

Robert McCarthy
MSPB Appeal Whistleblower
Narrative

Appellant McCarthy was hired as a Grade 15, Step 6 supervisory attorney with USIBWC by letter dated December 12, 2008, with an effective start date of January 18, 2009. Prior to taking this office, Appellant served eight years as a supervisory Grade 15 attorney with the United States Department of the Interior.

The United States Section, International Boundary and Water Commission (USIBWC or agency) abruptly terminated Appellant's employment as General Counsel on July 31, 2009, just three days after he made legally protected disclosures of fraud, waste and abuse to the Office of Special Counsel (OSC), Office of White House Counsel, State Department Inspector General (OIG), and General Accounting Office (GAO) on July 28, 2009, the same day on which Appellant informed the Commissioner, in writing, that he had made such disclosures.

On July 28, 2009, Appellant made protected disclosures of criminal electronic surveillance, rampant workplace hostility and threats, making false reports to the OIG, unlawful personnel actions, gross negligence and mismanagement of the \$220 million USIBWC Recovery Act program, potential Anti-Deficiency Act violations, and criminal interception of electronic communications. Appellant also noted that Agency employees' morale, as reflected in OPM workplace satisfaction surveys, place USIBWC at the bottom of all federal agencies.

Specifically, Appellant alleged that the Commissioner had for several months ignored legal advice regarding Recovery Act mismanagement and deception; construction of Recovery Act levees in Hidalgo County, Texas, with architectural designs in which USIBWC has no contractual rights (and issuing contract solicitations without bothering to change state law specifications to federal specifications, or even insert its own name in place of the original intended client); flaunting the Purpose Statute and Anti-Deficiency Act, for example by agreeing to pay part of the cost of construction of the Border Patrol's border barrier; wasting funds on cosmetic repairs to levees in Presidio, Texas, that are located on unsafe ground, to unsafe specifications, in order to deceive adjacent landowners to permit access to build a real levee across their lands to protect the town (but not the landowners); allowing an official who openly detests, criticizes and even threatens other executives to oversee "performance audits" of programs managed by those executives; approving unlawful pay increases for certain executive staff; allowing rogue employees to conduct secret audio-video surveillance as well as computer surveillance of USIBWC employees, for impermissible reasons; illegal interception, alteration and destruction of electronic communications; institutionalizing organizational conflicts of interest for personal gain; creating a hostile workplace; use of slanderous, malicious, derogatory, discourteous, and otherwise inappropriate language toward co-workers, including executive staff; engaging in highly offensive derogatory curses and threats at certain executive staff, including a threat to kill a former Commissioner (who shortly thereafter died in a plane crash along with the Mexican Commissioner, as they surveyed floods along the Rio Grande).

On the same day, Appellant sent a memo to USIBWC Commissioner Ruth by e-mail, stating, in part, "Commissioner, due to his exclusion from the Recovery Act Oversight Committee, your dissolution of the committee, and your disavowal of legal advice on a wide range of issues, I have no recourse other than to report allegations of fraud, waste and abuse (and suspected criminal activity) directly to the State Department Office of Inspector General, the FBI, and/or other appropriate entities ... Having done so, I assert his rights as a protected whistleblower."

On July 31, 2009, just three days after making the protected disclosures and notifying Commissioner Ruth that he had made such disclosures, Appellant received a letter from the Commissioner stating that he was

terminating his service with the USIBWC effective immediately. When the Commissioner handed Appellant the letter of termination, Appellant politely reminded him that his action was unlawful. The Commissioner responded that he did not care.

On August 1, 2009, Appellant filed his complaint with the Office of Special Counsel (OSC), alleging prohibited personnel actions including unlawful termination of employment in reprisal for whistleblowing. On September 17, 2009, OSC dismissed Appellant's complaint and informed him of his rights to appeal to this Board.

Specific Disclosures:

USIBWC is Constructing Recovery Act Levees in Hidalgo County with Architectural Designs in which USIBWC has no Contractual Rights.

