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**NATIONAL SECURITY AGENCY/CENTRAL SECURITY  
SERVICE**



**INSPECTOR GENERAL**

**REPORT OF INVESTIGATION**

**4 August 2015**

**IV-14-0062**

**Alleged Reprisal**

(U) This report might not be releasable under the Freedom of Information Act or other statutes and regulations. Consult the NSA/CSS Inspector General Chief of Staff before releasing or posting all or part of this report.

Approved for Release by NSA on 26 August 2022, FOIA Case # 85643 Litigation

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## **(U) OFFICE OF THE INSPECTOR GENERAL**

(U) Chartered by the NSA Director and by statute, the Office of the Inspector General conducts audits, investigations, inspections, and special studies. Its mission is to ensure the integrity, efficiency, and effectiveness of NSA operations, provide intelligence oversight, protect against fraud, waste, and mismanagement of resources by the Agency and its affiliates, and ensure that NSA activities comply with the law. The OIG also serves as an ombudsman, assisting NSA/CSS employees, civilian and military.

### **(U) AUDITS**

(U) The audit function provides independent assessments of programs and organizations. Performance audits evaluate the effectiveness and efficiency of entities and programs and their internal controls. Financial audits determine the accuracy of the Agency's financial statements. All audits are conducted in accordance with standards established by the Comptroller General of the United States.

### **(U) INVESTIGATIONS**

(U) The OIG administers a system for receiving complaints (including anonymous tips) about fraud, waste, and mismanagement. Investigations may be undertaken in response to those complaints, at the request of management, as the result of irregularities that surface during inspections and audits, or at the initiative of the Inspector General.

### **(U) INTELLIGENCE OVERSIGHT**

(U) Intelligence oversight is designed to insure that Agency intelligence functions comply with federal law, executive orders, and DoD and NSA policies. The IO mission is grounded in Executive Order 12333, which establishes broad principles under which IC components must accomplish their missions.

### **(U) FIELD INSPECTIONS**

(U) Inspections are organizational reviews that assess the effectiveness and efficiency of Agency components. The Field Inspections Division also partners with Inspectors General of the Service Cryptologic Elements and other IC entities to jointly inspect consolidated cryptologic facilities.

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~~UNCLASSIFIED//FOR OFFICIAL USE ONLY~~**I. (U) SUMMARY**

(U//~~FOUO~~) On 17 January 2014, the NSA/CSS Annual Contribution Evaluation (ACE) Reconsideration Team (RT) referred to the NSA/CSS Office of the Inspector General (OIG) an allegation that [REDACTED]

[REDACTED] had reprisal against [REDACTED] GG-13, Language Analyst, [REDACTED]. Specifically, it was alleged that for the performance period covering 01 August 2012 through 31 May 2013, [REDACTED] gave [REDACTED] a lower ACE rating than she deserved in reprisal for [REDACTED] reporting to the NSA/CSS Office of Administrative Grievances (OAG) that he had failed to document her mid-cycle performance review in the Human Resources Management System (HRMS) by the required due date.<sup>1</sup>

(U//~~FOUO~~) The subsequent OIG investigation determined that [REDACTED] complaint to the OAG was a protected communication and that thereafter she was the subject of a personnel action in the form of an overall ACE rating of 3.0 ("Successful"). We also found that [REDACTED] OAG complaint was a contributing factor in her ACE rating, in that [REDACTED] was aware of [REDACTED] 18 March 2013 complaint when he gave her the ACE rating less than seven months later on 10 October 2013.

(U//~~FOUO~~) However, we determined that [REDACTED] would have received an overall 3.0 ACE rating absent her protected communication. Clear and convincing evidence in the form of emails and testimony revealed that throughout the appraisal period, her performance was borderline satisfactory at best and that [REDACTED] regularly informed her of his concerns related to her progress against her performance objectives (POs). Prior to August 2012, [REDACTED] had been on a performance improvement plan (PIP) as a result of her receipt of a 2.2 ("Minimally Successful") ACE rating from a supervisor other than [REDACTED] for the period covering 01 August 2011 through 03 May 2012. During the August 2012 through May 2013 performance period, serious consideration was given to placing her on yet another PIP. Additionally, although [REDACTED] asserted that her rating would have been higher had [REDACTED] included in her ACE narrative all of her purported accomplishments, the investigation determined that many either occurred prior to the relevant appraisal cycle or were irrelevant to her POs and performance elements (PEs). There were no [REDACTED] employees similarly situated to [REDACTED]. We found no evidence, other than [REDACTED] testimony, that her performance warranted a rating above 3.0.

(U//~~FOUO~~) We also found no evidence that [REDACTED] was motivated to retaliate against [REDACTED] for her OAG complaint. Although the Agency issued guidance that for the 2012-2013 appraisal cycle supervisors were to document mid-year performance reviews with subordinates into HRMS by 28 February 2013, [REDACTED] failure to do so until several weeks later did not

<sup>1</sup> (U//~~FOUO~~) HRMS is the Agency's electronic system for inputting, sharing, and storing information related to individual employees and their careers.

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violate relevant Agency policy.<sup>2</sup> Additionally, given that supervisors routinely conduct mid-year assessments with multiple employees, his failure to document [redacted] in a timely manner did not rise to the level of mismanagement and his supervisors took no disciplinary action against him as a result. Finally, we found credible [redacted] testimony that because [redacted] complained about him and all of her supervisors with such frequency, her complaints had no impact on his impartiality.

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(U//FOUO) Based on the clear and convincing evidence in support of [redacted] ACE rating and the lack of motive for [redacted] to retaliate against her, we did not substantiate the allegation of reprisal.

(U//FOUO) [redacted] and [redacted] will be informed of the results of our inquiry in this matter. A summary of the investigative findings will be provided to [redacted] and the DoDIG.

<sup>2</sup> (U//FOUO) NSA/CSS Policy Manual (PM) 4-16A, Framework for Compensation, requires that raters and employees engage in "continuing dialog throughout the rating cycle" regarding progress against POs. It also requires at least once "at or near the midpoint of the rating cycle" that raters formally document their performance discussion with the employee. Such documentation is to include the date on which the session took place and "any changes in objectives or other summary information regarding the conversation."

