ONE HUNDRED TENTH CONGRESS

U.S. House of Representatives
Committee on Energy and Commerce
Washington, DC 20515–6115

JOHN D. DINGELL, MICHIGAN
CHAIRMAN

August 7, 2007

The Honorable Carlos M. Gutierrez
Secretary
U.S. Department of Commerce
1401 Constitution Avenue, N.W.
Washington, D.C. 20230

Dear Mr. Secretary:

Since March 2007, the Committee on Energy and Commerce and its Subcommittee on Oversight and Investigations has been investigating allegations against a number of senior officials within the Department of Commerce's (DOC) Office of Inspector General. As a result of our inquiry and that of the Office of Special Counsel (OSC), Inspector General Johnnie Frazier suddenly announced his resignation on June 7, 2007, to be effective June 29, 2007.

We are writing you today because you have permitted Elizabeth Barlow, the Deputy Inspector General, to serve as the Acting Inspector General since June 29, 2007, despite the fact that she is the subject of numerous allegations of misconduct and that she obtained her position as Deputy Inspector General as part of the discredited actions of Frazier to punish Edward Blansitt, his former Deputy Inspector General, and Allison Lerner, his former Counsel.

We are troubled by your action and wonder whether you have been fully briefed by your staff concerning our investigation or the findings of OSC, which we have attached. As that report indicates, OSC determined that Barlow's elevation by Frazier to the position of Deputy Inspector General was part of a plan by Frazier to punish Blansitt and Lerner for refusing to approve Frazier's questionable travel. Rather than rewarding Blansitt and Lerner for their actions, or attempting to redress their illegal punishment at the hands of the former Inspector General, Ms. Barlow has been rewarded for her involvement in Frazier's illegal scheme. This makes a mockery of the OSC investigation as well as long established whistleblower protection statutes.

This is particularly disturbing since the Committee has learned that OSC recently recommended corrective relief for Blansitt and Lerner to the Office of General Counsel, including restoring them to their original positions. We were shocked by DOC's response. Rather than making any effort to right the wrongs committed by the former Inspector General, it appears the Office of General Counsel advised OSC to negotiate any corrective action with Elizabeth Barlow, the individual who directly benefited from Frazier's acts. This presents an obvious conflict of interest.

We are concerned by the indifference apparently shown to the plight of Mr. Blansitt and Ms. Lerner, as well as other well-meaning members of the staff of the Office of Inspector General who undoubtedly recognize the absurdity of the current situation. While current departmental policies and procedures may require that an Inspector General vacancy be filled by the Deputy Inspector General until a Presidential appointment is made, such policies are clearly not appropriate in this situation, nor should they prevent the immediate appointment of another individual—who is not tainted by scandal or conflicts of interest—to Acting Inspector General.

Accordingly, under Rules X and XI of the Rules of the House of Representatives, we request that you provide detailed responses to the following items/questions within one week from the date of this letter:

(1) Describe any and all briefings, reports, recommendations, advice, and information that you provided to any official in the Executive Branch, relating to the selection or appointment of an interim, acting, or permanent Inspector General.

(2) Provide any records related to and describe any and all briefings, reports, recommendations, advice, and information that you received from your Deputy Secretary, Office of General Counsel, or Office of Inspector General relating to:

   a) Elizabeth Barlow;
   b) Edward Blansitt;
   c) Allison Lerner.

(3) Provide any records related to and describe any meetings concerning the Office of Special Counsel's investigation of Johnnie Frazier, including but not limited to, any meetings concerning OSC's recommendation that Blansitt and Lerner be reinstated to their previous positions.

(4) Provide any records related to and describe what efforts DOC has taken to appoint an acting Inspector General in lieu of Elizabeth Barlow.

Please note that, for the purpose of responding to these requests, the terms "records" and "relating" should be interpreted in accordance with the attachment to this letter.

We thank you for understanding the seriousness of our request. If you have any questions, please contact us or have your staff contact Steven Rangel with the Committee on Energy and Commerce staff at (202) 226-2424 regarding any questions and the delivery of the requested documents.

