified leaders, subject to no oversight, and appointed purely as a matter of political patronage, with no assurance that they meet even minimal qualifications, as demonstrated by the 2005 OIG report.

<sup>350</sup> Without constitutional authority, the Commissioner has no legal authority to act, and his every action is illegal.

<sup>351</sup> As an Agency responsible for the maintenance of the border, maintenance of levees, and operation of international dams, wastewater treatment plants and treaties, the questionable legality of the Agency's actions jeopardizes the health and safety of millions of border residents.

**8. The AJ erred in failing to find that McCarthy’s disclosures were a “contributing factor” in the personnel action taken against him, instead merely assuming “arguendo.”<sup>352</sup>**

- a. One or more factors, related to the protected disclosures, alone or in connection with other factors, tended to affect in some way the outcome of the decision.**

Again notwithstanding the Agency’s discovery misconduct, McCarthy established that one or more factors, related to the protected disclosures, alone or in connection with other factors, tended to affect in some way the outcome of the decision. Each of the four legal opinions cited by Ruth on July 31, 2009, as evidence of McCarthy’s alleged failure to support Ruth and the executive committee in a cooperative and collegial manner was discussed in McCarthy’s July 28, 2009, disclosures. Even the language of Ruth’s removal letter reflected the language of McCarthy’s July 28 notification to Ruth that he had made such disclosures, i.e. “no recourse.”

According to testimony of McCarthy and Petz, Ruth was “angry” and “upset” on July 31, when Ruth removed McCarthy, leaving both McCarthy and Petz “shocked”.

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<sup>352</sup> The employee need only “demonstrate that a disclosure described under section 2302(b)(8) was a contributing factor in the personnel action.” 5 U.S.C. 1221(e)(1). *Contributing factor* means any disclosure that affects an Agency’s decision to threaten, propose, take, or not take a personnel action with respect to the individual making the disclosure. 5 CFR 1209.4 (c). Reprisal is established by “any factor, which, alone or in connection with other factors, tends to affect in any way the outcome of the decision. \*\*\* [There may be many factors but] only one of which must be a protected disclosure and a contributing factor to the personnel action in order for the WPA’s protection to take effect.” *Marano v Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993). The employee may demonstrate that the disclosure was a contributing factor...through circumstantial evidence, such as... (A) the official taking the personnel action knew of the disclosure; and (B) the personnel action occurred within a period of time that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action. 5 U.S.C. 1221(e)(1). Other relevant factors may include whether the proposing and/or deciding official is implicated; whether there is disparate treatment; an excessive penalty; the seriousness of the disclosures. *E.g., Valerino v HHS*, 7 MSPR 487, 489-90 (1981); *Powers v Navy*, 69 MSPB 150, 156 (1995).

According to Riera's testimony, Ruth made his July 31, 2009, decision after he "thought about it long and hard last night." The decision came three days after the disclosures, and notification of the disclosures. Ruth gave no appeal rights, refusing to discuss the decision. Ruth later extended the termination by 30 days showing he had not given it much thought before making the decision. Ruth had approved McCarthy's leave for the following week to move his family from California.

Ruth's stated reasons for taking the action were extremely weak. Ruth took no disciplinary action against others, such as Forti and Graf, who were genuinely non-cooperative and non-collegial, or even Riera, who authored opinions similar to those for which McCarthy ostensibly was removed. Ruth testified he was aware of the abusive conduct of Forti and Graf yet never did anything but "talk to" them. Ruth testified about belated pretextual reasons for removing McCarthy such as an email exchange that actually showed Graf, not McCarthy, was abusive, and about a legal opinion that was actually the same as that given by the State Department. Ruth lied about not requesting reorganization recommendations, which were precisely the type of recommendations sought through the committee he had appointed, and which he later sought by way of a solicitation for contract.

Ruth was upset with Riera for taking personnel actions when the appointment of a new commissioner (Ruth) was imminent but Ruth removed McCarthy under the same circumstances and immediately sought to replace him. Ruth produced records of meetings purporting to show that he was considering removing McCarthy but Riera testified Ruth was not known to keep such records and Petz agreed, saying he had never seen him with his purportedly ubiquitous "daytimer". Ruth in fact fabricated and

surreptitiously backdated such records, and he withheld documents in response to discovery requests.