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~~UNCLASSIFIED//FOR OFFICIAL USE ONLY~~**II. (U) BACKGROUND****(U) Introduction**

(U//~~FOUO~~) On 18 March 2013, [REDACTED] reported to the OAG that, among other things, her supervisor, [REDACTED], had failed to document her mid-cycle performance review in HRMS by the due date of 28 February 2013. [REDACTED] gave [REDACTED] a formal verbal assessment of her performance on 26 February 2013. However, he did not document it until several weeks later after being prompted to do so based on [REDACTED] complaint.

(U//~~FOUO~~) On 21 October 2013, [REDACTED] filed with the ACE RT a request for reconsideration of her overall 3.0 or "Successful" ACE rating covering 01 August 2012 through 31 May 2013, for which [REDACTED] was the rater.<sup>3</sup> Within her request for reconsideration, [REDACTED] wrote that she "suspected" that in retaliation for her OAG complaint against [REDACTED], he had failed to include all of her accomplishments in her ACE and gave her a lower rating than she deserved.

(U//~~FOUO~~) On 17 January 2014, the ACE RT referred the allegation of reprisal to the OIG. Although initially noncommittal about whether the alleged personnel action was an act of reprisal, during an interview with the OIG on 13 May 2015, [REDACTED] stated that the personnel action would not have occurred absent her OAG complaint and was an act of reprisal.

(U//~~FOUO~~) [REDACTED] has been a language analyst in various branches of [REDACTED] the NSA/CSS Threat Operations Center's (NTOC) [REDACTED] since [REDACTED]. Since 2011, she received ACE Evaluations of Record (EOR) from various supervisors for particular appraisal periods as follows:

- (U//~~FOUO~~) 20 March 2011 to 31 July 2011, 3.1 (Successful), [REDACTED]
- (U//~~FOUO~~) 01 August 2011 to 03 May 2012, 2.2 (Minimally Successful), [REDACTED]
- (U//~~FOUO~~) 01 August 2012 to 31 May 2013, 3.0 (Successful), [REDACTED]
- (U//~~FOUO~~) 01 December 2013 to 31 July 2014, 3.2 (Successful), [REDACTED]

(U//~~FOUO~~) In 2012, prior to the end of the normal performance rating cycle, [REDACTED] made a permanent change of station from NSA Washington to NSA Hawaii. In both 2012 and 2013, [REDACTED]

<sup>3</sup> (U//~~FOUO~~) ACEs are composed of three to six individual POs aligned with Agency objectives, the number and content of which vary by work role, duties, and grade level, and six PEs that are behaviorally-based and common to all Defense Intelligence employees. Performance against each PO and PE is rated numerically between 1 (Unacceptable) and 5 (Outstanding). PO ratings make up 60% and PE ratings 40% of the overall ACE rating.

<sup>4</sup> (U//~~FOUO~~) In accordance with PM 4-16A, the annual performance rating cycle is from 01 August to 31 July each year. To be rated, employees must perform under an approved Performance Plan (PP), which includes defined POs and PEs, for at least 90 days during the current rating cycle. Therefore, [REDACTED] did not receive an EOR for the periods 04 May 2012 through 31 July 2012 and 01 June 2013 through 31 July 2013. The OIG did not research the reason that [REDACTED] had no EOR for the period 01 August 2013 through 30 November 2013.

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underwent reorganizations that resulted in management, branch, and team changes. As a result, prior to the end of the 2013 appraisal cycle, [REDACTED] transitioned from [REDACTED] team.

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**(U) Scope and Authorities**

(U//~~FOUO~~) NSA/CSS Policy 1-62, Whistleblower Protection (Policy 1-62), issued 6 July 2005, and NSA/CSS Policy Memorandum 2013-03 (PM 2013-03), issued 14 June 2013, provide protection from reprisal to NSA employees who make a “protected communication.”<sup>5</sup> Under Policy 1-62, the definition of “protected communication” includes the lawful communication of information which the communicant reasonably believes evidences a violation of law or regulation, mismanagement, a gross waste of funds or other resources, an abuse of authority, or a substantial and specific danger to public health or safety, when such communication is made to particular parties, to include an IG, anyone in the chain of command, or any other organization designated under Agency policy or other established procedures to receive such communications. The policy defines a “personnel action” as an action that affects or has the potential to affect the employment opportunities, current position, or career of the NSA employee. “Reprisal” is defined as taking or threatening to take an unfavorable personnel action or withholding or threatening to withhold a favorable personnel action, for making or preparing a protected communication.

(U//~~FOUO~~) The NSA/CSS OIG employs a two stage process in conducting whistleblower reprisal investigations. The first stage focuses on the alleged protected communication, personnel action, and acting official’s knowledge of the protected communication. The second stage focuses on whether or not the Agency would have taken, withheld, or threatened the personnel action absent the protected communication. The first stage of the whistleblower reprisal analysis is judged based on the preponderance of the evidence. “Preponderance” of the evidence is that degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue.

(U//~~FOUO~~) In order to progress to the second stage of the investigative process, there must be sufficient evidence, based on proof by a preponderance of the evidence, to make three findings:

1. (U//~~FOUO~~) The complainant made a protected communication;
2. (U//~~FOUO~~) The complainant was the subject of a personnel action; and
3. (U//~~FOUO~~) The protected communication was a contributing factor in the personnel action.<sup>6</sup>

<sup>5</sup> (U//~~FOUO~~) Policy 1-62 was re-issued 24 June 2015. Because both the alleged protected communication and personnel action in this case occurred prior to that date, the previous version of the policy was used in the conduct of the related OIG investigation.

<sup>6</sup> (U//~~FOUO~~) This third finding may be established where the acting official had knowledge, actual or imputed, of the complainant’s communication and the personnel action took place within a period of time

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(U//~~FOUO~~) If a preponderance of the evidence supports these three findings, the investigation will proceed to the second stage of the analysis. At that point, the Agency must provide evidence that establishes that the Agency would have taken, withheld, or threatened the personnel action against the complainant absent the protected communication. The second stage of analysis is judged based on a clear and convincing standard. "*Clear and convincing evidence* is that measure or degree of proof that produces in the mind of the trier of fact a firm belief as to the allegations sought to be established. It is a higher standard than preponderance of the evidence,"<sup>7</sup> but a lower standard than beyond a reasonable doubt.