Sincerely,

John D. Dingell
Chairman

Bart Stupak
Chairman
Subcommittee on Oversight and Investigations

Attachment

cc: The Honorable Joe Barton, Ranking Member
Committee on Energy and Commerce

The Honorable Ed Whitfield, Ranking Member
Subcommittee on Oversight and Investigations

ATTACHMENT

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

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

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

www.osc.gov

The Special Counsel

May 25, 2007

The President
The White House
1600 Pennsylvania Avenue
Washington, D.C. 20500

Re: OSC File Nos. MA-07-0679 and MA-07-0680

Dear Mr. President:

I received a referral from the President's Council on Integrity and Efficiency (PCIE) to investigate allegations that the Department of Commerce Inspector General Johnnie E. Frazier retaliated against two employees, former Deputy Inspector General Edward Blansitt, III and former Counsel to the Inspector General Allison Lerner, for their whistleblowing activities in violation of 5 U.S.C. § 2302(b)(8). Mr. Blansitt and Ms. Allison alleged that, among other actions, Inspector General Frazier removed them from their high-level positions and reassigned them to lesser positions because Blansitt disclosed information he reasonably believed evidenced violations of law, rule or regulation, or an abuse of authority, concerning IG Frazier's travel improprieties, to the PCIE, and that IG Frazier perceived that Lerner was working with Blansitt in making this disclosure. The issues concerning the travel in question, its legality and the proper or improper accounting for time and attendance, are currently under review by the PCIE; we do not address them here other than as an explanation of IG Frazier's motive for retaliating against Blansitt and Lerner. Nevertheless, our investigation did reveal problems with Mr. Frazier's travel that was the subject of the PCIE complaint filed by Mr. Blansitt.

The Office of Special Counsel has completed its investigation into the whistleblower retaliation allegations, and as discussed in the attached Report of Prohibited Personnel Practices, I have determined that Inspector General Frazier committed prohibited personnel practices when he reassigned Mr. Blansitt and Ms. Allison in retaliation for their protected disclosures. In accordance with 5 U.S.C. § 1215(b), I am transmitting the attached Report of Prohibited Personnel Practices, a copy of Inspector General Frazier's Response to OSC's Report of Prohibited Personnel Practices, and our Analysis of Mr. Frazier's Response, finding it generally unpersuasive, and in several critical areas, completely unresponsive.

Inspector General Frazier's violations of the Whistleblower Protection Act are of grave concern given the position of trust he holds both as a Presidential appointee and as the Inspector General of the Department of Commerce. Congress structured the Office of Inspector General to promote independence and objectivity in carrying out its obligation to prevent and detect fraud and abuse. Here, the very official charged with preventing and detecting fraud and abuse has compromised the integrity of the office by apparently using his official position not only for his own personal gain (the travel and time and attendance issues under separate review by the PCIE)

but also to silence those who have acted in accordance with their statutory obligation to expose such wrongdoing.

With respect to the ongoing PCIE investigation, please be advised that any information that my office has regarding the underlying travel related misconduct issues involving Inspector General Frazier's activities will be sent to PCIE.

Protecting employees from whistleblower retaliation is the cornerstone of the Whistleblower Protection Act. According to our statutes, it is the special mission of OSC to protect whistleblowers from reprisal for bringing to light violations of law, rule, or regulation, or abuse of authority, among other things. If whistleblowers do not know that our government takes reprisal seriously, they will be discouraged from improving our government efficiency, transparency and accountability.

Engaging in such retaliation is contrary to the leadership role of the Inspector General and cannot be reconciled with the intent and purpose of the Inspector General Act. Accordingly, I recommend that appropriate action be taken against Inspector General Frazier for his serious violations of the Whistleblower Protection Act and abuse of his position.

Respectfully,

Scott J. Bloch
Special Counsel

cc: Inspector General Johnnie E. Frazier

Enclosures

U.S. OFFICE OF SPECIAL COUNSEL
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The Special Counsel

May 4, 2007

The Honorable Johnnie E. Frazier
Inspector General
U.S. Department of Commerce
14th and Constitution Avenue, N.W.,
HCHB 7898-C
Washington, D.C. 20230

Re: OSC File Nos. MA-07-0679 and MA-07-0680

Dear Inspector General Frazier:

As you know, I received a referral from the President's Council on Integrity and Efficiency (PCIE) to investigate allegations that you retaliated against two employees, Edward Blansitt, III and Allison Lerner, for their whistleblowing activities in violation of 5 U.S.C. § 2302(b)(8). Mr. Blansitt and Ms. Allison alleged that, among other actions, you removed them from their high-level positions and reassigned them to lesser positions because Blansitt disclosed information he reasonably believed evidenced violations of law, rule or regulation, or an abuse of authority, concerning your travel improprieties, to the PCIE; Lerner alleges that you perceived her to be working with Blansitt in making this disclosure. The issues concerning the travel in question, its legality and the proper or improper accounting for time and attendance, are currently under review by the PCIE; we do not address them here other than as an explanation of your motive for retaliating against Blansitt and Lerner.

