PRIVATE

November 7, 2008

From: **Brenda P. Murray** BPM
Initiating Official
U.S. Securities and Exchange Commission

To: **Diego T. Ruiz**
Executive Director
U.S. Securities and Exchange Commission

Report of Initiating Official on Administrative Process for Disciplinary and Performance-Based Action Recommended by U.S. Securities and Exchange Commission Inspector General in Case No. OIG-431: Re-Investigation of Claims by Gary Aguirre of Preferential Treatment and Improper Termination

Background

On September 30, 2008, the Securities and Exchange Commission's (Commission or SEC) Inspector General (IG) delivered to Commission Chairman Christopher Cox a Report of Investigation: Case No. OIG-431 (OIG-431) that resulted from a complaint by Gary Aguirre (Aguirre) of preferential treatment and improper termination.[1] Aguirre was employed as a staff attorney in the Commission's Division of Enforcement (Enforcement) from September 7, 2004, through September 2, 2005, when he was terminated.[2] (OIG-431 at Appendix 141.) An investigation of these matters by the former IG, conducted in 2005, and an investigation and report by the U.S. Senate Committees on Finance and the Judiciary, released in August 2007, are described at OIG-431 at 1-4.

On October 21, 2008, the Commission's Executive Director appointed me as the Initiating Official with respect to the IG's recommendations that the Commission take:

---

[1] I will cite to OIG-431 as "OIG-431 at __." OGI-431 is a 191-page document with an Appendix of 226 items.

[2] Excepted service employees, including Attorneys, are subject to a one-year trial period beginning on the date of their appointment. (OIG-431 at 22.) Aguirre had tendered his resignation on June 30, 2005, effective September 30, 2005, but withdrew it in an e-mail on July 27, 2005. (OIG-431 at 36, 39.) Aguirre filed a complaint with the Equal Employment Opportunity Commission against the Commission on June 24, 2004. (OIG-431 at 27 n.22 and Appendix 92.) Aguirre also filed a complaint with the Office of Special Counsel, which closed its investigation in 2007 "because [Aguirre] had filed an individual right of action (IRA) with the Merit Systems Protection Board (MSPB)." (OIG-431 at 5 n.6.)

Appropriate disciplinary and/or performance-based action against Linda Chatman Thomsen (Thomsen), a Senior Officer (SO-3) employee, who has been Director of Enforcement from May 2005 through the present;

Appropriate disciplinary and/or performance-based action, including removal of his supervisory responsibilities, against Mark Kreitman (Kreitman), an Assistant Director in Enforcement at the SK-17 level;[3] and

Appropriate disciplinary and/or performance-based action, including removal of his supervisory responsibilities, against Robert Hanson (Hanson), Aguirre's Branch Chief in Enforcement from February though September 2, 2005, at the SK-15 level.

(OIG-431 at 28-29, 191.)

The Executive Director instructed me to complete the task by November 7, 2008.

I advised Hanson and counsel for Thomsen that I would accept written statements preferably by October 29, 2008, but at any time before I finished the task. Beginning on October 22, 2008, in response to requests from Hanson and Thomsen's counsel, I asked the Inspector General to provide me with full documents, portions of which are Appendices to OIG-431. The IG refused to furnish any of the requested materials. Memorandum on Requests for Office of Inspector General Files in Connection with Reports of Investigations in Case Nos. OIG-431 and OIG-483 CONFIDENTIAL (October 28, 2008). However, he later made certain materials available to Hanson and Thomsen's counsel.

Thomsen filed a written response on October 29, 2008. (Response of Linda Chatman Thomsen to Report of Investigation, Case No. OIG-431.)

On October 31, 2008, Hanson filed pro se a written response with four exhibits: (1) Commission's Response to Appeal in Gary J. Aguirre vs. SEC, Merit Systems Protection Board (MSPB), Docket No. DC-121-07-0387-W-1 (April 10, 2007); (2) e-mail to the IG (Oct. 23, 2008); (3) Rating for Robert Hanson for Period Ending May 1, 2008; and (4) Transcript of Witness 2's testimony to IG on April 17, 2008 at 37-44.). (Response of Robert B. Hanson.) Hanson filed a Supplemental Submission on November 4, 2008, with all evaluations in his file at the Commission. (Supplemental Response of Robert B. Hanson.)