(U//~~FOUO~~) To address the fourth element, we consider the following three factors:

1. (U//~~FOUO~~) The strength of the Agency's evidence in support of its personnel action;
2. (U//~~FOUO~~) The existence and strength of any motive to retaliate on the part of the Agency officials who were involved in the decision; and
3. (U//~~FOUO~~) Any evidence that the Agency takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated.

(U//~~FOUO~~) We interviewed three witnesses, including the complainant, [REDACTED], and the responsible management official (RMO), [REDACTED]. We also obtained and reviewed relevant e-mails, ratings, and other documents from various sources, including [REDACTED] and [REDACTED].

#### (U) Sequence of Events

(U//~~FOUO~~) On 25 September 2012, [REDACTED] then-Chief, [REDACTED] completed an interim ACE documenting [REDACTED] performance from May to August 2012. The ACE included six POs: Language/Technical, Analytic Contributions, Language Analysis Knowledge Sharing/Mentoring, Language Analysis Professional Development, [REDACTED], and Master of Science in Strategic Intelligence. It also included the six standard PEs shared by all NSA employees: Accountability for Results, Communication, Critical Thinking, Engagement and Collaboration, Personal Leadership and Integrity, and Technical Expertise. [REDACTED] received 3.0 for each PO and PE. In the "Employee Comments" section, [REDACTED] noted that her Master's thesis had been accepted, but was undergoing panel review. She stated that, based on the feedback she had received regarding her thesis and the "high impact of the critical mission accomplishments," she deserved an overall rating of 4.0

subsequent to the communication, such that a reasonable person could conclude that the communication was a contributing factor in the decision to take the action.

<sup>7</sup> (U) 5 C.F.R. 1209.4(d). 5 U.S. Code 2302(a)(2)(C)(ii)(1) exempts Intelligence Community employees from statutory whistleblower protections. However, we still use as a guide the implementing guidance found in relevant C.F.R. provisions, U.S. Merit Systems Protection Board, U.S. Office of Special Counsel, and DoD decisions and regulations under that title.

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(U//FOUO) On [redacted] sent an email to the "NTOC-All" distribution list,

[redacted]

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[redacted] That same date, [redacted] sent [redacted] a short response: "Please stop e-mailing the entire NTOC distribution."

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(U//FOUO) On 18 November 2012, [redacted] emailed [redacted] Chief, [redacted] modified POs for [redacted] that had been coordinated with ER. There were only three and they were untitled. One dealt with language analysis and required that [redacted] translate [redacted] language only," that her products go through QC with an accuracy rate of no less than 90%, and that she incorporate feedback in subsequent language work "by not egregiously repeating errors." A second PO dealt with [redacted] The final PO related to teaching and required that [redacted] obtain certification as adjunct faculty at the NSA/CSS Cryptologic School by 01 May 2013 and teach "at least one [redacted] language course." According to [redacted], he had been unable to enter the PO modifications into HRMS and [redacted] might need to do so.

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(U//FOUO) On 21 November 2012, [redacted] emailed her modified POs to the NSA/CSS Senior Language Authority (SLA). There were three, the first two of which (Language Analysis and [redacted] [redacted] respectively) mirrored those in [redacted] 18 November 2012 email. However, the third PO was unrelated to teaching at the Cryptologic School. Rather, it related to improvement and innovation and required that [redacted] identify areas for improvement within her language analysis mission area, develop new processes to speed up translations, and "characterize efficiencies that can be utilized while maintaining quality standards for [redacted] In her email, [redacted] complained that [redacted] was a new manager and a lower grade than her. Further, she considered his use of the phrases "you must" and "not egregiously repeating errors" to be unprofessional and disrespectful. She asked for assistance in getting her PP changed to make it possible for her to be "promotable to a grade 14."

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(U//FOUO) On 23 November 2012, [redacted] emailed [redacted] and [redacted] four draft POs that she considered appropriate for senior level language analysts that purportedly were provided to her by the SLA Office: Language Processing, Target Expertise/Technical Leadership, Coaching and Mentoring, and Professional Development. [redacted] requested that her POs be adjusted: "We need to amend our ACE accordingly."<sup>8</sup>

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(U//FOUO) On 29 November 2012, in response to a telephone conversation, NSA/CSS Employee Relations (ER) sent an email to [redacted] in which wording was suggested for an email to be

<sup>8</sup> (U//FOUO) Under PM 4-16A, employees are required to engage in dialogue with their rater in the development of POs at the beginning of each rating cycle. However, the rater is ultimately responsible for developing and communicating performance expectations and, therefore, POs.

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sent to [redacted] for failing to meet a deadline: "Feel free to change the wording to meet your own style but you must state that [redacted] did not meet the deadline and basically that is unacceptable."

(U//FOUO) On 17 January 2013, an "Agency All" announcement link, titled "It's 'Mid-Cycle Review' Time" was sent to the workforce by email. The announcement stated that effective that date, raters could begin conducting ACE mid-cycle performance reviews with their subordinates, "which must be completed no later than 28 February 2013." Narrative summaries of employee performance were required to be entered in HRMS. A similar reminder announcement was posted on 21 February 2013: "Raters are required to submit mid-cycle review narrative summaries in [HRMS] no later than 28 February 2013."

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(U//FOUO) In an undated Staff Processing Form (SPF) to ER through [redacted], [redacted] requested that ER take appropriate action to address continued misconduct by [redacted].<sup>9</sup> In the SPF, he noted that since being assigned to [redacted] had received a Letter of Counseling (LOC) and Letter of Reprimand (LOR) for failure to follow supervisory instructions. Further, her pattern of misconduct continued. [redacted] cited the "NTOC ALL" email [redacted] sent on [redacted] and his admonition that she stop sending emails to the distribution list, "which consists of thousands of people" - the same guidance she had received from a previous supervisor. Subsequent misconduct, as noted on the SPF, included:

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- (U//FOUO) Failing to meet a 29 November 2012 deadline for an urgent translation ([redacted] response when questioned was that the document to be translated was long and she was busy completing annual training that was due by 01 December 2012).