Appellant disclosed that the agency issued a solicitation for a multi-million dollar levee construction contract under the American Recovery and Reinvestment Act (ARRA or Recovery Act) with specifications that cited not to federal law and regulations, but to state law and regulations. (North Banker Floodway in Hidalgo County.) This was done even though he had previously advised the agency not to blindly insert specifications for architectural designs that the agency had no contractual rights to, in which the agency had no liability protections, and which were designed for and paid by a local county government with no proprietary interest in the levees.

This unlawful act of gross incompetence violates the Federal Acquisition Regulations (e.g., 14.202-6 Final review of invitations for bids, 14.202-1 Bidding time, 14.208 Amendment of invitation for bids.), and the contractual rights of the parties under Texas law.

This is also a gross waste of funds, a foolish decision to assume the risks described above rather than take the no-cost step of simply ascertaining whether the county would freely assign its rights under the design contract to the agency, or whether the design firm would re-certify the designs for the agency at a nominal fee. Indeed, despite urging of counsel, the Commissioner and the agency affirmatively rejected counsel's advice and offer to make such inquiries and to quickly determine what if any cost might be associated with eliminating all of these potentially costly liabilities. The agency has left itself open to the potential loss of millions of dollars in the event of contract disputes, design flaws, bid protests, etc.

This action also constituted an abuse of authority, an arbitrary or capricious exercise of power by a Federal official or employee that adversely affects the rights of the contracting parties. At no point did the agency make a serious attempt to obtain a clear assignment of rights. Indeed, only at the persistent urging of counsel, and even then after the solicitation had been issued using the designs, did the agency take the meager step of attempting to get some minimal expression of permission from a single official of the county, an official who had no authority to grant such rights to the agency. Taxpayers, of course, are left with potential liability for any number of possible claims. Contract bidders are deprived of the right to bid on a properly noticed solicitation with correct specifications. The reason for plunging ahead is a self-imposed deadline for issuing a solicitation for a construction contract so that the agency might look good to the State Department and the commissioner might hold onto his job a little longer.

A substantial and specific danger to public safety was created by an arbitrary decision to blindly adopt plans created for a local government, not to Federal standards and in accord with federal laws. The citizens whose homes and lands and communities are supposedly protected by levees built with these plans are placed at risk of design failures or contractual disputes that could leave the levees un-built or destroyed with no ready recourse to reconstruction funds.

Misuse of Agency Funds to Subsidize Border Barrier in Hidalgo County.

Another Hidalgo County levee project is similarly being built with a design prepared for the county, and in which the agency has no rights or protections. This Project is being built as a joint levee-border barrier, in collaboration with the Department of Homeland Security (DHS). DHS has arbitrarily capped its contribution at an amount known to be less than the cost of construction of the barrier portion of the structure (at least \$2 million). Despite Appellant's objections, he was directed by the Commissioner to obtain a signed interagency agreement under which USIBWC would be responsible for DHS costs in excess of \$1.75 million.

Subsidizing the purposes and projects of another agency with USIBWC funds appropriated specifically for flood control is a violation of the Purpose Statute and the Anti-Deficiency Act; 5 CFR part 2635—standards of ethical conduct for employees of the executive branch; 18 U.S.C. 1001 --- the prohibition against fraud or false statements in a Government matter. Post-mortem rationales that the agency might save time and money by not having to redesign the levee as a stand-alone project do not justify a lack of foresight in preparing for this easily foreseeable contingency. Nor do the calculations that Appellant has seen offer any measure of assurance or even probability that such costs would exceed the amount the agency will pay for the joint project. Once again, the real reason for plunging ahead is a self-imposed deadline for issuing a solicitation for a construction contract so that the agency might look good to the State Department and the commissioner might hold onto his job a little longer.

This act of gross mismanagement creates a substantial risk of significant adverse impact on the agency's ability to accomplish its mission, because the agency was funded to build flood control levees, not border barriers. This action also constitutes a gross waste of funds, since money spent for the border barrier takes funds away from real flood control projects.

Moreover, this project displayed an abuse of authority, an arbitrary or capricious exercise of power by a Federal official or employee that adversely affects the rights of communities all along the Rio Grande who are deprived of funds misappropriated to construction of a border barrier.