I have applied a preponderance of the evidence standard, that is whether a reasonable person, considering the contents of OIG-431, would conclude that Thomsen and Hanson have breached applicable laws, rules, and ethical standards. (MSPB Basic Procedures, Chapter 2.)

[3] On October 22, 2008, in a memorandum to the IG, I postponed these matters as to Kreitman for forty-five days based on [redacted].

OIG-431 discusses in some detail the conduct of Paul Berger (Berger), former Associate Director of Enforcement. Berger is no longer employed by the Commission, and OIG-431 makes no recommendations as to him.

Issues in OIG-431

I. Did the Commission give improper preferential treatment to John Mack (Mack) in connection with the Pequot Capital Management (Pequot) investigation and block Aguirre's efforts to take Mack's testimony because of Mack's political connections and/or prominence? (OIG-431 at 15, 32-69.)

General Electric (GE) announced that it had acquired Heller Financial (Heller) on July 30, 2001. Arthur Samberg (Samberg) was Pequot's Chairman and Chief Executive Officer (CEO). (OIG-431 at 30.) Mack had a personal relationship with Samberg and had been an investor in, and Chairman of, Pequot. (OIG-431 at 30-31.) Samberg and Mack communicated frequently prior to the public announcement. (OIG-431 at 30.) Ten days after Pequot began purchasing Heller stock, Mack became CEO of Credit Suisse First Boston (CSFB), an advisor to Heller in the acquisition. (OIG-431 at 31.) Pequot made a profit of $18.9 million on transactions in Heller and GE securities. (OIG-431 at 30.)

The IG did not find Aguirre's allegation of improper preferential treatment concerning the taking of Mack's testimony to be the basis for any personnel action. The IG concluded:

> Accordingly, the [IG] investigation did not find sufficient evidence to establish that Mack was given improper preferential treatment regarding the taking of his testimony. While there was evidence that the approach taken with respect to Mack's testimony was different than in other cases, Enforcement's explanation of why they felt it appropriate to wait to take Mack's testimony is a reasonable one and based on years of investigative experience. . . . [T]he investigation finds that this evidence [troubling aspects of the communications between Aguirre and his direct supervisor and the somewhat abrupt change in Aguirre's supervisors' views] alone is insufficient to establish that there was a direct connection between Mack's prominence or political connections and the decision not to take Mack's testimony in the summer of 2005.

(OIG-431 at 69.)

II. Did Commission senior Enforcement officials improperly provide representatives of Morgan Stanley non-public information about the Pequot investigation and, specifically, Enforcement's intentions with respect to Mack? (OIG-431 at 16, 69-87.)

On June 23, 2005, as part of its due diligence investigation of Mack, who it was considering hiring as its CEO, a high level Morgan Stanley representative began asking persons in Enforcement whether the Commission would be bringing insider trading charges against Mack in connection with the Pequot investigation. (OIG-431 at 70-74.) Morgan Stanley's previous CEO left amid considerable turmoil, and the caller from Morgan Stanley maintained it was not right

for the Commission to withhold information that Morgan Stanley needed for a hiring decision that could impact it and its shareholders. (OIG-431 at 71, 74 n.45.)

As a result of these inquiries, and the fact that it received a subpoena for Mack's e-mails, Morgan Stanley knew on or about June 24, 2005, that Enforcement "'was looking at Mr. Mack, among others, as part of [its] investigation,'" and there was an implication that Enforcement "'did not presently have evidence of any wrongdoing'" by Mack. (OIG-431 at 74 and Appendix 163.)

On June 27, 2005, Thomsen agreed that Mary Jo White (White), the lawyer conducting a six-day due diligence investigation of Mack for Morgan Stanley's Board vis-à-vis hiring Mack, could transmit directly to her Mack's subpoenaed e-mail records for review and a determination on what Thomsen could say about Mack's involvement in the Pequot investigation. (OIG-431 at 74, 76, 82.) Thomsen received the e-mails on June 28, 2005, and later personally gave them to Aguirre. (OIG-431 at 81.) It appears that Thomsen read the e-mails and talked with Berger, who told her Enforcement did not have enough information about Mack at this stage and he expected that Mack's testimony would be taken at some point. (OIG-431 at 77-78.) Thomsen did not ask Aguirre his opinion of the e-mails. (OIG-431 at 81.)