- (U//FOUO) Sending another email to "NTOC ALL" [redacted]

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- (U//FOUO) Sending an email to the "[redacted] All" alias (another large distribution list) on [redacted]

- (U//FOUO) Sending an email to a global reporting alias on [redacted]. The distribution list included "a wide set of customers outside of NTOC" and was an inappropriate venue for such comments: "Again, her supervisor told her this was unacceptable and she had been told on multiple occasions that this was not appropriate."

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(U//FOUO) On 08 February 2013, [redacted] sent herself an email documenting her interactions with [redacted]:

(U//FOUO) [redacted] just walked by and told me that I should only send translations to him only and I said then he needs to let me know who requested it and I need to know the intelligence impact and he can't just be

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<sup>9</sup> (U//FOUO) In an email to the OIG, [redacted] said that the SPF was sent to ER in late December 2012. However, because it mentioned an incident that occurred on 04 January 2013 (the date on the SPF of 04 January 2012 was a typographical error, given that date occurred during the previous appraisal cycle and prior to [redacted] supervision of [redacted]), the SPF was likely sent to ER shortly thereafter.

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sending me fluff stuff and novels to translate which have no intelligence impact and hinder me from doing my job which is to give [redacted] analyst[s] what they need to do their job. . . .

(U//FOUO) The article I translated pertained to both [redacted]. He said: I can see you are having trouble following instructions and I said no, I'm not having any trouble, I am doing my job and you are trying to hinder the mission by blocking me from getting and giving the necessary collaboration I need with the team.

(U//FOUO) I am really trying here, but he is intentionally trying to hinder me. I don't know what to do at this stage. He might be the manager but if he is wasting and abusing [redacted] talent] and doing something illegal, isn't it my job to report him?

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(U//FOUO) On 26 February 2013, [redacted] emailed ER (with cc's to [redacted], her deputy, [redacted] Chief, Workforce Services, NTOC) that he had just conducted an hour-long mid-cycle performance review with [redacted] in [redacted] presence. During the review, [redacted] told [redacted] that she was less than successful in all three POs and in two PEs and why. He also provided suggestions on how to become successful against her objectives. However, [redacted] "did not seem to want to listen" and when [redacted] said that he would be implementing a PIP, she "threatened" to complain to the NSA/CSS Office of the General Counsel (OGC), the NTOC director, and Deputy Director, NSA/CSS, if he did so. ER responded that same date advising [redacted] not to be intimidated by "[redacted] threats" and to go forward with the PIP.

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(U//FOUO) On 28 February 2013, [redacted] told the OIG that she was concerned about her potential for promotion, given that [redacted] did not allow her to work the "high value" [redacted] mission, had her "protégés" QC her translations, told her that she did not meet the required 90% accuracy rate for those translations, and made her obtain his permission before she conducted [redacted] translations for another division. Further, during her mid-year performance review, [redacted] told [redacted] that her performance was unsatisfactory in every aspect of her PP and threatened to put her on a PIP. That same date, [redacted] sent a similar complaint to the OGC, adding that her "lower grade manager" had also prevented her from QCing other analysts' translations, "which is what I do." According to [redacted], her manager resented being a lower grade than her, had "no knowledge of the [redacted] language or analysis," and should not be her rater.

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(U//FOUO) On 03 March 2013, [redacted] emailed a draft 30-day PIP for [redacted] to ER for review and concurrence. It would provide formal notice to [redacted] that her performance was at an unsuccessful level for two POs (Language Analysis [redacted] and two PEs (Accountability for Results and Communication) and was at a minimally successful level for one PO (Improvement and Innovation). The PIP cited deficiencies in Language Analysis as follows:

- (U//FOUO) On 21 November 2012, [redacted] was tasked to translate information labelled as urgent by 29 November 2012 and failed to meet the deadline (she had not requested an extension).
- (U//FOUO) On 03 December 2012, she was tasked to complete a "1.5 pg" translation. Although she met the required deadline, her translation did not pass QC at the required 90% accuracy rate.
- (U//FOUO) On 27 December 2012, [redacted] was tasked to complete a spreadsheet translation. She met the deadline, but the translation did not meet the required accuracy rate.

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(U//FOUO) The PIP cited [redacted] as deficient in [redacted] in that she had yet to show any progress in completing the associated duties, such as the translation of [redacted]

[redacted] In regard to Improvement and Innovation, the PIP noted that on 31 January 2013, [redacted] forwarded to [redacted] three documents that she felt were relevant to this objective. [redacted]

[redacted] Only one document, [redacted] [redacted] was relevant to the PO. Therefore, she was performing at the minimally successful level. The PIP emphasized that in order to satisfy this PO, [redacted] needed to develop "new processes" to improve translation turnaround time while maintaining quality standards.

(U//FOUO) According to the PIP, [redacted] was unsuccessful in her Accountability for Results PE. Although given multiple tasks to complete priority translations for the [redacted] Language Team, she instead chose to focus on other tasks unrelated to mission priorities. As a result, contractor resources had to be used to complete her tasks and meet mission needs. Further, [redacted] failed to serve as an expert resource for her colleagues; rather than approach [redacted], members of the branch sought out "alternative ways to obtain the same expertise." She was unsuccessful in her Communication PE in that she had "difficulty listening and responding to the professional opinions of others" and was so overwhelmed by the amount of email traffic she received that she was unable to "identify or locate assigned tasks." Further, despite being advised and reminded of tasks, due dates, and expectations in person, by email, and through hand-written notes, [redacted] refused to follow supervisory direction in a timely manner. This PIP was never implemented.<sup>10</sup>

(U//FOUO) On 14 March 2013, [redacted] sent [redacted] an email documenting their meeting that day with a senior linguist who had QC'd one of [redacted] translations. During the meeting, [redacted] was provided feedback in the form of "line by line" corrections. According to [redacted], [redacted] translation was only 50-60% accurate and did not meet the 90% accuracy requirement of her PO. Although [redacted] was directed to provide her translation only to [redacted], she sent it to a senior linguist in another organization that same date and asked him to provide a QC. That senior linguist's QC confirmed that [redacted] translation was less than 90% accurate. Further, her inaccuracies were significant with regard to meaning.

(U//FOUO) On 18 March 2013, [redacted] reported to the OAG that [redacted], who resented being a lower grade than her, had created a HWE. According to [redacted], he had changed her POs six times without her input, prevented her from doing QC, sent her emails stating that she had not met accuracy standards as documented in her PP, threatened to place her on a PIP, and had her work QC'd by "level ZERO junior linguists." Further, [redacted] had denied her the opportunity to provide written comments regarding her mid-year review by not documenting it in HRMS by 28 February 2013 as required. Rather, he provided only a verbal performance review that [redacted] found "demeaning."