Wasting funds on cosmetic repairs to levees in Presidio, Texas, that are located on unsafe ground to unsafe specifications, in order to deceive adjacent landowners to permit access to build a real levee across their lands to protect the town rather than landowners

Appellant disclosed that the agency made a programmatic decision to make purely cosmetic repairs to levees in Presidio, Texas, that are located on unsafe ground, to unsafe specifications, in order to deceive adjacent landowners to permit access to build a real levee across their lands to protect the town (but not the landowners). The decision of the agency to forego reconstruction of agricultural levees in favor of a "spur" levee that would only protect the City of Presidio is well within management prerogatives. However, the agency bent to the considerable political pressure applied by the agricultural landowners through their elected officials, and promised that repairs would also be made to the levees. This decision was complemented by a parallel decision to make merely cosmetic repairs to the agricultural levees, and in the process deceive the landowners into granting a right of way for the spur levee. This decision was made with full knowledge that not only would the repairs themselves be merely cosmetic, but that the very land upon which the existing levee would be rebuilt had been deemed unsuitable for any type of levee by agency geotechnical consultants.

In making this decision, the agency knowingly violated the Purpose Statute and Anti-deficiency Act, as advised by counsel in a written opinion; 5 CFR part 2635—standards of ethical conduct for employees of the executive branch; 18 U.S.C. 1001 --- the prohibition against fraud or false statements in a Government matter. The agency had no intention of building a working levee that would actually serve a flood control

purpose. Rather, emergency funds appropriated specifically for flood control were allocated to construction of a cosmetic levee to accommodate political pressures and deceive landowners into granting a right of way for the Presidio spur levee.

This decision constitutes gross mismanagement that creates a substantial risk of significant adverse impact on an agency's ability to accomplish its mission. Congress allocated these funds for flood control, and when it becomes apparent that a significant portion was spent on a cosmetic levee that washes away in the first flood Congress is going to think twice before similarly funding the agency in the future. Not only Congress, but the citizens and communities along the Rio Grande, and the taxpayers of America will rightfully condemn this gross waste of funds. Penalties for violation of the Purpose Statute and Anti-deficiency Act will eat into the agency's budget. Presidio landowners will rightfully demand compensation for damages, reconstruction of a real levee, and payment for the right of way given up for the spur levee.

This decision also constitutes an abuse of authority, an arbitrary and capricious exercise of power by the USWIBWC that adversely affects the rights of the citizens of Presidio and the landowners "protected" by the cosmetic levee, who not coincidentally will have granted away valuable rights of way for the spur levee.

Similarly, the decision constitutes a substantial and specific danger to public safety, as citizens, residents, communities and adjacent landowners are unknowingly being subjected to serious flood dangers, of the same type that wiped out their levee just last year.

South Bay International Water Treatment Plant Anti-deficiency Act Concerns

Appellant disclosed potential violations of the Anti-deficiency Act to the extent that the agency pledged appropriated funds in connection with a financial award for the South Bay International Water Treatment Plant (SBIWTP), when such funds had not yet been appropriated for the agency. Although primarily a violation of the Anti-deficiency Act, this decision again represents violations of 5 CFR part 2635—standards of ethical conduct for employees of the executive branch; 18 U.S.C. 1001 --- the prohibition against fraud or false statements in a Government matter. It also constitutes gross mismanagement that created a substantial risk of significant adverse impact on the agency's ability to accomplish its mission. The agency was under a court order to make improvements to the SBIWTP, and risked not only penalties for the aforesaid legal violations but also court-imposed penalties for contempt and lack of candor. The decision jeopardized both appropriated funds and the award funds, which would have left the agency incapable of meeting its mandated duties. Should the agency be found to have violated the law, it will constitute a gross waste of funds, for likely they will have to be repaid. Again this is an abuse of authority because the agency made an arbitrary or capricious decision that adversely affected the rights of funding agencies, competitors for funds, and millions of people who depend on effective wastewater along the United States-Mexico border. Finally, it constitutes a substantial and specific danger to public health for the same reasons.