Even if the Board were to give any credibility to Ruth's claim of earlier irritation with McCarthy's other opinions, especially concerning Senate confirmation of the commissioner and qualifications of a CIO, that doesn't help the Agency. Ruth himself claims that both of those decisions were sent to the State Department, rendering them protected disclosures, long before he claims to have hatched any plan to remove McCarthy, and it was his irritation at these disclosures that was his motivation to retaliate.

**b. The official taking the personnel action knew of the disclosure.**

McCarthy's July 28 notification to Ruth that he had made such disclosures establishes that Ruth was aware of the disclosures. Ruth also testified that he was aware of the disclosures prior to July 31. In examining retaliatory motive for an Agency action, officials "involved" in the action may encompass more than just the proposing or deciding officials, and may include other officials upon whom the proposing or deciding official relied for information.<sup>353</sup>

**c. The personnel action occurred within a period of time that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action.**

The disclosures were made on July 28, 2009 and Ruth was notified the same day. Ruth took his removal action on July 31, 2009. The termination of health insurance

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<sup>353</sup> See *Redschlag v. Department of the Army*, 89 M.S.P.R. 589, ¶¶ 65-67 (2001), review dismissed, 32 F. App'x 543 (Fed. Cir. 2002).

benefits took place almost immediately, and the denial of relocation expenses shortly thereafter. Ruth's claim that he began his consideration of removing McCarthy in response to earlier protected disclosures to the State Department of opinions regarding Senate confirmation of the commissioner and qualifications of a CIO doesn't help the Agency.

**d. The proposing and/or deciding official is implicated.**

Ruth is implicated in some or all of the disclosures. In most cases, he is the official alleged to have taken or directed actions that evidenced fraud, waste or abuse. In others, Ruth is alleged to have failed to take action, despite having knowledge, to correct fraud, waste and abuse. Forti, Graf and Brandt are all implicated in various disclosures, and all had some influence in the decision to remove McCarthy and concomitant decision to terminate his benefits. Ruth admitted under oath his complicity in covering up matters disclosed, such as the evidence of SBIWTP Antideficiency Act violation he hid in his private files allegedly to protect Burns from retaliation by Forti.

**e. There is disparate treatment.<sup>354</sup>**

Again notwithstanding Agency discovery misconduct, McCarthy established that there is disparate treatment. Forti and Graf are implicated in a wide range and long history of fraud, waste and abuse, but especially in conduct that would be considered not "collegial or cooperative." On July 31, Ruth even acknowledged as much to Petz, and

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<sup>354</sup> Where, as here, an employee raises an allegation of disparate penalties in comparison to specified employees, the Agency must prove a legitimate reason for the difference in treatment by a preponderance of the evidence before the penalty can be upheld. *See Taylor v. Department of Veterans Affairs*, 2009 MSPB 197, ¶13 (2009); *Lewis v. Department of Veterans Affairs*, 111 M.S.P.R. 388, ¶ 8 (2009); *Woody v. General Services Administration*, 6 M.S.P.R. 486, 488 (1981).

pledged that they would be taken care of too, yet neither was ever disciplined in the slightest.

Ruth also testified that he was aware that Forti violated the Antideficiency Act and that she covered it up (as did he, by putting the documentary evidence in his personal files, instead of reporting it to congress as required by law). He testified he was aware that she abused her authority by routinely harassing and cursing Agency employees, for example screaming at the Acquisitions Chief, “don’t blow smoke up my ass”; compelled personnel office employees to take unlawful actions; routinely abused her authority by forcing her employees to baby-sit her son; unlawfully conducted computer surveillance of USIBWC staff for improper reasons, intercepted, altered or destroyed official communications, and failed to comply with Information Management laws and regulations; conspired to award unlawful pay increases for herself and favored others; unlawfully circumvented Agency hiring practices for improper purposes; and maliciously reported to OIG false allegations of misconduct and cronyism by the USIBWC Principal Engineer for Operations.