On June 28, 2005, Thomsen told White that the e-mails did not change Enforcement's opinion of Mack. (OIG-431 at Appendix 163.) It was too early in the investigation to tell whether Mack had any issues and that Enforcement was weeks from knowing more, and she could provide no more comfort. The conversation included a comment by Thomsen, "[T]here is 'smoke there' – but that there was 'surely not fire.'" (OIG-431 at 78-79 and Appendix 163.) White reported to the Morgan Stanley Board that Thomsen said it was too early for Enforcement to conclude whether Mack had any involvement in any alleged unlawful insider trading by Pequot; it seemed clear the Commission would continue the Pequot investigation aggressively, including making sure there was no misconduct by Mack; and Mack likely would be asked to testify. (OIG-431 at 79 and Appendix 163.)

> A member or employee of the Commission shall not . . . :
>
> Divulge to any unauthorized person or release in advance of authorization for its release any non-public Commission document, or any information contained in any such document or any confidential information: (A) in contravention of the rules and regulations of the Commission promulgated under 5 U.S.C. §§ 552, 552a and 552b; or (B) in circumstances where the Commission has determined to accord such information confidential treatment.

17 C.F.R. § 735-3(b)(7)(i).

> Information or documents obtained by the Commission in the course of any investigation or examination, unless made a matter of public record, shall be deemed non-public, but the Commission approves the practice whereby officials of the Division of Enforcement at the level of Assistant Director or higher . . . may engage in and may authorize members of the Commission's staff to engage

> in discussions with persons identified in § 240.24c-1(b) of this chapter concerning information obtained in individual investigations or examinations, including formal investigations conducted pursuant to Commission order.

17 C.F.R. § 203.2.

The IG references SEC Administrative Regulations, Disclosure of Non-Public Information in Connection with Investigations, Examinations or Grants of Access, SECR19-1 (Aug. 31, 1999), which states:

> a. Various SEC rules prohibit disclosure by its officers and employees of information and documents or other non-public records of the SEC obtained in the course of any examinations or investigations, unless the SEC authorizes or approves the disclosure of such information or documents. In certain cases, however, the SEC has authorized its staff to discuss, and grant access to, materials in its examination and enforcement files and other non-public records.
>
> b. The prohibitions against use of non-public information or documents without specific authorization or approval by the SEC does not apply to the use of such materials as necessary or appropriate by members of the staff in pursuing SEC investigations, examinations, or in the discharge of other official responsibilities.

The IG found that the evidence was insufficient to establish a direct connection between Thomsen's communication with Morgan Stanley and Enforcement's decision not to take Mack's testimony in the summer of 2005. (OIG-431 at 87.) However, the IG found the contacts between Thomsen and White to be the basis for a personnel action against Thomsen for the following reasons.

The IG concluded Thomsen imparted relevant information to representatives of Morgan Stanley regarding the nature of Enforcement's evidence against Mack in connection with the Pequot investigation by indicating that "with respect to pertinent e-mails there was 'smoke' but 'surely not fire.'" (OIG-431 at 85-86.) The IG concluded Morgan Stanley used this information to decide to go forward and hire Mack as Chairman and CEO. (OIG-431 at 86.)

The IG concluded that there are serious questions about the information Thomsen provided to Morgan Stanley:

> there is a clear disconnect in Enforcement about procedures for release of non-public information;
>
> Thomsen's failure to consult with Aguirre, the lead lawyer on the investigation, could result in inaccurate information being imparted so that Enforcement might "be more reluctant to bring an action against an individual like Mack after having provided assurances about the lack of evidence." (OIG 431 at 87.);

it could be useful to a potential target in preparing a defense to know the extent of Enforcement's evidence; and

perhaps of most concern is that the information would not be available to another potential target of lesser means or reputation. (OIG-431 at 87.)

Applying the preponderance of the evidence standard, I conclude that:

Thomsen's disclosure to someone outside the Commission of the status of a pending investigation could be considered a technical violation of the non-disclosure of non-public information regulations, or it could be viewed as covered by an exception to non-disclosure set out in SECR19-1:

> The prohibitions against use of non-public information or documents without specific authorization or approval by the SEC does [sic] not apply to the use of such materials as necessary or appropriate by members of the staff in pursuing SEC investigations, examinations, or in the discharge of other official responsibilities (emphasis added).