Gross Mismanagement of the Recovery Act, Abuse of Authority and Deception of Federal Officials

Appellant disclosed that three long-term executive officers, Mr. Graf, Ms. Forti, and Ms. Brandt, conspired to control and manipulate information concerning the agency's implementation of the Recovery Act, to deceive the Commissioner and the State Department, and to undercut any executive official who attempted to carry out his duties, to the extent those duties interfered with their nefarious plan. Appellant disclosed that these three officials held secret Recovery Act oversight committee meetings, actively excluding the fourth member of the committee – the General Counsel - from every such meeting; that they misrepresented legal requirements and the very nature of administrative actions to persuade the

Commissioner to sign off on their plans; that they misrepresented agency activities to the State Department and covered up fraud, waste and abuse; and that ultimately they persuaded the Commissioner to dissolve the Oversight Committee as a way of formally excluding the General Counsel, after which they persuaded the Commissioner to terminate his employment.

As the draftsman for this group, Mr. Graf prepared several policy and action documents for the Commissioner's signature, including one that vested in Mr. Graf the powers of an inspector general (later retracted by the Commissioner). Mr. Graf intentionally misled the Commissioner about the nature of these documents and the legal authority therefore, in one case telling me "the Commissioner doesn't always know what he's signing." Telling the State Department that they need not monitor the agency's implementation of the Recovery Act, Mr. Graf and his co-conspirators misrepresented their cover-up as the opposite – a rigorous internal auditing program. Yet Mr. Graf and his cohorts opposed every single measure to strengthen internal controls, focusing on imagined fraud by contractors and covering up gross mismanagement by the agency.

Mr. Graf sought tirelessly to augment his powers over other departments, especially the personnel office (Human Capital), which he repeatedly identified as the first target of his program performance audits. He misrepresented almost every single legal authority he cited in support of his activities, including audit guidelines that prohibit such an openly biased individual from participating in audits of programs about which he has already expressed strong judgments, or from auditing programs for which he previously had authority (personnel). He falsely claimed that the Commissioner was bound by law to implement all of his recommendations.

These actions, again passively condoned by the Commissioner, violate 5 CFR part 2635—standards of ethical conduct for employees of the executive branch; 18 U.S.C. 1001 --- the prohibition against fraud or false statements in a Government matter.

They constitute gross mismanagement because they create a substantial risk of significant adverse impact on an agency's ability to accomplish its mission, when the so-called compliance officer also claims to be in charge of internal controls and audit, two functions that the OIG also strongly recommended be separated, and which the agency falsely claimed had been separated; when said officer actively and with great hostility opposes every proposal to strengthen internal controls and comply with OIG recommendations; when the official covers up the agency's gross mismanagement and provides false reports to the Commissioner and the State Department; when the official abuses his office for personal motives, including revenge.

A gross waste of funds is established by creating a façade of Recovery Act oversight and internal controls, while in fact sabotaging every effort to create real oversight and honest internal controls, for effective implementation of the Recovery Act rather than cosmetic appearances through carefully crafted reports and meeting artificial deadlines.

The arbitrary or capricious exercise of power by a Federal official or employee to retain personal control over functions that are required by generally accepted practice to be under separate oversight, to limit access to information to a self-selected group of co-conspirators, to lie to the Commissioner and the State Department, to cover up gross mismanagement, all were conducted for no other reason than to enhance their bureaucratic power, at the expense of the agency and its mission. The Commissioner was led to believe that Mr. Graf had a firm grip on internal controls and oversight, that Ms. Forti was the only person he could turn to concerning money matters, and that Ms. Brandt – the USIBWC State Department liaison – was responsible for his appointment and held his fate in her hands.

The agency operates several international wastewater treatment plants, international dams, and other flood control facilities, all of which are put at greater risk by this tiny cabal that sees no further than their own parochial bureaucratic interests, jeopardizing the health and safety of millions of border residents.

Refusal to Correct Improper Lack of Separation of Budget and Contracts

Appellant disclosed that five years after the State Department OIG strongly recommended that the agency separate responsibility for budget and contract functions, and four years after the agency claimed to have done so, there had never been the slightest change in this highly inappropriate arrangement that is a virtual invitation to fraud, waste and abuse. In 2005, and ever since, Ms. Forti has served both as supervisor of the Acquisitions Division and Acting Budget Director. (Ms. Forti also served and continues to serve as Chief Administrative Officer and Chief Information Officer.) In condemning this arrangement, the OIG 2005 Report stated: “The Budget and Contracting offices are reporting to the senior budget officer, in contravention of generally accepted practices regarding separation of duties”.