Uncontested evidence establishes that Graf made threats, including a death threat against a former Commissioner, creating a dangerous and hostile workplace; that he called the acting commissioner and principal engineer for operations a “motherfucker”, a “son of bitch”, “the devil” and that he threatened to “get him”; that he conspired to award unlawful pay increases for favored others; that he unlawfully circumvented Agency hiring practices for improper purposes; that he maliciously reported to OIG false allegations of misconduct and cronyism by the USIBWC Principal Engineer for

Operations; and that he used a hidden monitor to conduct remote electronic surveillance of the personnel offices. Mr. Ruth testified that he did no more than “talked to him”.

**f. The penalty is excessive.**<sup>355</sup>

The Agency refused to produce relevant records requested in discovery, including its relevant policies with regard to discipline or removal for unacceptable performance.<sup>356</sup>

There is no evidence that McCarthy was ever given any written warning that his performance was unacceptable, not even a performance review. Officials such as Forti and Graf, who even Ruth admits clearly engaged in abusive conduct, were “talked to.” Removal is the ultimate penalty and should be reserved for appropriate cases. There are no circumstances that justify termination of benefits to which there is a pre-existing legal entitlement.

**g. The disclosures involve serious allegations.**

In making his July 28, 2009 disclosures and more detailed August 21, 2009 supplemental disclosures to the OSC, McCarthy established his reasonable belief that certain acts committed by USIBWC officials, including Commissioner Ruth, evidenced a violation of law, rule, or regulation; gross mismanagement; gross waste of funds; abuse of authority; or substantial and specific danger to public health or safety; that the Agency

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<sup>355</sup> The Board reversed the ID where the AJ erred in failing to address the Appellant’s claims that the removal penalty exceeded the maximum penalty provided in the Agency’s table of penalties and that the Agency imposed less severe penalties upon other employees who had committed similar misconduct that was discovered as a result of the same OIG investigation. *Taylor v. Department of Veterans Affairs*, 2009 MSPB 197, ¶9 (2009).

<sup>356</sup> Petz testified to the normal procedures used for conduct or performance related actions, which mirror those described in regulations. He also stated that the Agency has “a table of penalties that describes progressive discipline.” See Petz deposition, p. 97 lines 14-15.



solicited bids to construct Recovery Act levees in Hidalgo County with architectural designs in which USIBWC has no contractual rights; that the Agency planned to misuse Agency funds to subsidize a border barrier for the Department of Homeland Security (DHS); that the Agency planned to misuse funds for cosmetic repairs to levees located on unsafe ground, to unsafe specifications; that the Agency pledged appropriated funds in connection with a financial award for the South Bay International Water Treatment Plant (SBIWTP), when such funds had not yet been appropriated for the Agency; that Agency officials conspired to conceal the Agency's mishandling of \$220 million in Recovery Act funds intended for flood control projects; that the Agency refused to properly separate responsibility for oversight of Budget and Contract functions within the Agency in contravention of generally accepted practices regarding separation of duties; that the Agency illegally conducted secret surveillance of USIBWC personnel offices; that Agency officials unlawfully conducted computer surveillance of USIBWC staff for improper reasons, intercepted, altered or destroyed official communications, and failed to comply with Information Management laws and regulations; that Agency officials conspired to award unlawful pay increases for themselves and favored others; that Agency officials unlawfully circumvented Agency hiring practices for improper purposes; that Agency officials maliciously reported to OIG false allegations of misconduct and cronyism by the USIBWC Principal Engineer for Operations; that Agency officials made threats, including a death threat against a former Commissioner, creating a Dangerous and Hostile Workplace; and that Commissioner Ruth was unconstitutionally appointed to his position.

As stated in the 2005 OIG Report:

In contrast to internal management, issues such as water and sanitation can reach the highest levels of the US and Mexican governments. Such issues involve questions of the very immediate domestic consequences in the border region where burgeoning population growth, industrialization, and cross-border issues such as sewage disposal have greatly increased the interest and demands of state and local governments, other federal agencies, and the courts.<sup>357</sup>

**9. The AJ erred in failing to find that the appointment of the Agency’s head, absent Senate confirmation, did not give him the legal authority to remove Appellant and terminate his benefits.<sup>358</sup>**

Under the United States Constitution Appointments Clause, the president may appoint two classes of officers: principal officers and inferior officers. The former are appointed subject to the advice and consent of the Senate. Pursuant to Supreme Court standards, if the duties, authority and autonomy of the Commissioner suggest that he is a “principal” officer, as it appears they do, then his appointment absent Senate confirmation may be unconstitutional.