The Office of Special Counsel (OSC) has completed its investigation into the whistleblower retaliation allegations, and as discussed in the attached Report of Prohibited Personnel Practice, I have determined that you committed prohibited personnel practices when you reassigned Mr. Blansitt and Ms. Allison in retaliation for their protected disclosures. You have seven days from the date of this letter to provide OSC with a response to the Report of Prohibited Personnel Practice. As required by law, 5 U.S.C. § 1215(b), I will transmit any response you provide and the attached Report of Prohibited Personnel Practice to the President along with my recommendation that the President take appropriate disciplinary action against you for your egregious violations of the Whistleblower Protection Act.

If you have any questions regarding this matter, you may contact James Byrne, Deputy Special Counsel at (202) 254-3600.

Sincerely,

Scott J. Bloch
Special Counsel

Enclosure

U.S. OFFICE OF SPECIAL COUNSEL

Memorandum

U.S. Office of Special Counsel
Report of Prohibited Personnel Practice
OSC File Nos. MA-07-0679/0680 (Edward Blansitt & Allison Lerner)

Gregory A. McClelland
Attorney/Investigator

2007

INTRODUCTION

This report contains the investigative findings in OSC File Numbers MA-07-0679/0680, complaints of prohibited personnel practices filed by Edward Blansitt and Allison Lerner. The complainants alleged that they were reassigned to lesser positions and given bonuses not commensurate with their peers and with past practice in retaliation for a Mr. Blansitt's communication to the President's Council on Integrity and Efficiency (PCIE) of suspected travel fraud by Mr. Frazier. We investigated to determine whether the Inspector General (IG), Department of Commerce (DOC) committed a prohibited personnel practice under 5 U.S.C. § 2302(b)(8).

I. FACTUAL FINDINGS

One of Mr. Blansitt's duties as Deputy Inspector General (DIG) was to review and approve, by his signature, Mr. Frazier's official travel orders and vouchers. Mr. Blansitt testified that he had questions regarding an official trip Mr. Frazier made to Boston and New York from August 6 through 13, 2006 [referred to herein as "the trip"]—primarily questions about activities Mr. Frazier conducted after the first weekday of the trip (August 7). Mr. Frazier submitted his voucher for this trip for approval on August 25, 2006. Uncontested evidence confirmed that Blansitt asked Frazier to account for his activities during the trip in a meeting between Blansitt and Frazier in Frazier's office on September 6, 2006.[1]

While there is agreement that the meeting occurred, there is disagreement in testimony about several key facts regarding the meeting: (1) While Blansitt said the meeting was lengthy—lasting some 2 hours—Frazier testified that he was "on his way out the door" to leave on vacation, and the meeting lasted only about 15 minutes. (2) Blansitt testified that he asked Frazier about his activities during the trip several times in the course of the meeting. Blansitt said Frazier kept "dancing around the issues"; that a brief listing of Frazier's activities would have sufficed, but Frazier would not provide this; and that Frazier kept "putting it back on [Blansitt], saying [Blansitt] should have asked for this information before the trip rather than waiting until it was over." Frazier stated that he told Blansitt that Blansitt already knew what he had done on the trip because they had discussed it in detail prior to the trip, but he nevertheless gave Blansitt an "overview" of his activities, mentioning agencies he had visited. Frazier confirmed that he told Blansitt he should have asked about the details of the trip *before* signing the travel order. (3) Blansitt said that at this meeting, Frazier cautioned him not to discuss his concerns about the trip with Lerner. Frazier denied this.