With her stranglehold on so many centers of power, Ms. Forti was certainly in a position to fill the Budget Office with a new hire, but chose to retain complete authority over both budget and contracts, while telling OIG that the problem had been corrected. Not coincidentally, virtually every major project that USIBWC has underway is short of funds, including Recovery Act projects, notwithstanding the sudden infusion of several years worth of budgets all at one time. USIBWC jerks and swings between announcements of a projected budget surplus, and calls for a hiring freeze (including hiring for positions to properly implement the Recovery Act). The agency has no procedure in place for routine monitoring of charge card use.

These actions, again passively condoned by the Commissioner, violate generally accepted practices regarding separation of duties; explicit recommendations from the OIG; Standards for Internal Control in the Federal Government, General Accounting Office (1999); The Federal Managers’ Financial Integrity Act of 1982; The Chief Financial Officers Act of 1990; OMB Circular A-123; 5 CFR part 2635— standards of ethical conduct for employees of the executive branch; 18 U.S.C. 1001 --- the prohibition against fraud or false statements in a Government matter.

This constitutes gross mismanagement because it creates a substantial risk of significant adverse impact on an agency’s ability to accomplish its mission, when the budget officer oversees the contracting office in direct “contravention of generally accepted practices regarding separation of duties,” even several years after exposed and condemned by the OIG and after the agency had falsely claimed to have fixed the problem. .

A gross waste of funds is established by budget and contract transactions that essentially have no independent oversight, and no way to accurately calculate the waste of funds, in addition to the incompetent performance of budget and contract functions, that frequently result in contract appeals and lack of funds for essential operations.

The arbitrary or capricious exercise of power by a Federal official or employee to retain personal control over these two functions, while claiming to have fixed the problem, is for no other reason than to enhance her bureaucratic power, at the expense of the agency and its mission.

As noted above, the agency operates several international wastewater treatment plants, international dams, and other flood control facilities, all of which are put at greater risk by incompetent budget and contract functions, lack of internal controls, and an open invitation to fraud, waste and abuse, jeopardizing the health and safety of millions of border residents.

Illegal secret surveillance by Executive Official Covered Up by Commissioner

Appellant disclosed illegal secret surveillance of the USIBWC Human Capital Office (HCO), by Mr. Graf, a disgruntled executive staff member who had been passed over for the job of Human Capital Director. This individual had purchased with agency funds and installed in the HCO Offices an audio-video system that he monitored from a remote location in his Compliance office, something he later denied. The Commissioner refused to conduct or authorize any investigation, concluding Mr. Graf had done nothing wrong, but oddly the Commissioner nonetheless required the “innocent” surveillance system to be dismantled.

Among other statutes, this activity violates a criminal statute at 18 U.S.C. §§ 2510-2520; 5 CFR part 2635—standards of ethical conduct for employees of the executive branch; 18 U.S.C. 1001 --- the prohibition against fraud or false statements in a Government matter. It also violates USIBWC rules.

This constitutes gross mismanagement because it creates a substantial risk of significant adverse impact on an agency’s ability to accomplish its mission. USIBWC perennially ranks at the very bottom of all small Federal agencies when it comes to employee morale, according to surveys done for the Partnership for Public Service “Best Places to Work” in the Federal Government. When it comes to trust in agency leadership, the agency ranks dead last. When I advised the Commissioner to investigate this matter, he declined, and directed that no one else do so either. He did not bother to talk to the individuals who reported the surveillance.

Obviously, a gross waste of funds is established by expenditure of Federal funds made by a single Federal employee for his own purposes, to spy on colleagues and invade the rights of privacy of innumerable individuals.