<sup>10</sup> (U//FOUO) According to [redacted], [redacted] PIP was not implemented due to an ongoing reorganization and impending supervisory changes.

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(U//FOUO) On 27 March 2013, [redacted] emailed a friend that her situation had gotten worse since the filing of her complaint; [redacted] had altered [redacted] POs so that she could no longer perform [redacted] work, despite the fact that she was "the MOST advanced, most fluent person with a 3.6 [testing score] in the Upper Level [redacted] [a] certified court reporter, and [had] [redacted] as a target expert." In the email, [redacted] forwarded a copy of her POs, which were the same as those in her 21 November 2012 email to the SLA.

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(U//FOUO) On 15 April 2013, [redacted] filed a grievance with the OAG regarding her failure to be promoted and attached a copy of her Employee Promotion Assessment (EPA).<sup>11</sup> According to [redacted], she was told during her promotion feedback that she was not a "cyber expert," which was required for promotion. However, her job and ACE POs were not cyber-related.<sup>12</sup> Rather, she was a "language expert": "Moreover, my manager consistently denied my requests for training." [redacted] asserted that senior-level mentors said that based on her EPA she should be a GG-15. Therefore she requested an independent review of her promotion package.

(U//FOUO) On 16 April 2013, [redacted] Grievance Examiner, OAG, emailed [redacted] regarding the outcome of her HWE and mid-cycle performance review grievance. According to [redacted], she had contacted [redacted] and requested that she work with [redacted] to ensure that he entered [redacted] review into HRMS and [redacted] had the opportunity to enter comments. [redacted] had also confirmed that this was done. She noted that during their 18 March 2013 meeting, [redacted] confirmed that [redacted] had communicated with her about the changes to her PP, but also expressed concern with the content of the POs. [redacted] explained that nothing could be done: "Employees have a right to grieve the fact that they do not have an ACE [performance] plan. However, they cannot grieve the content of that plan." Further, supervisors could make changes to POs, as long as the employee was notified and there were at least 90 days remaining in the rating cycle. In reference to the HWE, [redacted] told [redacted] that supervisors could assign duties and manage their resources as they deemed appropriate. The OAG considered the entire matter resolved.

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(U//FOUO) On 29 April 2013, [redacted] emailed [redacted] regarding the outcome of her promotion grievance to OAG. According to [redacted], the office could investigate only whether the promotion process was conducted in accordance with policy, it could not assess [redacted] EPA to determine eligibility for promotion based on her accomplishments. The OAG found that because [redacted] was a lower grade than [redacted], her promotion package was instead reviewed by [redacted], who made the decision not to submit it to the next level for consideration. [redacted] told OAG that [redacted] job included a cyber-aspect; her branch supported the

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<sup>11</sup> (U//FOUO) An EPA is an employee's written self-assessment of their promotion readiness for the next higher grade, based on their performance in terms of work complexity, independent action, working relationships, span of authority/responsibility, and scope/impact of decisions.

<sup>12</sup> (U//FOUO) However, in a resume dated 26 March 2012, [redacted] listed her current job duties, which included [redacted]

[redacted] Her listed duties also included [redacted]

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cyber mission. Further, although [redacted] had received appropriate cyber training, she had not applied the new skills to her job. Finally, the training courses denied by management were "on languages outside your mission area or classes that do not align with/pertain to your current [POs]." Because the promotion process had been correctly followed, the grievance was dismissed.

(U//~~FOUO~~) On 10 October 2013, [redacted] signed [redacted] ACE for the rating period 01 August 2012 through 31 May 2013 (she refused to sign the document). [redacted] received straight 3 (Successful) ratings for every PO and PE, resulting in an overall performance rating of 3.0. The POs in this EOR were the same as those [redacted] sent to the SLA on 21 November 2012.

(U//~~FOUO~~) On 21 October 2013, [redacted] filed a Request for Reconsideration of ACE Rating with the ACE RT. According to [redacted] request, in "suspected retaliation" for her filing a grievance against him, [redacted] had "failed to acknowledge my accomplishments and has omitted them from the [ACE narrative] apparently in order to justify a lower score." In the request, [redacted] asserted that she deserved a "5" rating for the Language Analysis and Improvement and Innovation POs and for the Accountability for Results, Communication, Critical Thinking, and Engagement and Collaboration PEs. She deserved a "4" rating for the [redacted] PO. [redacted] provided the ACE RT with the narrative of accomplishments she had given [redacted] for his consideration in drafting her ACE. Because her request for reconsideration mentioned retaliation, the ACE RT referred the matter to the OIG.

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### III. (U) FINDINGS

#### 1. (U) Did [redacted] make a protected communication? Yes.

(U//FOUO) Policy 1-62 and Policy Memorandum 2013-03 prohibit the Agency from taking or threatening to take an unfavorable personnel action, or withholding or threatening to withhold a favorable personnel action, against an employee, for making a protected communication. Policy 1-62, Paragraph 10, defines a protected communication as:

1. Any lawful communication to a member of Congress or an IG; or
2. A lawful communication of information which the employee reasonably believes evidences a violation of law or regulation, mismanagement, a gross waste of funds or other resources, an abuse of authority, or a substantial and specific danger to public health or safety, when such communication is made to a member of Congress, an IG, or any other person or organization (including any person or organization in the chain of command) designated under Agency policy or other established administrative procedures to receive such communications.

(U//FOUO) PM 4-16A requires that raters and employees engage in "continuing dialog throughout the rating cycle" regarding progress against POs. It also requires that "at or near the midpoint of the rating cycle" at least one such performance discussion be formally documented. Although the policy states that such documentation must include a summary of the assessment given and the date of its occurrence, it does not specify an exact timeframe for its completion.

(U//FOUO) That [redacted] did not document [redacted] mid-cycle performance assessment in HRMS until prompted to do so several weeks after its completion did not constitute a violation of PM 4-16A. Further, given that supervisors routinely conduct mid-year assessments with multiple employees, [redacted] failure to document [redacted] in a timely manner also did not rise to the level of mismanagement; his supervisors took no disciplinary action against him as a result.