Appointment of the Commissioner is provided for in Article II of the Convention of March 1, 1889, which established the International Boundary Commission (IBC) to apply the rules in the 1884 Convention concerning the Rio Grande and the Colorado River as the international boundary.

The International Boundary Commission shall be composed of a Commissioner appointed by the President of the United States of America, and of another appointed by the United States of Mexico, in accordance with the constitutional provisions of each country ...

Article II of the Convention of March 1, 1889.

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<sup>357</sup> See Appellant’s exhibit VVVV, at 5.

<sup>358</sup> See McCarthy Legal Opinion, Appellant Exhibit *EEEE*.

Earlier treaties and conventions also provided for appointment of a commissioner, but these were for temporary commissions with narrowly circumscribed duties. See, e.g., Article V of the Treaty of 1848 (Treaty of Guadalupe Hidalgo) (provided for presidential appointment of a Commissioner and surveyor with responsibility for demarcation of the international boundary); Convention of July 29, 1882 (provided for appointment in unspecified manner of a “Commissioner Engineer in Chief” to resurvey and place additional monuments along the western land boundary from El Paso, Texas/Ciudad, Juárez, Chihuahua to San Diego, California/Tijuana, Baja California). Although not apparent from the language of the Treaty, there is some evidence that presidential appointment pursuant to the 1848 Treaty was made subject to advice and consent of the Senate. The first appointee, Ambrose Sevier, reportedly died “even before the Senate had confirmed his nomination.” *See* Robert V. Hine, *Bartlett’s West, Drawing the Mexican Boundary*, p. 5 (Yale University Press 1968).

The United States Constitution Appointments Clause provides as follows:

[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. Art. II, § 2, cl. 2. (Notably, the Constitution's Appointments Clause appears in the same sentence of Article II as the Treaty Clause.)

The Appointments Clause divides all officers into two classes: principal officers and inferior officers. Only the former are appointed subject to the advice and consent of

the Senate. *See Morrison v. Olson*, 487 U.S. 654 (1988). “[P]rincipal officers are selected by the President with the advice and consent of the Senate. Inferior officers Congress may allow to be appointed by the President alone, by the heads of departments, or by the Judiciary.” *Buckley v. Valeo*, 424 U.S. 1 (1976).

“The line between ‘inferior’ and ‘principal’ officers is one that is far from clear, and the Framers provided little guidance into where it should be drawn.” *Morrison*, 487 U.S. at 671 (*citation omitted*). However, the Supreme Court has identified several factors that guide its inquiry. These include: (1) the scope of the officer's duties; (2) the scope of the officer's authority; (3) the length of the officer's tenure; and (4) whether the officer is subject to removal by a higher Executive Branch official. *See Id.* at 671-672.

In *Morrison*, the Court considered each of these factors and concluded that an independent counsel appointed under the Ethics in Government Act was an inferior officer. The independent counsel had been appointed by a Special Division of the United States Court of Appeals for the District of Columbia pursuant to 28 U.S.C. §§ 591 *et seq.* If the Court had found the independent counsel to be a “principal” officer, then the Act would have been declared unconstitutional, and struck down as being in violation of the Appointments Clause.

Applying the *Morrison* test to the USIBWC Commissioner suggests that the Commissioner could be considered to be a “principal” officer rather than an “inferior” officer. If that is the case, then his appointment absent advice and consent of the Senate could violate the Appointments Clause of the Constitution.

When it ratified the 1944 Treaty, the Senate contemplated making the position of Commissioner subject to the advice and consent of the Senate.

Nothing contained in the treaty or protocol shall be construed as impairing the power of the Congress of the United States to define the terms of office of members of the United States Section on the International Boundary and Water Commission or to provide for their appointment by the President by and with the advice and consent of the Senate or otherwise.

Senate ratification, Paragraph (b) understandings attached to Senate Resolution of April 18, 1945.

The decision of the Senate not to require Senate advice and consent does not directly address the concerns about the constitutionality of the current arrangement, however. The prescribed manner of appointment for principal officers is also the default manner of appointment for inferior officers. “[B]ut,” the Appointments Clause continues, “the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.”