Similarly, the arbitrary or capricious exercise of power by a Federal official or employee to acquire surveillance equipment and install it for purposes of spying on colleagues in highly confidential personnel offices adversely affects the rights of every person whose privacy was invaded. Moreover, the individual who perpetrated these acts did so for his own personal gain or advantage. He had been passed over for the job of Human Capital Director and had filed a discrimination complaint, and used this method to try to gather evidence that would somehow support his claim.

Executive Staff’s Unlawful computer surveillance for improper reasons; Criminal interception, alteration and/or destruction of communications; Failure to comply with Information Management laws and regulations

Appellant disclosed criminal interception, alteration and destruction of computer communications and other electronic documents, also in violation of constitutional rights and civil laws. He also disclosed highly invasive monitoring of computer users for improper personal reasons unrelated to the mission of the organization, as well as failure to comply with Information Management laws and regulations. He also disclosed a written instruction by the supervisor of the Information Management office, under direction from Ms. Forti, that “members of management” were out to “put us in a bad light to advance their agenda.” IMD staff were instructed “Don’t ‘hook up’ anybody with any type of additional services, access or privileges on our network or PC’s (If you have already undo it immediately). Keep your ears open and don’t offer any information about the IMD’s abilities to monitor users...” (*sic*).

All of these actions were under the direction of Ms. Forti, and vehemently defended by Mr. Graf, both of whom initially denied the true extent of monitoring, with passive toleration by the Commissioner. The gross mismanagement of information in this agency violates an executive order and OMB circular

concerning requirements for a Chief Information Officer who reports directly to the agency head. I also disclosed the agency's failure to comply with the Foreign Intelligence Surveillance Act (FISA).

As noted above, and as described in legal opinions, the abuse of computer monitoring violates both civil and criminal statutes; the privacy act; 5 CFR part 2635—standards of ethical conduct for employees of the executive branch; 18 U.S.C. 1001 --- the prohibition against fraud or false statements in a Government matter; 18 U.S.C. 2071 - the prohibition against concealing, mutilating or destroying a public record; 18 U.S.C. 1030 - the prohibition against fraudulent access and related activity (including exceeding authorized access) in connection with computers.

This constitutes gross mismanagement because it creates a substantial risk of significant adverse impact on an agency's ability to accomplish its mission. Of course the employees further distrust management when they realize their every keystroke is being scrutinized, and their documents and emails are subject to alteration or deletion. Many avoid use of the computers whenever possible, including routine email communications, rather than assume these risks, resulting in a sharp decline in productivity. The actual loss or alteration of documents is devastating to the agency's substantive work.

A gross waste of funds is established by expenditure of Federal funds for purposes of computer monitoring that is unrelated to legitimate agency purposes, but rather in search of ammunition for bureaucratic in-fighting and undermining imagined foes.

The arbitrary or capricious exercise of power by a Federal official or employee to monitor computers for personal and illegitimate reasons, to alter and destroy documents and communications, and to put every employee in fear of using their computers adversely affects the rights of every person whose privacy is invaded and whose productivity is impeded, while providing private advantage to those officials who use their control of the computer network to sustain their bureaucratic advantages.

The agency operates several international wastewater treatment plants, international dams, and other flood control facilities. Two of the large storage dams were rated unsafe in 2009 by the Federal Emergency Management Agency. Two international wastewater treatment plants are under court orders to clean up their effluent. Employees who operate and maintain these facilities, both in the central office and in field offices, must have confidence that data and communications they enter on their computers are not being tampered with. Unfortunately, this is no longer the case, jeopardizing the health and safety of millions of border residents.

Conspiracy Among Executive Staff to Obtain Unlawful Pay Increases

Appellant also disclosed that certain executive staff, Mr. Graf and Ms. Forti, conspired to award pay increases that violated OPM regulations concerning time in grade, and that have the appearance of fraudulent *quid pro quo* arrangements. More specifically, a former Commissioner and an acting personnel director approved unlawful increases for the Chief Administrative Officer, former legal adviser, and another employee, over the objections of personnel staff, shortly after the Chief Administrative Officer had requested and the acting personnel director approved sizeable salary increases for the Commissioner. Similarly, Appellant disclosed that an executive staff member violated the privacy act and OPM regulations by deceiving the EEO officer and interfering with an approved personnel action.