(U//FOUO) Nonetheless, we concluded that [redacted] related disclosure to the OAG constituted a protected communication. The OAG serves as the Agency's authority for processing civilian employee grievances pertaining to the misinterpretation or misapplication of Agency policies or regulations and certain other personnel actions. In her 18 March 2013 grievance to that office, [redacted] acknowledged that [redacted] gave her a verbal mid-cycle assessment of her performance. However, she asserted that he had failed to document that assessment by the required date; NSA had notified the civilian workforce through several separate "Agency All" emails that mid-cycle performance reviews were "required" to be documented by raters in the HRMS no later than 28 February 2013.

(U//FOUO) Based on the above, we found reasonable [redacted] belief that [redacted] failure to meet the "required" deadline for documentation of her mid-cycle review evidenced either a violation of policy or mismanagement. Further, her resultant OAG grievance was made to an

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organization designated to receive such communications. As a result, we concluded that it constituted a protected communication under Policy 1-62.

**2. (U) Was an unfavorable personnel action taken or threatened, or was a favorable action withheld or threatened to be withheld following the protected communication? Yes.**

(U//FOUO) [redacted] alleged that [redacted] reprisal against her for making a protected communication. Specifically, she alleged that in reprisal for [redacted] reporting to the OAG that he failed to document her mid-cycle performance review in NSA's HRMS by the required due date, [redacted] gave her a lower ACE rating than she deserved for the rating period covering 01 August 2012 through 31 May 2013.

(U//FOUO) Policy 1-62 defines a "personnel action" as an action that affects or has the potential to affect the employment opportunities, current position, or career of the NSA employee. Within the Agency, ACEs of record are used to determine performance bonuses for civilian employees. Additionally, the most recent three ACEs of record are part of the promotion review package an employee submits when seeking promotion to the next higher grade and the ratings received are a consideration in the decision whether or not to promote. Further, when applying for another position within NSA, an employee must submit their computer-generated employment history profile, which includes the overall rating of the employee's ACEs of record for the last several performance appraisal cycles.

(U//FOUO) We concluded that an unfavorable personnel action, an overall ACE rating of 3.0 for the appraisal period covering 01 August 2012 through 31 May 2013, was taken against [redacted]. Because a rating of 3.0 is considered "successful," it generally would not be considered adverse. However, based on this rating, [redacted] did not receive a performance bonus. Further, her 3.0 rating has the potential to adversely impact her ability to both be promoted and obtain a different position within the Agency if the ratings of otherwise similarly qualified candidates are higher. Because [redacted] ACE rating prohibited her from receiving a bonus and had the potential to affect her employment opportunities and career, we concluded that it met the definition of an unfavorable personnel action under Policy 1-62.<sup>13</sup>

**3. (U//FOUO) Was the protected communication a contributing factor in the personnel action? Yes.**

(U//FOUO) We concluded that [redacted] took the personnel action above within a period of time after [redacted] protected communication to reasonably conclude that the communication was a contributing factor for the personnel action; [redacted] ACE was signed less than seven months after her complaint to the OAG.

<sup>13</sup> (U//FOUO) Although lowered performance evaluations may constitute a personnel action in this context, courts are hesitant to find the existence of reprisal, particularly if the performance evaluation is an accurate indication of the complainant's performance. Therefore, although we could have evaluated the accuracy of the ACE at this point, we chose to error on the side of caution and determine that the ACE rating was a personnel action. The accuracy of the ACE rating is evaluated in the final step of the reprisal analysis *infra*.

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(U//FOUO) Additionally, we determined by a preponderance of the evidence that [REDACTED] had knowledge of [REDACTED] communication at the time he signed her ACE. Emails revealed that the OAG had asked [REDACTED] to work with [REDACTED] to ensure that the review was documented. When contacted by the OIG, [REDACTED] confirmed that she spoke with [REDACTED] about entering his mid-cycle reviews of subordinate performance into HRMS and he told her that he was in the process of doing so. According to [REDACTED], she would not have told [REDACTED] about [REDACTED] complaint to the OAG.

(U//FOUO) In his testimony to the OIG, [REDACTED] said that although he did not specifically recall [REDACTED] making a complaint to the OAG about his failure to document her mid-cycle performance review, he would not be surprised if she did: "[REDACTED] complained about me and every other supervisor she had, I'm sure, to everyone and anyone who would listen...." Additionally, based on [REDACTED] 26 February 2013 email to ER, he knew that [REDACTED] intended to file some kind of complaint related to her mid-year assessment. In the 26 February 2013 email, [REDACTED] wrote that [REDACTED] was unhappy with her ratings and, when told that she would be placed on a PIP, "threatened to go to the OGC, D/DIRNSA, and NTOC DIR" if he did so. Two days later, [REDACTED] followed through on the "threat," reporting her mid-cycle review concerns to, at the very least, both the OIG and OGC.

(U//FOUO) In her testimony to the OIG, [REDACTED] said that because [REDACTED] told her during her mid-cycle review that she was not meeting her POs and threatened to place her on a PIP, she later told him that she would file a grievance with OAG about his failure to document the session as required. Given [REDACTED] testimony, her apparent anxiousness to enter her rebuttal to the mid-cycle review into HRMS, and her history of openly stating her intention to file complaints, we find it more likely than not that [REDACTED] warned [REDACTED] of her intention to report his documentation failure to the OAG. Further, we find it more likely than not that when contacted by [REDACTED] about this same matter, [REDACTED] realized that [REDACTED] had already followed through on her stated intent. As a result, we concluded that [REDACTED] knew of [REDACTED] protected communication when he took the adverse personnel action against her.

(U//FOUO) Because the first stage of our analysis established a nexus between [REDACTED] communication and the personnel action, the burden shifted to the Agency requiring clear and convincing evidence to support the personnel action.