Despite his recommendation that the Commission take disciplinary and/or performance-based action against Thomsen, the IG acknowledges:

> Thus, although Commission regulations do not define specifically in what circumstances this type of non-public information may be disclosed, . . . Thomsen may have legitimately believed that the information she provided was necessary in the discharge of her responsibilities . . . .

(OIG-431 at 86.)

The factors management should use in applying responsible judgment to where there has been a violation are set out in Douglas v. Veterans Admin., 5 MSPB 313 (1981). I will consider those criteria seriatim.

> **(1.) 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.**

Morgan Stanley knew Mack was involved in an Enforcement investigation because Enforcement had issued a subpoena for his e-mails while he was employed by Morgan Stanley. Thomsen intentionally disclosed to White that it was premature for Enforcement to determine Mack's involvement in allegations of insider trading in connection with the Pequot investigation, the investigation would continue, and Mack would likely be called to testify.

Thomsen had two, apparently brief, conversations with White. The disclosure of non-public information occurred only in the second conversation. Thomsen's uncontradicted position is that

it was not unusual for her to receive calls from persons outside the Commission about an Enforcement investigation, but generally callers did not ask about the status of an investigation, and that Morgan Stanley should have expected her to state that she could not tell them anything. (OIG-431 at 77, 80.) According to White:

> She said that again reiterated it was premature to really say anything about Mr. Mack's potential exposure, I think she had a comment on the e-mails referring to the e-mails that there was smoke but certainly not fire there on the face of the e-mails, but that it was premature to say anything about his potential exposure.
>
> I think she made a comment that because I undoubtedly reiterated the board didn't want to step into something obviously if there was a problem there and I think she made a comment the board will just have to trust him or not. Because the SEC was not going to be in a position to say anything at this juncture.

(OIG-431 Exhibit 68.)

Thomsen's explanation for disclosing information is that, after receiving the unusual request, she was concerned about the impact on Morgan Stanley and the financial markets if Morgan Stanley hired someone as CEO who Enforcement believed engaged in insider trading, and, alternatively, that Morgan Stanley might not hire a qualified individual because Enforcement indicated somehow that he was in violation of the federal securities laws. (OIG-431 at 77.) The evidence is that Thomsen believed she was faithfully carrying out her responsibilities as Enforcement Director by disclosing information that she was told was significant to an employment decision by Morgan Stanley, information which would not affect Enforcement's investigation. There are no indications that Thomsen's disclosure was committed maliciously or for gain, or was frequently repeated.

The IG places a great deal of emphasis on Thomsen's comment that there was "smoke" but "surely not fire." (OIG-431 at 85-86.) Thomsen's explanation that she was trying to convey that Mack was an actor in what Enforcement was investigating, but it did not have information to take action against him, is a reasonable interpretation. White noted the words, but there is no indication what meaning she gave to them. In the context of the conversation and surrounding circumstances, these words did not have any hidden meaning and did not disclose any more than Thomsen's other less metaphorical comments. After reviewing Mack's e-mails, Enforcement's position was unchanged; Mack remained a person of interest, but Enforcement did not have enough to prosecute at that time.

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

As one of 103 Senior Officers out of a total Commission work force of 3,649 employees, Thomsen holds a front line, prominent, and public position. (Number from David Cunningham, Office of Human Resources, October 31, 2008.) Enforcement has a long standing open-door policy that encourages people to call senior Enforcement officials. (OIG-431 at 84-85.) It was not unusual for Thomsen to take a call from someone outside the Commission about an

investigation, but it was unusual for her to be asked about the status of an investigation and to receive subpoenaed materials. (OIG-431 at 80.)

The IG does not cite to any authority for his conclusion that Morgan Stanley used information Thomsen provided to go ahead and hire Mack. White testified that Thomsen did not say anything that made her feel more assured that the Board should move ahead in hiring Mack. (OIG-431 at 79.) Based on her own investigation, White, an experienced litigator, concluded that Mack had not engaged in insider trading. (OIG-431 at 74, 77, Appendix 68 at 32.)

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

Thomsen has no prior disciplinary history. (David Cunningham, Human Resources, October 28, 2008.)