Uncontested evidence shows that Frazier was on vacation from September 7 (Friday) through September 12 (Tuesday), 2006, returning to the office on September 13 (Wednesday), and that Blansitt made one additional request to Frazier for information

[1] Pursuant to 5 U.S.C. § 3392(c), as a career appointee in the Senior Executive Service (SES), appointed by the President with the advice and consent of the Senate as Inspector General, Mr. Frazier had the option of continuing to have the SES provisions relating to leave, among other benefits, continue to apply to him after his confirmation. He exercised this option.

about the trip in an e-mail sent to Frazier on September 12. The September 12 e-mail read, in part, "Johnnie, as we discussed last Wednesday, more information is needed in order to review and process the travel voucher. . . . A copy of the meeting agendas or a list of meetings or other activities and the times they were conducted would be sufficient. . . ." It is also uncontested that Frazier did not respond to this e-mail until after Blansitt sent Frazier a further e-mail dated September 17 stating that he (Blansitt) had referred the matter to the PCIE. There is disagreement as to what ensued between these two e-mails: Blansitt said he made several attempts to talk to Frazier in person but that Frazier "avoided" him; Frazier denied avoiding Blansitt.

In the e-mail to Frazier dated September 17, 2006 (Sunday), Blansitt stated that, having not received the requested information from Frazier, he had "taken the step I believe is appropriate which is to refer the matter to the PCIE. . . ." He attached a copy of a letter addressed to PCIE dated September 16, 2006 (Saturday).

Blansitt cited several factors as contributing to his belief that there were irregularities related to Frazier's August trip to Boston and New York: (1) Frazier's apparently evasive reaction to requests to account for his activities during the trip. (2) Blansitt stated that he asked several Office of the Inspector General (OIG) employees who were usually knowledgeable about or involved in Frazier's official travel for information about Frazier's activities during the August trip, but they were unable to provide it. (3) Blansitt stated that he had heard gossip—both in the interagency IG community about Frazier's general official travel practices and within OIG, DOC about this particular trip—that contributed to his own suspicions about the trip. (4) Blansitt's perception (corroborated by some other witnesses) that Frazier was less forthcoming in the information he provided to his staff about this trip as compared to past trips.

Blansitt and Frazier both testified that they met on September 18 (Monday), and that they discussed Blansitt's concerns about the trip and Blansitt's referral of the matter to PCIE. Here again, testimony varied regarding details. (1) Frazier said that despite the language in the September 17 e-mail, Blansitt told him he had not yet submitted the matter to PCIE and that they could "work this out" (Frazier expressed ignorance as to what Blansitt meant by this expression). Blansitt testified that he had already mailed his complaint to PCIE on the morning of September 18, before meeting Frazier, and he denied saying anything could be "worked out" or anything else that might lead Frazier to believe the complaint had not been submitted to PCIE. (2) Blansitt testified that Frazier said to him during this meeting, "If you challenge my integrity, I can't work with you as Deputy," and that he (Frazier) knew Lerner was involved in filing the complaint with PCIE. Frazier denied the quoted words and denied any knowledge of Lerner's involvement, although he testified that anything he told Blansitt would immediately be communicated to Lerner and vice versa, so "if I had to speculate [about Lerner's involvement], I'd have to say yes." Frazier said that after this meeting, "I didn't have a clue that [Blansitt] had [sent the complaint to PCIE]." On closer questioning, Frazier admitted that he knew on September 18 that there was at least a possibility that the complaint had been submitted to PCIE.

On September 19, 2006, Frazier sent an e-mail to Blansitt purporting to detail his activities the week of August 6 to 13, making specific reference to Blansitt's September 12 request for information. In a second portion of the e-mail, Frazier speculated as to what had caused the "colossal breakdown in our relationship," citing Blansitt's anger when Frazier had counseled him about the "appearance of an inappropriate relationship" between Blansitt and Lerner.

After the September 18 meeting with Blansitt, Frazier instructed his Assistant Inspector General (AIG) for Administration (Jessica Rickenbach) to revise the procedures for approval of official travel "after learning that the Deputy Inspector General had concerns about my travel in August." Rickenbach produced a draft of a new procedure by September 27. Frazier's stated purpose in directing this change was to "develop an even more stringent procedure to provide exceptional transparency and additional layers of review" of his official travel. In fact, the new procedure removed the DIG (still Blansitt at the time) as a *required* signatory of Frazier's official travel orders and vouchers, replacing him with Rickenbach (in addition, any *one* of several "SES-level managers," who included Blansitt, was required to review and initial the documents). When asked why he had removed Blansitt as the required signatory, Frazier said he "wanted to make certain that Ed [Blansitt] would not be in a position of power any longer that he could use this somehow." When asked to explain this statement, Frazier stated, "I thought he had an alternate agenda. He should have checked my agenda before the trip—if you're not going to do your job, I need to put someone in there who will."