**4. (U) Does the evidence establish that the personnel action would have been taken absent the protected communication? Yes.**

(U//FOUO) The OIG determined that [REDACTED] would have given [REDACTED] a rating of "3" on her ACE, even if she had not made a protected communication to the OAG. We considered the following factors in our analysis:

(U//FOUO) **Strength of the Agency's evidence in support of its personnel action.** The investigation disclosed that [REDACTED] was well aware that [REDACTED] thought her performance did not exceed the successful level throughout the rating cycle. [REDACTED] testimony that, during the 2012-2013 rating cycle, she did not receive any performance feedback until

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her mid-cycle review when she was told that she was not performing at the successful level in any PO and PE, was not supported by other evidence. Rather, documentation revealed that [REDACTED] provided her feedback regarding deficiencies in her performance related to the following incidents:

- (U//FOUO) On 29 November 2012, [REDACTED] missed the deadline for an urgent translation without justification.
- (U//FOUO) In December 2012, two of [REDACTED] translations failed to meet the required 90% accuracy rate required by her Language Analysis PO.

- (U//FOUO) On [REDACTED] after having been told on multiple occasions not to do so, [REDACTED] inappropriately sent unsolicited language comments to a global reporting alias that included NTOC external customers.

- (U//FOUO) On 31 January 2013, [REDACTED] provided [REDACTED] two documents she mistakenly believed relevant as accomplishments toward her [REDACTED]. However, they were not; one was from 2007, years before the rating cycle, and the other was simply [REDACTED].

- (U//FOUO) On 08 February 2013, [REDACTED] failed to follow instructions in translating an [REDACTED].

(U//FOUO) Further, on 26 February 2013 [REDACTED] received an overall accounting of her performance during her mid-cycle performance assessment that was subsequently documented in a draft PIP. [REDACTED] was performing at an unsuccessful level in both her Language Analysis and [REDACTED] POs due to translation errors and failure to show progress in completing translations [REDACTED]. She was at the minimally successful level on her Improvement and Innovation PO, but needed to develop new processes to improve translation turnaround time while maintaining quality in order to be successful. Because she chose to focus on other tasks with no regard for mission priorities, could not identify and locate assigned tasks, had difficulty communicating with others, did not serve as an expert resource for colleagues, and refused to follow supervisory direction in a timely manner, [REDACTED] was performing at the unsuccessful level in her Accountability for Results and Communication PEs.

(U//FOUO) Subsequent to her mid-cycle review, [REDACTED] continued to receive negative feedback in regard to the accuracy of her translations. During a March 2013 meeting, she was told that a particular translation was only 50-60% accurate. In a follow-up email, [REDACTED] also reminded [REDACTED] of the 90% accuracy requirement of her Language Analysis PO.

(U//FOUO) According to [REDACTED], although the narrative in her ACE covering 01 August 2012 through 31 May 2013 was appropriate for receipt of 3 (Successful) ratings in every PO and PE, she deserved at least a 4 in every category; [REDACTED] did not include all of the accomplishments she provided in her input. However, [REDACTED] acknowledged that because she felt stressed and rushed to provide her input, she may have inappropriately listed several accomplishments under multiple POs, rather than under the particular PO for which they were appropriate (such as the development of [REDACTED] and the completion of a particular survey, both of which [REDACTED] listed as accomplishments within all three POs, rather than just within the NTOC Improvement and Innovation PO where [REDACTED] listed them). When asked about a specific accomplishment she felt should be included under the [REDACTED] PO, receipt of kudos for her [REDACTED] responded that although the article was written prior to 2009, it remains relevant,

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generates positive feedback, and, therefore, should have been included as an accomplishment. She acknowledged that another accomplishment she had wanted listed under the same PO, positive feedback from an organization outside of NTOC for her [REDACTED] PowerPoint briefing slides, was not relevant. (b) (6)

(U//FOUO) Regardless of the above, [REDACTED] considered her ACE from [REDACTED] to be "totally unfair"; because of her OAG complaint about [REDACTED] failure to document her mid-cycle performance review, he gave her a lower rating than she deserved. According to [REDACTED] act of reprisal was a continuation of the HWE and pattern of reprisal that she had experienced within [REDACTED]. These alleged acts of earlier reprisal, according to [REDACTED] included receiving a low evaluation and being placed on a PIP after complaining to the OIG about a previous supervisor, [REDACTED] and being told by [REDACTED] that [REDACTED] gave [REDACTED] a 3.0 overall ACE rating despite having been directed to rate her lower. (b) (3) -P.L., 86-36 (b) (6) (b) (3) -P.L., 86-36

(U//FOUO) According to [REDACTED], due to an ongoing reorganization and impending supervisory changes, [REDACTED] PIP was never implemented. Although her performance improved somewhat for a period following her mid-cycle review, it remained a struggle to focus [REDACTED] on her assigned duties so that she could perform at a successful level. [REDACTED] frequently claimed grandiose accomplishments and to be performing at a high level and [REDACTED] and others in the management chain had to tell her otherwise: "It wasn't reality." Further, [REDACTED] had an unwarranted high opinion of her skills and did not follow procedures; although the branch required all translations to be QCd prior to release, she did not always submit hers for review, as she considered it unnecessary. Although [REDACTED] considered herself a mentor and the most senior language analyst, in actuality, colleagues found her difficult to work with and avoided her and the branch's GG-15 senior language analyst found her translations to be inaccurate. (b) (3) -P.L., 86-36 (b) (6)

(U//FOUO) [REDACTED] denied that [REDACTED] ACE was an act of reprisal; she would have received the same rating regardless of whether or not she had filed a complaint with the OAG. Further, no one in [REDACTED] management chain ever conveyed to her that she was performing at a level higher than successful. She received straight 3 ratings on her final evaluation. Although [REDACTED] considered rating her lower, he did not, as she had not been formally placed on a PIP.<sup>14</sup> (b) (3) -P.L., 86-36 (b) (6) (b) (3) -P.L., 86-36

(U//FOUO) According to [REDACTED], he relied on his employees to provide a "good chunk" of the narrative for their evaluations. However, he could not do so with [REDACTED]. The narrative input she provided included many purported accomplishments that were "false" (including that she mentored over 40 analysts across the Agency, applied 17 languages, and was the most senior and fluent linguist in NTOC), repetitive (she listed having taken a particular survey under multiple POs), or irrelevant to the corresponding PO/PE (such as including participation in and completion of a

<sup>14</sup> (U//FOUO) According to PM 4-16A, in order for an employee to receive an overall EOR of "Minimally Successful," a rater must schedule and document feedback sessions throughout the remainder of the evaluation period (which must be at least 30 days), with a copy of the documentation provided to the employee. The documentation must include a statement of the performance requiring improvement, the performance improvement actions that will be implemented, and the consequences of failure to demonstrate acceptable performance.