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

Thomsen has been a Commission employee in Enforcement since 1995. She is a graduate of Smith College and Harvard Law School. She has been engaged in the practice of law for nearly thirty years. She began as Assistant Chief Litigation Counsel, moved up successively to Assistant Director, Associate Director, and Deputy Director before being appointed Director in May 2005.

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

There is no indication that this event has impacted Thomsen's ability to discharge her responsibilities. As a Senior Officer, Thomsen reports to the Commission Chairman.

(6.) The consistency of the penalty with those imposed upon other employees for the same offense in like or similar circumstances, and (7.) the consistency of the penalty with agency guidance on disciplinary actions.

Neither the Office of Human Resources nor the Office of General Counsel is aware of any similar situation.

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

The publicity about this matter has not benefited the Commission.

(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.

Thomsen was aware of the non-disclosure of non-public information prohibition. Her position is that she did not reveal any non-public information. (Response of Linda Chatman Thomsen at 2, 10-19.)

(10.) The potential for the employee's rehabilitation.

Thomsen disputes that she committed any violation. There is nothing in the record that responds to this factor.

(11.) The 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.

This was a unique situation in which a major financial institution, whose services include investment banking, sales and trading, investment management, prime brokerage, and research services, was concerned that Enforcement had information that the person it was about to hire as CEO had committed insider trading violations. It knew he was being investigated by Enforcement. The unrefuted evidence is that Thomsen, acting in good faith, responded to an inquiry from White and disclosed that Enforcement had reached no conclusions about the individual. There is no evidence that disclosure impeded Enforcement's investigation, that it assisted the person being investigated, or that Thomsen expected to benefit personally from the disclosure.

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

It is reasonable to assume that the adverse publicity and angst that these matters have caused to individuals in Enforcement and the Commission will serve as a deterrent .

Conclusion:

I conclude that neither disciplinary nor performance–based action is appropriate as to Thomsen because SECR19-1 specifies an exception to the non-disclosure policy "as necessary or appropriate by members of the staff in pursuing SEC investigations, examinations, or in the discharge of other official responsibilities." The uncontradicted evidence is that Thomsen believed she was performing her responsibilities as Director of Enforcement by providing the information. Additionally, application of the Douglas factors indicates that no disciplinary action is appropriate against Thomsen for her disclosure of non-public information in these circumstances.

III. Did the Commission's Enforcement Division take insufficient actions to investigate Mack and improperly close the Pequot investigation after Aguirre was terminated because of Mack's political connections and/or prominence? (OIG-431 at 16, 87-111.)

Enforcement's Market Surveillance Group referred its concerns about possible illegalities in connection with Pequot's purchase of Heller securities and sales of GE securities in July 2001 to

Enforcement's Investigations Group. The matter began as an informal inquiry in November 2003, but did not receive much investigative attention until September or October 2004, when Aguirre was assigned to it. (OIG-431 at 29.) The Commission issued a formal order of investigation in January 2005 and a Case Closing Report was signed in Enforcement on November 30, 2006. (OIG-431 at 30.)

Aguirre believes that Mack was the tipper in an insider trading scheme and that the Commission conducted a sham investigation to give the appearance that Mack was blameless. (OIG-431 at 105.)

The materials uniformly reflect that Enforcement did not subpoena Mack before Aguirre was terminated because senior people believed Enforcement needed to have evidence to confront Mack with that established he knew about the GE/Heller transaction before the Pequot transactions occurred. Enforcement never succeeded in finding this evidence. (OIG-431 at 89, 92, 110, and Appendix 170.) This belief continued after Aguirre was terminated when the investigation continued under a new lead investigator.

The IG found:

> the evidence demonstrated that Enforcement continued to aggressively pursue the Pequot investigation after Aguirre was terminated until it was closed;
>
> the evidence is that the shift in the investigation's emphasis away from Mack following Aguirre's departure was based on a reasonable belief that other aspects were more promising; and
>
> Enforcement's explanation as to why it delayed taking Mack's testimony until after the statute of limitations had run for bringing charges against him in connection with the Pequot investigation was not credible. (OIG-431 at 110-11.)

Nothing in the IG's Report supports Aguirre's claims.