Frazier testified that he decided to reassign Blansitt and Lerner "the first or second week of October [2006]." He stated that he reassigned Blansitt because "I came to the conclusion that Ed [Blansitt] was not going to separate himself from Allison [Lerner]." His testified that his reason for reassigning Lerner was that he "lost confidence that [she] could give him an independent opinion . . . [and that she] had become counsel to the Deputy IG [rather than] the IG."

Testimony of witnesses interviewed—to include Blansitt and Lerner—established that there was a close relationship. Blansitt and Lerner were often together during working hours and during lunch and coffee breaks, and Blansitt often accompanied Lerner to her car after work. Blansitt and Lerner also often had similar opinions on work-related issues. Some testimony suggested that they coordinated their positions on issues and tried to impose their views on others, that Blansitt treated Lerner better than his other subordinates, and that there was office gossip about a romantic relationship. Blansitt and Lerner denied a romantic relationship, but acknowledged that they often "thought alike" and that they were often in each other's company.

According to Lerner, Frazier notified her of his intent to reassign her to the position of Deputy AIG (Audit) on October 4 or 5, 2006. She said the only reason he gave for her reassignment was that he needed her expertise in working with "high profile audits with congressional interest," and that he said nothing about her relationship with Blansitt. Frazier confirmed Lerner's testimony about the rationale he gave for her reassignment, stating, "I was putting the best face on the situation." He testified that he did not

remember whether he mentioned her relationship with Blansitt or his (Frazier's) loss of confidence in Lerner's counsel at this meeting.

Frazier testified that he approached three subordinates about his plans to change DIG after his September 18 meeting with Blansitt, but prior to informing Blansitt of his reassignment: Judith Gordon, AIG for Systems Evaluation; Jill Gross, AIG for Inspections and Program Evaluation; and Lisa Barlow, then AIGI, now DIG.

Frazier testified that he asked Gordon whether she would be interested in the DIG job, but did not tell her why he was reassigning Blansitt. Gordon testified that Frazier told her that he was reassigning Blansitt to AIGI because Investigations needed administrative and managerial leadership, which Blansitt could provide, and that Lerner would be Deputy AIG Audit to assist the AIG (Audit), who was new to the organization. Gordon said she did not believe these explanations because Blansitt's and Lerner's new positions were clearly demotions within the organization. Gordon said she initially speculated that the reassignments were made because Blansitt's and Frazier's relationship had deteriorated, to separate Blansitt and Lerner, or because of Blansitt's abrasive management style. She said Rickenbach later told her that Blansitt had lodged a complaint against Frazier based on Frazier's official travel, and that this was the reason for the reassignments.

Frazier said he told Gross he was reassigning Blansitt, but "I didn't have to tell her why—her prayers have been answered." Gross confirmed that Frazier had not given her an explanation at the time for the reassignment. She speculated that it may have been because of Blansitt's personality and management style. When asked if she thought the Blansitt-Lerner relationship played a part, she answered that it may have, but she could not pinpoint any statements by Frazier that made that link.

Frazier said he offered the DIG position to Barlow and she accepted. He said he told her, "I'm going to reassign Ed [Blansitt] so I can deal with the Allison and Ed situation." Barlow testified that in more than one conversation in late September to early October 2006, Frazier spoke with her about the possibility of reassigning Blansitt. She said Frazier cited several reasons for doing this, to include his deteriorating relationship with Blansitt and the Blansitt-Lerner relationship (Barlow: "this was the first time he acknowledged being troubled by [the relationship]"). Barlow said that in the course of these discussions, Frazier also told her of Blansitt's withholding of his approval for Frazier's travel voucher and Blansitt's stated intention to refer the matter to PCIE. With regard to Blansitt's reassignment, Barlow testified that she believed the travel matter was "the straw that broke the camel's back." She stated that Frazier had made it clear that Blansitt's challenge of him on the travel issue was a factor in his decision to reassign Blansitt.