This power of the Congress is limited to the appointment of “inferior” offices. The Congress has no authority to vest the appointment of “principal” officers in the President alone. That would be an unconstitutional abdication of responsibility to advise and consent on such appointments. The Supreme Court recognized in *Buckley v. Valeo*, 424 U.S. 1, 125 (1976), that “the Appointments Clause of Article II is more than a matter of ‘etiquette or protocol’; it is among the significant structural safeguards of the constitutional scheme. By vesting the President with the exclusive power to select the principal (noninferior) officers of the United States, the Appointments Clause prevents congressional encroachment upon the Executive and Judicial Branches.” *Id.*, at 128-131.

The President's power to select principal officers of the United States was not left unguarded, however, as Article II further requires the “Advice and Consent of the

Senate.” This serves both to curb Executive abuses of the appointment power, and “to promote a judicious choice of [persons] for filling the offices of the union.” *Edmond v. U.S.*, 520 U.S. 651 (1997) (*citations omitted*).

The Supreme Court has found the following offices to be “inferior”: a district court clerk, *Ex parte Hennen*, 38 U.S. (13 Pet.) 225, 229 (1839); an election supervisor, *Ex parte Siebold*, 100 U.S. 371, 397-398 (1880), a vice consul charged temporarily with the duties of the consul, *United States v. Eaton*, 169 U.S. 331, 343, (1898), a “United States commissioner” in district court proceedings, *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 352-354 (1931); the independent counsel created by provisions of the Ethics in Government Act of 1978, *Morrison v. Olson*, 487 U.S. 654 (1988) (relied on several factors: that the independent counsel was subject to removal by a higher officer, the Attorney General, that she performed only limited duties, that her jurisdiction was narrow, and that her tenure was limited); and judges of the Coast Guard Court of Criminal Appeals appointed by the Secretary of Transportation pursuant to statutory authority, *Edmond v. U.S.*, 520 U.S. 651 (1997) (by reason of the supervision over their work exercised by the General Counsel of the Department of Transportation in his capacity as Judge Advocate General and the Court of Appeals for the Armed Forces).

Generally speaking, the term “inferior officer” connotes a relationship with some higher ranking officer or officers below the President: Whether one is an “inferior” officer depends on whether he has a superior. It is not enough that other officers may be identified who formally maintain a higher rank, or possess responsibilities of a greater magnitude. If that were the intention, the Constitution might have used the phrase “lesser officer.” Rather, in the context of a Clause designed to preserve political accountability relative to important Government assignments, we think it evident that “inferior officers” are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate.

*Edmond v. U.S.*, 520 U.S. 651, 663 (1997).

An April 16, 2007 memorandum opinion on the appointments clause from the Justice Department Office of Legal Counsel appears on surface to suggest the commissioner should not be subject to Senate confirmation, but upon closer examination that is not the conclusion to be drawn.<sup>359</sup> The DOJ/OLC Opinion finds that there are two essential elements that must apply to a position for it to be a “federal office” subject to the Appointments Clause. OLC states a federal office must involve a position to which is delegated by legal authority a portion of the sovereign powers of the federal Government. It must be “continuing,” which means either that the position is permanent or that, even though temporary, it is not personal, “transient,” or “incidental.”

Among authorities cited by the OLC are *Proposed Comm’n on Deregulation of Int’l Ocean Shipping*, 7 Op. O.L.C. 202, 202 (1983) (holding that positions of commissioners with purely advisory powers were not subject to the Appointments Clause where they involved “no enforcement authority or power to bind the Government”). Indeed the Opinion applies this logic only to temporary or advisory positions. With respect to other positions, the O.L.C. Opinion has a decidedly different view, for example positions that entail “[t]he actual conduct of foreign negotiations,” (quoting *Federalist No. 72*, at 486).

The second element of a federal “office,” necessary to make a position subject to the Appointments Clause, is that the position be “continuing.” The OLC states that

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<sup>359</sup> <http://www.usdoj.gov/olc/2007/appointmentsclausev10.pdf>. See also [http://www.usdoj.gov/olc/delly.htm#N\\_68](http://www.usdoj.gov/olc/delly.htm#N_68) (“The traditional view of the Attorneys General has been that the members of international commissions hold an office or employment emanating from the general treaty-making power, and created by it and the foreign nation(s) involved and that members are not constitutional officers. Office -- Compensation, 22 Op. Att’y Gen. 184, 186 (1898).”)

although a position is most clearly of this sort where it is permanent, a temporary position also may be continuing, if it is not personal, “transient,” or “incidental.”

