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U.S. OFFICE OF SPECIAL COUNSEL

Memorandum

DATE: May 25, 2007

SUBJECT: Analysis of Mr. Frazier's Response to OSC Prohibited Personnel Practice Report

In his sworn testimony to OSC, given March 28, 2007 (hereinafter "testimony"), Mr. Frazier stated that his primary reason for reassigning Mr. Blansitt and Ms. Lerner was to separate them because of the negative effect their "close personal relationship" (hereinafter "the relationship") was having on the Office of the Inspector General, Department of Commerce (OIG, DOC). Mr. Frazier specifically included his own loss of confidence in Blansitt's and Lerner's advice among these negative effects. In its PPP report, OSC concluded that Mr. Blansitt's complaint to the President's Commission on Integrity and Efficiency (PCIE) was *at least* a contributing factor (if not the primary factor) in Mr. Frazier's decision to reassign Blansitt and Lerner. This conclusion was based on evidence falling under the general headings of *timing, indications of animus, and significance of the Blansitt-Lerner relationship* (discussed below). In his response to the PPP report, dated May 17, 2007 (hereinafter "response"), Mr. Frazier failed to address much of this evidence; consequently, OSC's conclusion that Mr. Frazier retaliated against Mr. Blansitt and Ms. Lerner for Mr. Blansitt's complaint to PCIE in violation of 5 U.S.C. § 2302(b)(8) is bolstered.

1. In his response, Mr. Frazier made the point that the issues of the Blansitt-Lerner relationship and Mr. Blansitt's abrasive leadership style "merged" over time and became a single source of office problems. In his testimony, Mr. Frazier had asserted that several of his senior subordinates had made "numerous" complaints to him about the relationship, which motivated him to make the reassignments. While there was ample corroboration of Mr. Blansitt's negative management style and of the fact that his close relationship with Lerner generated much office gossip, the testimony of the senior subordinates named by Mr. Frazier suggested that Mr. Blansitt's leadership was of greater concern to them, that they spoke with Frazier about this issue on several occasions, but that they had rarely spoken with Frazier about the relationship. Testimony also showed that the issue of Mr. Blansitt's leadership predated the relationship.

Ultimately, the issue of whether these two problems "merged" is irrelevant, because OSC found retaliation based on the following factors, which Mr. Frazier failed to rebut in his response:

- *Timing:* While Mr. Frazier testified that he had concerns about the relationship and Blansitt's leadership dating back to summer-fall of 2005, he took no action to remedy the situation until early October 2006, less than 3 weeks after Blansitt informed him of the PCIE complaint (September 18, 2006). (Regarding a second reason Mr. Frazier gave in his response for reassigning Blansitt—the breakdown in their relationship—Mr. Frazier stated that he had lost faith and confidence in Mr. Blansitt “long before” September 2006).

- *Indications of Animus:*
 - (1) Almost immediately after Mr. Blansitt informed Mr. Frazier that he had made the PCIE complaint about Mr. Frazier's travel, Mr. Frazier ordered amendment of the process for approval of his (Frazier's) official travel; the amendment eliminated Mr. Blansitt as a required approval authority. Mr. Frazier said this was done so Blansitt would not be “in a position of power any longer that he could use this somehow.”

 - (2) More importantly, two witnesses testified that Mr. Frazier admitted to them that Blansitt's PCIE complaint was a reason Frazier had ordered the reassignments. Significantly, Mr. Frazier does not address these statements in his response. One of these witnesses was particularly credible because she was appointed by Mr. Frazier to replace Mr. Blansitt as Deputy IG.

- *Significance of the Relationship:* Several items of evidence suggested that the relationship was of less importance than Frazier claimed in his decision to reassign Blansitt and Lerner, and Frazier's statements to the contrary are less than credible:
 - (1) Mr. Frazier said that the relationship first became an issue with him in summer-fall of 2005. At that time, Ms. Lerner was detailed as acting AIG (Audit). Mr. Frazier said he did not select Lerner for permanent AIG (Audit) because of her poor performance, which Mr. Frazier attributed to her close relationship with Mr. Blansitt. Despite this, Mr. Frazier selected Ms. Lerner as Counsel to the IG, which resulted in her elevation to SES, her relocation to the office adjacent to Mr. Blansitt's, and Mr. Blansitt's continuation as her immediate supervisor. Indeed, Mr. Frazier's “Exhibit A,” attached to his response to OSC's PPP report (“Executive Pay Rate Analysis,” prepared at the time Lerner was appointed as Counsel to the IG), describes Ms. Lerner's performance in glowing terms, and makes no mention of concerns about her performance or her relationship with Mr. Blansitt; concerns which Mr. Frazier purports to have entertained at the time.

 - (2) Mr. Frazier never documented his alleged concerns about the Blansitt-Lerner relationship, his alleged loss of confidence in Blansitt and Lerner, or the

breakdown in his relationship with Blansitt. (He also never documented any deficiencies in Mr. Blansitt's 2006 performance, which he highlights in his response.)