On October 13, 2006, Frazier informed Blansitt of his reassignment from DIG to AIGI. Frazier testified that the only explanation he gave Blansitt about why he was being transferred was that it was in the best interests of the organization. Blansitt testified that when he asked Frazier why he was being reassigned, Frazier replied that the AIGI

position was a "management job." Blansitt also said Frazier informed him that he (Frazier) had offered the DIG position to Gordon and Gross, and that they had refused.

Frazier announced the reassignments (Blansitt to AIGI, Lerner to Deputy AIG (Audit), Barlow to DIG, all effective November 2) at the senior staff meeting on October 16, 2006. The explanation he gave for the assignments was that they would improve the operation of the office.

Rickenbach testified that Frazier told her about the projected reassignments in "mid-October" 2006. She said the reason he gave for the reassignments was the Blansitt-Lerner relationship; specifically that this relationship deprived him (Frazier) of the independent advice of Blansitt and Lerner and that it had become a liability to the organization. Frazier did not mention this conversation in his testimony.

Lerner testified that Frazier gave her her performance evaluation in late October 2006. She stated that he "raved" about her performance, spent most of the session "ranting" about his dissatisfaction with Blansitt, and told her, "I had to separate [you and Blansitt; you'll learn from this." Lerner said Frazier did not mention his earlier stated reason for reassigning her ("high profile audits"). Frazier's only testimony about this meeting was to confirm the validity of a comment he said Lerner had made about a "loss of chemistry" between Lerner and himself.

Susan Carnohan, former Director Congressional Liaison & Communications, DOC, testified that she went to Frazier on November 6, 2006 and requested a transfer. She said Frazier mentioned the reassignments, saying, "I had to get Ed Blansitt out of here. I have no confidence in him. . . .There are e-mails [gesturing toward his computer screen]. . . . I had to move Allison too, because I had to get her away from Ed." Frazier denied making any reference to e-mails at this meeting, and said he would have given Carnohan the same explanation he gave the rest of the staff.

In early December 2006, Frazier received notice from the PCIE that he was under investigation for the issues raised by his August 6-13 trip to Boston/NY. A junior subordinate testified that Frazier told her about the investigation, whereupon she asked him, "is that why you reassigned Ed [Blansitt]?" According to the subordinate, Frazier replied, "Yes. I had to get him the hell up out of here."

Frazier testified that he reassigned Blansitt and Lerner in November 2006 because of the negative effects their relationship was having on the organization. He said the relationship became an issue for him starting in the summer of 2005, when Lerner was detailed as acting chief of the auditing division. Frazier said that Lerner allowed Blansitt to effectively "run" the auditing division, so Frazier removed Lerner from this position and told her in October 2005 that he would not select her for the AIG (Audit) position, which was then vacant. Frazier testified that at that time he counseled both Lerner and Blansitt on the fact that their close relationship was creating a bad appearance and was interfering with their professional independence. Lerner denied that Frazier had

counseled her regarding her relationship with Blansitt at the time, or that he in any way linked the relationship to her non-selection as AIG (Audit).

Frazier testified that he communicated his concerns about the relationship to Blansitt "three or four times" between the summer of 2005 and the time of his decision to reassign Blansitt and Lerner in October 2006. He said he spoke with Lerner about this issue only once during that time—upon removing her from the auditing position in October 2005. Frazier explained that he felt he didn't have to directly address the issue with Lerner because Blansitt was the senior member of the pair and Frazier believed that whatever he said to one was immediately communicated to the other. Frazier testified that he did not produce any documentation of these conversations either in performance reviews or counseling records.

After removing Lerner from the acting chief of auditing position, allegedly because her relationship with Blansitt had resulted in her failure to effectively do the job, Frazier testified that he assigned Lerner as Counsel to the IG "as a consolation prize." As Counsel, she was elevated from GS-15 to SES rank, still supervised directly by Blansitt, and installed in an office adjacent to the office of the DIG (Blansitt).

Frazier pointed to several events as increasing his concerns about the Blansitt-Lerner relationship to the point where he decided to reassign both parties. He said that Blansitt, Lerner, and others were scheduled to go on an official trip together in November or December 2005. Frazier decided to remove Lerner from the trip, a decision to which he said Blansitt reacted angrily. At an "all-hands" conference in Philadelphia in June 2006, attended by most of the personnel in the Washington office, Blansitt, Lerner, and Carnohan spent much time together, apart from the other attendants, which generated much gossip about Blansitt and Lerner.