The IG does not cite any reasons for finding not credible Enforcement's explanation for taking Mack's testimony after the statute of limitations had run. (OIG-431 at 110.) I find credible the unrefuted testimony that no one paid any attention to the statute of limitations because, by that time, Enforcement did not believe it would lead to charges. Mack's testimony was taken because two Deputy Directors thought doing so would improve Enforcement's image following Congressional inquiries and a New York Times story about the Pequot investigation and the termination of Aguirre.[4] (OIG-431 at 91-93, 106, 110.) There is no evidence that casts doubt on

[4] When Mack was finally subpoenaed, Aguirre's replacement as lead investigator and the Assistant Director saw no reason to subpoena him. (OIG-431 at 92.) Mack testified for three or four hours on August 1, 2006. He denied knowing about GE's acquisition of Heller until he began working at CSFB and he denied any involvement in insider trading. (OIG-431 at 95.) The statute of limitations for criminal and civil offenses that occurred in connection with the GE acquisition of Heller expired on July 30, 2006. (OIG-431 at 96.) Enforcement got four-month

the testimony of the two Deputy Directors who made the decision, and their testimony is confirmed by others at the meeting at which the subject was discussed.

IV. Did the Commission's Enforcement Division improperly terminate Aguirre in retaliation for his complaints about preferential treatment of Mack and to block his efforts to take Mack's testimony? (OIG-431 at 16, 111-87.)

Aguirre claims that his termination was directly related to his communications with his supervisors beginning in late July 2005, regarding his concern that political considerations were blocking him from taking Mack's testimony and that Mack was receiving preferential treatment. (OIG-431 at 174-75, 181, 186.) The IG finds that, in light of all the evidence, it is not credible to find that the termination decision was totally unrelated to Aguirre's efforts to take Mack's testimony. (OIG-431 at 187.)

The Whistleblower Protection Act of 1989, as amended, 5 U.S.C. § 2302(b)(8) (1989) (Whistleblower), makes it

> a prohibited personnel practice to take or fail to take, or to threaten to take or fail to take, a personnel action with respect to any employee or applicant because of any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences:
>
> 1. a violation of law, rule, or regulation;
> 2. gross mismanagement;
> 3. a gross waste of funds;
> 4. an abuse of authority; or
> 5. a substantial and specific danger to public health or safety.

(OIG-431 at 17.)

For Aguirre to have Whistleblower protection, he would have to show by a preponderance of the evidence that Enforcement acted to terminate him because his complaints to Hanson, Kreitman, and Berger about their refusal to subpoena Mack merited Whistleblower protection as disclosures of a violation of law, rule, or regulation, gross mismanagement, or an abuse of authority.[5] Aguirre points specifically to a July 27, 2005, communication from him to Berger in which he claimed that the Pequot investigation had been halted for political reasons. (OIG-431 at 186.) I find that Aguirre has not shown that his expressions of disagreement with his supervisors about how to effectively gather evidence are protected by the language of the Whistleblower statute. Complaining about a difference of opinion among a team of lawyers on

---

tolling agreements against Pequot and two individuals, but it did not seek one against Mack because it did not think it had a case. (OIG-431 at 96, 106.)

[5] As noted in note 2 supra, Aguirre has a complaint pending before the MSPB. That complaint raises this issue for which the MSPB is the authority.

the same side of an issue is not a disclosure of a legal violation, gross mismanagement, or an abuse of authority. Moreover, the courts have held, "When an employee reports or states that there has been misconduct by a wrongdoer to the wrongdoer, the employee is not making a 'disclosure' of misconduct. If the misconduct occurred, the wrongdoer necessarily knew of the conduct already because he is the one engaged in the misconduct." Huffman v. OPM, 263 F.3d 1341, 1350 (Fed. Cir. 2001).

Even if Aguirre's expressions were protected speech, however, Enforcement has shown that it had good cause to terminate Aguirre in the absence of his complaints. The IG concluded that Enforcement had a legitimate basis for terminating Aguirre before the end of his probationary period. The IG finds substantial evidence that Aguirre was unable to work with others and that Aguirre had "conflicts in the workplace." (OIG-431 at 187.) Until the probationary period is completed, a person is an applicant for appointment and has the burden of showing it is in the public interest to finalize appointment. Until the appointment is finalized, the probationer has only limited job protections.[6]

I conclude that the record does not show that Enforcement terminated Aguirre in retaliation for his complaints about preferential treatment of Mack and to block his efforts to take Mack's testimony.