In consideration of the foregoing authorities, it is very likely that the constitutionality of the Commissioner’s appointment absent Senate confirmation cannot withstand legal challenge. The constitutional issue might conceivably be remedied in one of two ways: either by making the appointment subject to the advice and consent of the Senate, or possibly by subjecting the Commissioner to the supervision and authority of an Executive branch official (other than the president). The added benefit of either or both measures is that the USIBWC arguably would be assured a well-qualified leader and professional administration. However, until then, the Commissioner’s actions are constitutionally invalid.

**10. The AJ erred in denying Appellant’s Request for Stay on October 8, 2009, impermissibly relying on the Agency’s fabricated evidence and the prohibited reference to the OSC rationale, and misapplying rules of law and evidence.**

The AJ’s Order denying Appellant’s Request for Stay was based on numerous errors of fact and law: McCarthy was not serving a probationary period; evidence does not establish that the Agency would have removed McCarthy in absence of Whistleblowing; the Order Denying Stay relies on harmful inadmissible evidence; the Order misapplies the Burden of Proof; the Order misapplies the Rules of Evidence; and the Order Denying Stay fails to address McCarthy’s right to due process.

The Order Denying Stay maintains that McCarthy was serving a probationary period as a GS-0905-15 Supervisory Attorney when he was removed from employment on July 31, 2009. In fact, at no time was McCarthy serving a probationary period, as indicated above. The Order completely failed to address McCarthy’s due process claims.



In addition, the Order Denying Stay maintains: “The agency’s submission included several memoranda noting that, as early as June 25, 2009, Commissioner C.W. Ruth had sought advice about removing the appellant.” Hearsay evidence produced by Agency Counsel does not establish that the Agency would have removed McCarthy in absence of Whistleblowing. Assuming, *arguendo*, that this fraudulent hearsay evidence should be given any weight whatsoever, it simply does not establish that the Agency had determined to seek McCarthy’s removal, let alone that it could have legally done so.

The Order Denying Stay impermissibly relies upon a letter by the Office of Special Counsel regarding Appellant’s claims. The Order states:

... the appellant also provided a copy of OSC’s letter, which included the observation: ‘Specifically, we have statements from Mr. Petz that he had been contacted by Commissioner Ruth about terminating your employment and had conversations with him regarding the steps to take in the termination of your employment approximately one week before your July 28, 2009 disclosures. Again, because the process for your termination began before your protected activities, we cannot infer the termination action was retaliation by management officials for them even if Commissioner Ruth did not identify his intent in the email to the executive staff.’

Both McCarthy, in his declaration, and Appellant’s counsel, in a pleading in support of the stay, specifically objected to any reference to the OSC decision letters that were submitted to the Board solely for purposes of establishing jurisdiction. See Appellant’s Declaration and Memorandum in Support of Stay of Agency Action (“The OSC findings may not be cited as evidence and Appellant objects to any references thereto pursuant to 5 USC § 1214(a)(2)(B).”) Pursuant to 5 U.S.C. § 1214(a)(2)(B), a written statement under subparagraph (A) may not be admissible as evidence in any judicial or administrative proceeding, without the consent of the person who received such statement under subparagraph (A).

The Order Denying Stay impermissibly relied upon the Agency's very weak hearsay evidence, while giving no credibility to McCarthy's sworn declaration and identification under oath documents submitted in evidence as actually being what they purport to be.

An un rebutted declaration made under penalty of perjury, like that of McCarthy, is entitled to considerable weight. *Luciano v. Department of the Treasury*, 88 M.S.P.R. 335 (2001), citing *Vercelli v. U.S. Postal Service*, 70 M.S.P.R. 322, 327 (1996). Statements in pleadings, like those of Agency counsel, are not evidence. *Jones v Interior*, 97 M.S.P.R. 282 (2004), citing *Mc Clendon v. Office of Personnel Management*, 92 M.S.P.R. 250, ¶ 12 (2002). Slightly above that level are the agency's unsworn, uncorroborated hearsay documents, which are entitled to little weight. *Jones v. Interior*, 97 M.S.P.R. 282, citing *Wallace v. Department of Health & Human Services*, 89 M.S.P.R. 178, ¶ 15 (2001), *review dismissed*, 41 Fed. Appx. 455 (Fed. Cir. 2002).