Frazier said he finally made the decision on the reassignments because he was being "besieged" by complaints from his staff about the relationship. He specifically said Gross complained to him about the relationship "almost weekly," Barlow "multiple times," and Rickenbach "on numerous occasions." Testimony of these witnesses did not support these statements. Gross, Barlow, and Rickenbach (as well as other witnesses) drew a distinction between Blansitt's personality and management style (variously described as "nasty," "demeaning," and "insulting") and the effects of his relationship with Lerner on the office. While they all testified to talking to Frazier about the former issue, Gross said she didn't remember discussing the relationship with Frazier except possibly once or twice in passing; Rickenbach said she never approached Frazier about the relationship; and Barlow likewise said she didn't remember talking with Frazier about the relationship at any time before "the last 6 months." All three of these witnesses said that their main concern was Blansitt's abrasive management style rather than the relationship, and all three testified to hearing Frazier make few, if any comments about the Blansitt-Lerner relationship.

II. ANALYSIS

Blansitt and Lerner alleged that Frazier reassigned them to lesser positions within the organization and gave them diminished bonuses and pay increases in retaliation for Blansitt's disclosures to PCIE. Under the Whistleblower Protection Act of 1989, it is a violation of 5 U.S.C. § 2302(b)(8) to take or fail to take any personnel action against an employee because of any disclosure of information by an employee, which the employee reasonably believes evidences a violation of law, rule or regulation, gross mismanagement or other wrongdoing identified in that section.

A violation of section 2302(b)(8) exists where: (1) the employee disclosed information that he or she reasonably believed evidenced a violation of law, rule, or regulation or other wrongdoing identified in the statue, (2) the acting official had actual or constructive knowledge of the protected disclosure, (3) the acting official took a personnel action, and (4) the protected disclosure contributed to the personnel action. Rutberg v. Occupational Health and Safety Administration, 78 M.S.P.R. 130, 136 (1998); Marano v. Department of Justice, 2 F.3d 1137 (Fed.Cir. 1993).

Blansitt's disclosure to PCIE was a protected disclosure because he reasonably believed that Frazier had committed travel irregularities. This belief was reasonable based on several factors: (1) Frazier's apparently evasive reaction to reasonable questions from Blansitt about his (Frazier's) activities during the Boston/NY trip; (2) the lack of knowledge on the part of others in the office (especially those who regularly prepared supporting materials for Frazier) regarding what Frazier was doing on the trip; (3) "gossip" and speculation about the official purpose of this trip as well as Frazier's past trips both within and outside the office; (4) the perception of at least some witnesses that Frazier's public account of this trip was less comprehensive and detailed than those of other trips.

While Frazier denied that he knew Blansitt had referred the travel matter to PCIE, he admitted he knew it was a possibility. Furthermore, while we can never be certain what was said in the meeting between Blansitt and Frazier on September 18, 2006, the written record (Blansitt's e-mail message to Frazier of September 17) supports Blansitt's account that he had submitted his complaint to PCIE prior to talking to Frazier.

Although Frazier said he did not consider Blansitt's and Lerner's reassignments as demotions because they maintained their pay grades, and, in Frazier's words, SESs are "intertransferable," the evidence suggests that, within the hierarchy of the office, the reassignments were downgrades. Frazier conceded in testimony that, "in the sense that [Blansitt] was Deputy IG and now he's an Assistant IG" it could be perceived as a demotion. In Lerner's case, she left a position in which she was head of a division within the office and became the deputy head of another division. In any case, a reassignment is explicitly identified by statute as a "personnel action" for purposes of prohibited personnel practice analysis (5 U.S.C. § 2302(a)(2)(A)(iv)).

Several pieces of evidence suggest that Blansitt's disclosure of information that he reasonably believed evidenced a violation of law, rule, or regulation, and an abuse of authority, to PCIE about Frazier's travel contributed to Blansitt's and Lerner's reassignments.

(1) *Timing*: Frazier testified that he made the decision to reassign Blansitt and Lerner in the first or second week of October 2006. This was 2 to 3 weeks after the September 17 e-mail and the September 18 meeting in which Blansitt revealed his intention to disclose the travel issues to PCIE. Regarding the matter which Frazier argued was the basis for the reassignments—the Blansitt-Lerner relationship—Frazier had tolerated the situation for one-and-a-half years and, contrary to his testimony, there was little evidence of a sudden aggravation in September-October 2006.