The IG refers to the fact that Aguirre was terminated shortly after being found acceptable and given a two-step pay-for-performance award. The IG rejects what I consider to be a reasonable explanation. The acceptable rating and step increase were based on Aguirre's performance in the period September 7, 2004, through April 30, 2005. (OIG-431 at 152.) Hanson and Kreitman, who made the determination, based it on supervising Aguirre from January or February through April 2005, without soliciting the negative impression from those who supervised him from September through December 2004. (OIG-431 at 125-27, 139, 152-53.) Serious concerns arose after the rating period ended. For example, in May 2005, Aguirre engaged in a dispute with the attorney in the Trial Unit. (OIG 431 at 141-42.) In June 2005, the Executive Vice President and

---

[6] The IG comments that few Enforcement employees are terminated in the probationary period. In fact, few government employees are terminated inside or outside the probationary period. "Only 1.6 percent of competitive service workers are removed in their first year of service, the traditional length of the probationary period. However, after that first year of service, the removal rate in the competitive service drops to 0.5 percent and remains there for the next two decades of service. The Probationary Period: A Critical Assessment Opportunity, MSPB (Aug. 2005). In 2005 and 2006, four Enforcement employees, in addition to Aguirre, were terminated, or resigned, after receiving a notice of proposed termination. (OIG-431 at 157.) Aguirre's first direct supervisor, a branch chief, thought he should have been fired within four months. (OIG-431 at 125.) It appears that Hanson decided to recommend that Aguirre be terminated the week of August 21, 2005, after Berger noted that the probationary period was ending and a decision had to be made on whether to keep Aguirre. (OIG-431 at 177-78.) Hanson testified that he concluded "enough was enough." Hanson considered the following factors: "Aguirre had quit so many times; he was going around Hanson to Kreitman; Eichner [a co-worker] was not getting along with Aguirre; Aguirre was creating chaos with [outside] counsel; he did not seem to be organized; and he was sometimes in tears and sometimes angry." (OIG-431 at 177.)

Chief Legal Officer of Morgan Stanley complained to Berger about Aguirre's rude and unprofessional manner and Aguirre's request that a person at Morgan Stanley keep the investigation confidential. (OIG-431 at 135-36.) An Assistant U.S. Attorney testified that Kreitman called him in July 2005, and he sensed from their conversation that Kreitman was concerned with Aguirre's conduct. (OIG-431 at 142.)

The only reasonable explanation for the supplemental evaluation that Kreitman prepared on August 1, 2005, at Berger's direction, is that Berger wanted to memorialize concerns that were not reflected in Aguirre's evaluation for the period that ended April 30, 2005. If Berger, Kreitman, and Hanson knew on August 1 that they were going to recommend terminating Aguirre before the end of his probationary period, they would have known they would not need this type of document to do so. The circumstances surrounding the supplemental evaluation reads like an Abbot and Costello routine. The IG states that the supplemental evaluation was issued, but the facts indicate it was written, but not issued. (OIG-431 at 151.) The document was prepared several weeks after the Compensation Committee met to review Aguirre's pay-for-performance award, but, even if it had been available earlier, the criticisms occurred outside the evaluation period so it is questionable what impact they would have played in the Compensation Committee's evaluation.[7] A copy was not placed in Aguirre's personnel folder. Aguirre did not receive a copy until he left the Commission. (OIG-431 at 143-45, 150-51.)

The IG found that Hanson and Kreitman failed to fulfill their management responsibilities towards Aguirre and conducted themselves in a manner that raised serious questions about the impartiality and fairness of the Pequot investigation. (OIG-431 at 187.)