Following judicial precedents examining the weight to be given hearsay evidence, the Board has identified the following factors, among others, to consider in assessing the probative value of hearsay evidence: The following factors affect the weight to be accorded to hearsay evidence: (1) the availability of persons with firsthand knowledge to testify at the hearing; (2) whether the statements of the out-of-court declarants were signed or in affidavit form, and whether anyone witnessed the signing; (3) the agency's explanation for failing to obtain signed or sworn statements; (4) whether declarants were disinterested witnesses to the events, and whether the statements were routinely made; (5) consistency of declarants' accounts with other information in the case, internal consistency, and their consistency with each other; (6) whether corroboration for the

statements can otherwise be found in the agency record; (7) the absence of contradictory evidence; and (8) credibility of declarant when he made the statement attributed to him.

*See Vaughn v. United States Postal Service*, 2008 MSPB 178, citing *Borninkhof v.*

*Department of Justice*, 5 M.S.P.R. 77, 83-87 (1981); see also *Spruill v. U.S. Postal*

*Service*, 84 M.S.P.R. 36, 44-5 (1999) (same).

**11. The AJ should be disqualified based on demonstrated personal bias or prejudice.**

Appellant requests an order of recusal requiring the AJ to withdraw from any further involvement in this case on the basis of personal bias or prejudice of the AJ. Although the bias and prejudice of the AJ was apparent from the earliest stages of this appeal, it has steadily grown and become undeniable and intolerable in successive rulings, conduct of the hearing, and the issuance of the ID, indicating the AJ is thoroughly incapable of rendering a fair judgment.

An administrative judge's conduct during the course of a Board proceeding may warrant recusal if the judge's comments or actions evidence "a deep-seated favoritism or antagonism that would make fair judgment impossible". *Bieber v. Department of the Army*, 287 F.3d 1358, 1362-63 (Fed. Cir. 2002) (quoting *Liteky v. United States*, 510 U.S. 540, 555 (1994)).

In the present case, the AJ has made numerous rulings and comments that evidence a deep-seated favoritism or antagonism that would make fair judgment impossible, as demonstrated above.

**IV. CONCLUSION: APPELLANT IS A TENURED EMPLOYEE WHOSE REMOVAL VIOLATED CONSTITUTIONAL DUE PROCESS AND THE WHISTLEBLOWER PROTECTION ACT; THE AGENCY AND ITS COUNSEL SHOULD BE SEVERELY SANCTIONED FOR ILLEGAL AND UNETHICAL CONDUCT.**

McCarthy is a tenured employee whose removal was invalid absent compliance with constitutionally mandated due process. In addition, Appellant proved by a preponderance of the evidence that he made protected disclosures that he reasonably believed evidenced a violation of law, rule, or regulation; gross mismanagement; gross waste of funds; abuse of authority; or substantial and specific danger to public health or safety. McCarthy's disclosures were a "contributing factor" in the personnel actions taken against him. The Agency failed to demonstrate by "clear and convincing evidence" that it would have taken the actions in the absence of his protected disclosures.

The AJ abused his discretion in denying Appellant's motions to compel discovery and sanction the Agency for failing to respond to the appeal, for widespread discovery misconduct, for unlawful and unethical fabrication of evidence, and for committing fraud upon the tribunal.

The ID is fatally plagued by harmful errors, abuse of discretion, and erroneous interpretations of statutes and regulations. The AJ similarly erred in denying Appellant's Request for Stay by impermissibly relying on the Agency's fabricated evidence and OSC rationale, and misapplying rules of law and evidence.

Appellant respectfully requests the Board to enter an Order that reverses the ID and enters judgment for Appellant on the foregoing bases, reinstating Appellant to the *status quo ante* and awarding all appropriate costs and fees. Appellant also respectfully requests the Board to enter an Order that the Office of Special Counsel shall investigate

and bring appropriate disciplinary charges against Agency officials and Agency counsel responsible for the misconduct referenced above.

Respectfully submitted,

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