(2) *Indications of Animus*: Almost immediately after the September 18 meeting, Frazier directed that Blansitt be removed as the required approval authority for IG official travel because Frazier "wanted to make certain that [Blansitt] would not be in a position of power any longer that he could use this somehow." Later, when a subordinate asked Frazier if he had reassigned Blansitt because of Blansitt's complaint to PCIE, Frazier answered, "Yes. I had to get him the hell up out of here." Finally, Barlow testified that Frazier mentioned the travel issue when he was talking to her about the projected reassignments, and that he made clear that this was a factor in his decision to reassign Blansitt and Lerner.

(3) *Significance of the Blansitt-Lerner Relationship*: Although the evidence supports the conclusion that the Blansitt-Lerner relationship was a subject of gossip and speculation within the office, the testimony suggests that Frazier exaggerated its significance as a factor in his decision to make the reassignments. Witnesses failed to corroborate Frazier's testimony about the number of times they complained to him about the relationship. Those witnesses also said Blansitt's personality and management style were a larger concern to them, and that they remembered few times when Frazier had mentioned the Blansitt-Lerner relationship. Furthermore, Frazier's testimony failed to support his own assertions about the importance of the issue: he stated that he counseled Blansitt about the relationship only "3 to 4 times" in one-and-a-half years, and Lerner only once; he never documented his concerns about the relationship; and after removing Lerner from her auditing position in October 2005, ostensibly because of the relationship, he promoted her, moved her to another position under Blansitt's direct supervision, and put her in an office adjoining Blansitt's.

(4) *Lerner as a Perceived Whistleblower*: Blansitt testified that Frazier told him not to involve Lerner in the travel matter and then accused him of having done so. While Frazier denied this, he stated that whatever was told to one of the pair was immediately known by both and "if I had to speculate [about Lerner's involvement], I'd have to say yes." Frazier also wrote in his September 19 e-mail to Blansitt that he normally would consult his counsel on questions regarding his travel, but he felt he couldn't because of Blansitt's relationship with Lerner. Finally, Frazier never convincingly explained why, if his purpose was to separate Blansitt and Lerner, he had to reassign *both* of them. While he did state that he had lost confidence that Lerner would give him an opinion independent of Blansitt's, he also testified that if Blansitt were removed from the situation the problem would be resolved. These factors support the conclusion that Frazier perceived Lerner as

being involved in Blansitt's PCIE complaint and reassigned her in retaliation for that perceived involvement.

III. DISCIPLINARY ACTION

The standard applied by the Merit System Protection Board (MSPB) in disciplinary actions under 5 U.S.C. § 2302(b)(8) is the "significant factor" test (*Special Counsel v. Santella*, 65 M.S.P.R. at 526-27, *rev'd on other grounds*, 73 F.3d 349 (Fed. Cir. 1996)). Pursuant to that standard, the Board must find that the protected disclosure was a significant factor in the decision to impose the personnel actions taken. Because the subject of this case is a Presidential appointee confirmed by the Senate, the President, not the MSPB, must make any decision regarding imposition of disciplinary action. There is no authority holding that the President is bound by any standard applied by the MSPB. Further, as a purely executive officer, it would most likely be within the President's constitutional authority to take any disciplinary action, including termination, against an Inspector General for any reason. In fact, the Inspector General Act states that an Inspector General can be removed by the President; it does not set out any terms or conditions and only requires that the President communicate the reasons for any such removal to both houses of congress. 5 U.S.C. Appendix (Inspector General Act, § 3(b).

In our view, the evidence in this case supports a conclusion that Mr. Blansitt's protected communication to the PCIE was a significant factor in Frazier's decision to reassign both Mr. Blansitt and Ms. Lerner and thus Frazier committed prohibited personnel practices. Whatever standard the President uses to review the evidence in this case, we recommend that the President take disciplinary action against Mr. Frazier. Because Mr. Frazier, as an IG, is charged with ensuring compliance with laws and regulations governing the Executive Branch, his flouting of such standards in taking this retaliatory action is particularly egregious, as should be his punishment.