The IG recounts testimony of Aguirre and some eleven persons, almost all of whom were given confidential status, that Kreitman was frequently verbally abusive, dictatorial, arbitrary, and disrespectful to the people he supervised and to outside counsel. (OIG-431 at 158-169.) The witnesses also indicated that Kreitman was vindictive and retaliated against complainers. (OIG-431 at 158-62, 166-67.) The testimony specifies that someone complained about Kreitman at least once directly to Berger, Associate Director Peter Bresnan (Bresnan), Associate Director Christopher Conte (Conte), Thomsen's counsel, and Thomsen; and that two Associate Directors and Deputy Director Walter Ricciardi observed Kreitman's unprofessional conduct at a meeting with outside lawyers. (OIG-431 at 159-61, 165-67.) Berger questioned Kreitman about the complaint in August 2005, and Kreitman provided his explanation. (OIG-431 at 170.) Kreitman acknowledged he was inappropriately aggressive on some occasions to outside counsel. (OIG-431 at 170.) Thomsen testified that she got no complaints about Kreitman's management style. (OIG-431 at 168.)

On August 23, 2005, Aguirre sent an e-mail to Thomsen, suggesting that she speak to people about the working environment in Kreitman's group. Thomsen forwarded the message to Berger who responded that Thomsen knew why four people had left Kreitman's group. Thomsen

[7] A person on the Compensation Committee stated that the supplemental evaluation would have drawn more attention if it had been in the file when the Compensation Committee met on July 18, 2005. (OIG-431 at 49.)

responded that she meant to follow up on the complaints and take steps to make sure what they did was appropriate. (OIG-431 at 168-69.)

Some of the witnesses who criticized Kreitman's behavior and conduct criticized Hanson's management style and conduct. One witness characterized Hanson as abusive. (OIG-431 at 170.) Seven unnamed witnesses claimed Hanson micro-managed and did not provide feed back or guidance. (OIG-431 at 158, 170-73.) Hanson denied being abusive or disrespectful to the named witness or others. (OIG-431 at 173.) The only person to complain to Kreitman about Hanson's management style was Aguirre. Thomsen received no complaints about Hanson's management. (OIG-431 at 174.)

The record does not support Aguirre's claims that he was improperly terminated in retaliation for his complaints about preferential treatment of Mack and to block his efforts to take Mack's testimony. In addition, the record does not show that Aguirre was terminated because he complained about his supervisors.

Hanson graduated from the University of Delaware in 1984 with a Bachelor of Science degree in Accounting. He worked with Ernst and Young for most of the period from 1984 through 1991. Hanson earned a Juris Doctor degree from the University of Maryland School of Law in 1995. After three years in the Office of Chief Counsel at the Internal Revenue Service, he joined the Commission in 1998. The record lacks any plausible support for the IG's claim that Hanson failed to fulfill his management responsibilities towards Aguirre and conducted himself in a manner that raised serious questions about the impartiality and fairness of the Pequot investigation.

All but one of the witnesses on whom the IG relies for the allegations against Hanson are unidentified. The one identified individual retired on a medical disability in October 2006. (David Cunningham Nov. 5, 2008.) According to Hanson, her allegation that he favored white male attorneys in their late twenties or thirties is false because he only supervised one person who fit this description. (OIG-431 at 171; Response of Robert B. Hanson.) On October 28-30, and on November 6, 2008, in what appear to be unsolicited actions, five of Hanson's co-workers in Enforcement – Conte, Assistant Director Yuri B. Zelinsky, Branch Chief Ivonia K. Slade (Slade), and Staff Attorneys Jim Eichner, and Ilana Z. Sultan, submitted written statements supporting Hanson. These individuals have had a positive experience working with Hanson, and, based on their first-hand experience, they represent that the allegations made against Hanson are false. As Slade notes, criticism that Hanson both micro-managed and did not give enough guidance are contradictory.

Hanson's entire work performance record at the Commission consists almost entirely of outstanding ratings, high praise, and award nominations that contradict the IG's allegations. These evaluations refer to his abilities, positive attitude, team player mentality and willingness to take on new assignments. One notes, for example, that, "[Hanson] unstintingly provides guidance and insight to other members of the section. As noted last year he is the consummate team player: he always makes major contributions, yet he unfailingly notes the contributions of others." (Response and Supplemental Response of Robert B. Hanson.)

Conclusions:

The record does not support any disciplinary and/or performance-based action against Linda Chatman Thomsen;

The record does not support any disciplinary and/or performance-based action, including removal of his supervisory responsibilities, against Robert Hanson; and

The IG's recommendation that disciplinary and/or performance-based action, including removal of his supervisory responsibilities, be taken against Mark Kreitman will be decided at a future date.