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master degree program as an accomplishment under the NTOC Improvement and Innovation PO and listing having a beautiful spirit and room-brightening smile under the Communication PE).

(U//FOUO) In her testimony to the OIG, [REDACTED] said that she gave [REDACTED] a fair overall 3.0 rating on her ACE covering from May to August 2012 and was not pressured by higher management to lower it. [REDACTED] was on a PIP during this timeframe. At one point, [REDACTED] thought that [REDACTED] might have progressed to a point where she could receive higher than a 3.0. However, complaints from other linguists convinced her that a higher rating was not justified; although a senior linguist based on grade, within the office [REDACTED] skills were viewed as being only "mid-level." At the time, [REDACTED] focus was supposed to be [REDACTED]. However, she liked to do everything else and "I had to keep reining her back in." [REDACTED] had to remind [REDACTED] that she could only do work unrelated to her POs if time permitted.

(U//FOUO) According to [REDACTED] did not respect supervisors who were her same grade or lower and her colleagues found her boastful. As a GG-15, [REDACTED] was respected by [REDACTED] and had no problems with her following directions. However, [REDACTED] was "high maintenance" and required "a lot of hand-holding" to get where she needed to be with regard to performance. Additionally, [REDACTED] found it difficult to perform her duties related to [REDACTED] ("If you don't have that background, it's very hard to master."). Although [REDACTED] had received the related training, she needed to be mentored through the process "to ensure that she knows what she should be looking for."

(U//FOUO) The documentary and testimonial evidence in this case is clear and convincing that [REDACTED] overall 3.0 ACE rating for the period covering 01 August 2012 through 31 May 2013 was appropriate. Evidence in the form of emails and testimony revealed that throughout that appraisal period, her performance was borderline satisfactory at best and that [REDACTED] regularly informed her of his concerns related to her progress against her POs. Prior to August 2012, [REDACTED] had been on a PIP. During the August 2012 through May 2013 appraisal period, [REDACTED] gave serious consideration to placing her on yet another PIP. Because that PIP was never implemented, [REDACTED] could not have received less than a 3.0 rating.

(U//FOUO) Although the rating cycle was supposed to end on 31 July 2013, a reorganization meant that [REDACTED] supervision of [REDACTED] ended early. Therefore, she had only three months, from 26 February (the date of her mid-cycle performance review) to 31 May 2013, to make improvements and bring her performance up to the fully successful level. For [REDACTED] to believe that during a three-month period she raised her overall performance for the 10-month rating period from a minimally successful/unsuccessful level to excellent/outstanding is unreasonable, especially given that she continued to struggle with the accuracy of her translations. Further, many of the purported "accomplishments" that she provided for inclusion in her ACE were irrelevant or inappropriate. Given the evidence regarding [REDACTED] performance shortfalls, we find credible [REDACTED]'s testimony that it was a stretch to justify giving her even a 3.0 overall rating. We found no evidence, other than [REDACTED] testimony, that her performance warranted a rating above 3.0.

(U//FOUO) Existence and strength of any motive on the part of [REDACTED] to retaliate. We also found no evidence that [REDACTED] was motivated to retaliate against [REDACTED] for her

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OAG complaint related to his failure to document her mid-cycle performance review by the required due date. NSA/CSS PM 4-16A requires that raters formally document a performance discussion held with each employee "at or near the midpoint of the rating cycle." It does not specify a due date for said documentation. On 26 February 2013, less than seven months into the rating cycle, [redacted] held a mid-cycle performance review with [redacted]. He later documented the session after being prompted to do so. According to [redacted] at the time he had [redacted] employees in his branch.

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(U//FOUO) Although the Agency issued guidance that for the 2012-2013 appraisal cycle supervisors were to document mid-year performance reviews with subordinates into HRMS by 28 February 2013, [redacted] failure to do so until several weeks later did not violate PM 4-16A. Additionally, given that supervisors routinely conduct mid-year assessments with multiple employees, his failure to document [redacted] in a timely manner did not rise to the level of mismanagement and his supervisors took no disciplinary action against him as a result. Finally, we find credible [redacted] testimony that because [redacted] complained about him and all of her supervisors with such frequency, her complaints had no impact on his impartiality. Given the above, we concluded that [redacted] had no motive to reprise against [redacted] for her protected communication to the OIG.

(U//FOUO) Evidence that the Agency takes similar actions against employees who are not whistleblowers but are otherwise similarly situated. The investigation determined that [redacted] finalized ACEs for 22 employees during the 2012-2013 appraisal cycle. However, only four of these employees had the same [redacted] work role as [redacted] and all were more junior in grade: one was a GG-9, two were GG-11's, and one was a GG-12.<sup>15</sup> [redacted] also rated two other language analysts more senior to [redacted] (one was a GG-14 and the other a GG-15), both of whom held the work role of [redacted].

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(U//FOUO) Of [redacted] five [redacted] only two (one of the GG-11s and the GG-12) shared the same POs. The POs of the other [redacted] varied, apparently based on position, duties, grade, and training. Because the other [redacted] grades and POs differed from those of [redacted] whose POs were finalized prior to her protected communication, we concluded that there were no [redacted] employees similarly situated to her during the 2012-2013 appraisal cycle.

(U//FOUO) Based on the clear and convincing evidence in support of [redacted] 3.0 "Successful" ACE rating and the lack of motive for [redacted] to retaliate against her for her protected communication, we did not substantiate the allegation of reprisal.

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<sup>15</sup> (U//FOUO) The [redacted] work role no longer exists at the Agency. In May 2014, [redacted] work role was updated to that of [redacted].

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#### IV. (U) CONCLUSION

##### (U) Conclusion

(U//~~FOUO~~) We concluded that [redacted] did not reprise against [redacted] for reporting to the OAG that he had failed to document her mid-cycle performance review in HRMS by the required due date.

##### (U) Distribution of Results

(U//~~FOUO~~) [redacted] and [redacted] will be informed of the results of our inquiry in this matter. A summary of the investigative findings will be provided to [redacted] and the DoDIG.

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[redacted]

Senior Investigator

[redacted]

Assistant Inspector General  
for  
Investigations

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