(3) In his testimony, Mr. Frazier admitted that he did not mention the relationship or any of the other concerns he now highlights in his response when he first informed Blansitt and Lerner, in early October 2006, that he was reassigning them. Instead, he gave them other reasons not mentioned in his response for his decision to reassign them.

2. In his response, Mr. Frazier stated that his reassignment of Ms. Lerner was unrelated to Mr. Blansitt's complaint. Rather, he said he reassigned her because he lost trust and confidence in her as a result of her relationship with Mr. Blansitt. OSC's reasons for doubting the significance of the relationship as a factor in the reassignments are discussed above. Ms. Lerner's reassignment was linked with Mr. Blansitt's complaint based on Mr. Blansitt's testimony that Mr. Frazier specifically voiced his belief in Lerner's involvement during the Frazier-Blansitt September 18, 2006 meeting. While Mr. Frazier denied making such a statement, he stated in his testimony that he believed that Blansitt and Lerner were so close that "if I had to speculate [about Lerner's involvement with the complaint], I'd have to say yes." Based on the evidence, OSC concluded that Mr. Frazier did in fact speculate about Lerner's involvement, and that her perceived role in Mr. Blansitt's protected communication was a factor in her reassignment.

3. In his response, Mr. Frazier cited other reasons for the reassignments: his impending retirement and the breakdown in his relationship with Mr. Blansitt. In his 5-hour interview during the OSC investigation, Mr. Frazier made no mention of his retirement as a factor in his decision to make the reassignments. While he referred to the deterioration of his relationship with Blansitt, he did not (as he does in his response) cite it as a reason for the reassignments distinct from his desire to separate Blansitt and Lerner. In any event, like the issues of the Blansitt-Lerner relationship and Blansitt's leadership style, these were factors that were present over an extended period. For the reasons discussed above (timing; indications of animus), these explanations did not alter OSC's conclusion that Mr. Blansitt's PCIE complaint was a motivating factor in Mr. Frazier's personnel actions involving Mr. Blansitt and Ms. Lerner.

4. In his response, Mr. Frazier stated his belief that Blansitt's and Lerner's reassignments were not adverse personnel actions and that Mr. Blansitt's diminished 2006 bonus was based on deficiencies in Mr. Blansitt's 2006 performance. While these matters are primarily relevant to the question of the appropriateness of corrective action rather than disciplinary action (which is at issue here), OSC offers the following comments:

- Mr. Frazier argued that the reassignments were not demotions because they involved no change in pay and because employees of SES rank are “intertransferrable.” However, in his testimony, Mr. Frazier admitted that the reassignments could be perceived as demotions within the hierarchy of OIG, DOC. Further, pursuant to 5 U.S.C. § 2302(a)(2), *any* reassignment is a “personnel action” within the purview of whistleblower reprisal prohibitions.
 - Contrary to his assertion in his response, Mr. Frazier was given the opportunity to discuss his reservations about Mr. Blansitt’s 2006 self-evaluation, and did. However, this was within the context of Mr. Frazier’s decision regarding Mr. Blansitt’s bonus, rather than the reassignment decision. Additionally, as with his other criticisms of Mr. Blansitt, Mr. Frazier produced no documentation of these concerns.
5. Mr. Frazier’s response raises other issues that require clarification:
- Mr. Frazier mentioned that PCIE had “cleared” him of any wrongdoing regarding his August 6-13, 2006 trip, suggesting that this renders Mr. Blansitt’s belief that there were irregularities unreasonable. First, OSC is unaware of any final determination by PCIE in this matter. Second, case law clearly indicates that, at the time of the complaint, the complainant’s belief in the existence of wrongdoing need not be “right,” merely reasonable. In this case, OSC considered Mr. Blansitt’s belief to be reasonable at the time of his complaint based on several factors. Finally, OSC’s review of the trip in question revealed facts that raised reasonable questions: among them, Mr. Frazier testified to returning to Washington, D.C. on August 12 whereas his train ticket showed he returned August 13; and Mr. Frazier’s account of his activities on Thursday, August 10 suggested that he had several meetings in New York, whereas he spoke with one person for approximately one hour and then spent minimal time working on a computer, and then left the office.
 - Mr. Frazier suggests that, despite Mr. Blansitt’s e-mail of September 17 informing him that Blansitt had taken the travel issue to the PCIE, he was unaware that the complaint had been made. However, Mr. Frazier admitted in testimony that he was aware, after receiving this e-mail and meeting with Mr. Blansitt on September 18, that there was at least a possibility that the complaint had been made. In this regard, case law has held that taking a personnel action against an employee who has expressed an intent to make a protected disclosure is a prohibited personnel practice just as is retaliation against an employee who has already made such a disclosure.