These actions violate OPM regulations regarding time in grade; merit system principles; 5 CFR part 2635—standards of ethical conduct for employees of the executive branch; 18 U.S.C. 1001 --- the prohibition against fraud or false statements in a Government matter; 5 U.S.C. 2302 --- the prohibition against certain personnel practices; and agency rules.

This gross mismanagement creates a substantial risk of significant adverse impact on an agency's ability to accomplish its mission. Again, employee morale could not possibly be any lower at USIBWC, as measured by objective external standards. The agency is small, and it is no secret what grades employees occupy, or when an employee illegally skips a grade in jumping to an even higher grade. It instills disrespect for agency personnel management when certain officials operate outside the rules that apply to everyone else. A 2005 OIG report described an exodus of the best and brightest from USIBWC due to this kind of corruption.

Looking just at three of the inarguably unlawful pay increases in which certain USIBWC officials were involved, approximately \$20,000 in wages were paid out over and above the very highest amounts that the recipients could have qualified for. This is surely a gross waste of funds. No attempt was made to recover these funds, although a written legal opinion explained that the time to request a waiver of repayment had long since lapsed.

Similarly, the arbitrary or capricious exercise of power by these Federal officials resulted in personal gain or advantage to themselves or to preferred other persons. Human Capital staff who were forced to process these pay raises over their own objections were made to commit acts they knew to be unlawful. USIBWC rank and file employees' cynicism and distrust for management was reinforced.

Executive Officials' Unlawful Interference in Hiring Process

Appellant disclosed that the same long-time members of the executive staff, namely Mr. Graf and Ms. Forti, routinely commandeered the hiring process for their own purposes. Ms. Forti told a Recovery Act temporary job applicant, before she had been offered a job, that she could continue collecting her USIBWC retirement in addition to pay, and she continues to seek to fulfill this unauthorized promise, which would cost the agency tens of thousands of dollars. This executive official also seized the applications for Supervisory Legal Adviser from the desk of Commissioner Marin following his death, and did not deliver them to HCO but rather took them to her own office where she conducted her own investigation of applicants in violation of OPM regulations and the privacy act, and where HCO had to seek them out.

Mr. Graf recently inserted himself into the hiring process of an attorney adviser. Following a lengthy selection process with over 100 applicants, and a selection team composed of the Supervisory legal adviser and the Director of Human Capital (who participated in all interviews) a selection was proposed to the Commissioner. This executive official declined to offer any comments through approved official channels, even when specifically requested. Rather, he deceived the EEO Officer to surrender to him the already-approved selection, lying about his intention to deliver it to the Human Capital Office, and instead took it to the Commissioner and lied about the process seeking to sabotage the approved selection.

These activities represent violations of OPM regulations, agency rules, the privacy act, EEO principles and rules, and merit system principles; 5 CFR part 2635—standards of ethical conduct for employees of the executive branch; 18 U.S.C. 1001 --- the prohibition against fraud or false statements in a Government matter; 5 U.S.C. 2302 --- the prohibition against certain personnel practices.

They constitute gross mismanagement that creates a substantial risk of significant adverse impact on the agency's ability to accomplish its mission, which requires a merit system based hiring process that is free of manipulation by powerful executive staff. As noted above, unauthorized promises of exorbitant double dipping constitute a gross waste of funds, as would the efforts to require a new hiring process and a continued legal position vacancy when the agency has many millions of dollars at stake in pending litigation, not to mention needed legal counsel for implementation of the \$220 million Recovery Act projects.

These acts constitute an abuse of authority, an arbitrary and capricious exercise of power by two long-term executive officials who knew their actions were illegal and yet who undermined the credibility of the agency's personnel system for their own reasons (patronage and seeking to undermine Human Capital and the Office of Legal Affairs). They prejudiced the rights of job applicants and selectees while further undermining USIBWC staff morale and trust in management.

Executive Officials Made False Reports to OIG

Appellant disclosed that certain executive staff, again Ms. Forti and Mr. Graf, knowingly made "anonymous" false reports to the State Department Inspector General. They maliciously alleged gross misconduct and cronyism by Principal Engineer Al Riera, who is in charge of agency operations and by all accounts is the main reason this agency is still functioning at all. Three executive officials conspired to undermine Mr. Riera following his term as acting Commissioner, when he attempted to institute some modest reforms. Even the OIG recognized the incredible job done by Mr. Riera amidst the scandal and corruption that otherwise enveloped the agency in 2005.

Knowingly making false reports to an OIG is prohibited by 5 CFR part 2635—standards of ethical conduct for employees of the executive branch; 18 U.S.C. 1001 --- the prohibition against fraud or false statements in a Government matter; 5 U.S.C. 2302 --- the prohibition against certain personnel practices.

These officials were guilty of gross mismanagement that created a substantial risk of significant adverse impact on an agency's ability to accomplish its mission, which Mr. Riera alone was in a position to lead. These officials and the Commissioner committed a gross waste of funds by pursuing a witch hunt against Mr. Riera, creating an employee committee including some with potential biases against Mr. Riera to investigate all charges against him and to interview a large number of employees in the process. This entire episode constitutes an arbitrary or capricious exercise of power by Federal officials or employees that adversely affected the rights of Mr. Riera and served only the secret agendas of the perpetrators on the executive staff.

Executive Officials Made Threats, including a death threat, and Other Conduct creating a Dangerous and Hostile Workplace

Appellant disclosed that two executive staff officials routinely exhibited unbalanced, anti-social, abusive, threatening, slanderous and malicious conduct toward co-workers, all of which was passively tolerated by the Commissioner.

Mr. Graf made a death threat against a former Commissioner, who shortly thereafter died in a plane crash. This same official routinely expressed contempt for other executive staff members, and even said he despised his own staff. Commenting on a routine proposal to fill a soon to be vacant part-time student position, for example, this official wrote in an email to the Commissioner and the entire executive staff that they were "irresponsible" and "dysfunctional", that they were the reason for employees' lack of "trust and confidence in leadership", and that he alone was somehow not part of "the executive staff's failed leadership." This official openly expressed his hostility at every opportunity, for example by his open display of a book, entitled "How to Work with Jerks," at an executive staff meeting.

Appellant also disclosed that Ms. Forti similarly abuses co-workers, both orally and in emails. Her name-calling is only one expression of her attempts to abuse and intimidate others. He disclosed a complaint by an employee of HCO that Ms. Forti had attempted to force her to approve unlawful personnel actions. A former supervisor of the Acquisitions office, under Ms. Forti's direction, resigned due to abuse by Ms.

Forti, as did others before her. When that employee threatened to go to the Commissioner, Ms. Forti allegedly responded, "I am the Commissioner."

Certainly making a death threat against the former Commissioner was a violation of law. Consistent use of abusive, insulting, slanderous, malicious, derogatory, discourteous, or otherwise inappropriate language, and creation of a hostile workplace, all violate agency rules, as documented in legal opinions; 5 CFR part 2635—standards of ethical conduct for employees of the executive branch; 5 U.S.C. 2302 --- the prohibition against certain personnel practices.

These acts and the Commissioner's bland toleration of this conduct constitute gross mismanagement that creates a substantial risk of significant adverse impact on an agency's ability to accomplish its mission, as the executive staff could no longer function as a group in the context of such open hostility and abuse. (Paradoxically, the Commissioner never gave the slightest suggestion of disciplinary action for this disruptive, unprofessional conduct, in contrast to his ~~the my~~ dismissal for an imagined "lack of collegiality.")

Everything connected to this disruptive anti-social abusive conduct constitutes a gross waste of funds, as no conceivable benefit could reasonably be expected to accrue to the government. They also constitute an arbitrary or capricious exercise of power by a Federal official or employee that adversely affects the rights of every co-worker who must suffer such abuse, including those who quit their jobs rather than continue to be so abused, while it perversely consolidated more power in the hands of the perpetrators. Of course, such conduct is a prime reason for overall employee distrust of leadership and lack of satisfaction with the agency as a workplace.

Finally, Appellant disclosed that this angry, volatile official, Mr. Graf, known to carry a gun in his vehicle at all times, created a substantial and specific danger to public safety.