U.S. OFFICE OF SPECIAL COUNSEL

KATHLEEN FUREY,

Complainant,

v.

SECURITIES AND EXCHANGE COMMISSION,

Agency

OSC FILE No. MA-12-1508

AMENDMENT TO COMPLAINT OF POSSIBLE PROHIBITED PERSONNEL PRACTICE OR OTHER PROHIBITED ACTIVITY

PART 1. PROHIBITED PERSONNEL PRACTICES/OTHER PROHIBITED ACTIVITY

1. Name of person seeking OSC action ("Complainant"):

   Ms. Kathleen Furey

2. Position, Title, series, and grade:

   Senior counsel, Series: SK-0905, Grade SK-14.

3. Agency name:

   Securities and Exchange Commission

4. Agency Address:

   100 F St. N.E.
   Washington, DC 20549

5. Home or mailing address:

   [redacted]

6. Contact information

   Ms. Furey's email address is: [redacted]

Ms. Furey's counsel (Gary Aguirre) email address is: gary@aguirrelawapc.com

7. If you are filing this complaint as a legal or other representative of the Complainant, please supply the following information:

   Mr. Gary Aguirre, Esq.
   501 W Broadway, Ste. 800
   San Diego, CA 92101
   Phone: 619-400-4960
   Fax: 619-501-7072
   Email address: gary@aguirrelawapc.com

8. Are you (or is the Complainant, if you are filing as a representative) covered by a collective bargaining agreement?

   Yes.

9. How did you first become aware that you could file a complaint with the OSC?

   Ms. Furey's counsel has previously litigated before the MSPB.

10. Employment status:

    Competitive service: Career or career-conditional appointment

11. What other action(s), if any, have you taken to appeal, grieve, or report this matter under any other procedure?

    Only the filing of the original complaint in this matter.

12. What official is responsible for the violation(s) that you are reporting, and what is his/her employment status?

    See original complaint in this matter for individuals who are responsible for the violations. Additionally, with this amendment, Ms. Furey is also identifying the following individual:

13. What are the actions or events that you are reporting to OSC? (To the extent known, specifically list: (a) any suspected prohibited personnel practices or other prohibited activity, other than reprisal for whistleblowing; and (b) any personnel actions involved.

See the responses in the original complaint to this question. As a supplement to the original complaint, Ms. Furey specifies the prohibited personnel practices and personnel actions specified in Attachment A hereto and her original complaint in this matter. These include the reprisals against Ms. Furey as a consequence of her disclosures (1) from November 2007 through February 2008 to senior SEC officials and the SEC's inspector general relating to the decision of her chain of command not to enforce two of the securities acts, and (2) in November 2008 to the SEC's inspector general that her supervisors were again engaged in reprisals against for seeking to obtain the result of her desk audit and her original disclosures in 2008. As a consequence of these disclosures, her supervisors, as identified in the original complaint, [redacted], and other senior SEC officials have engaged in a series of reprisals against her, including a demotion/failure to promote, failure to grant pay raises and bonuses and tampering with or concealing her personnel files, all of which is discussed in Attachment A hereto in further detail.

Ms. Furey has recently learned that [redacted] likely participated, with the individuals identified in the complaint filed on January 30, 2012, in making the decision not to promote Ms. Furey to (or demote Ms. Furey from) an SK-16 position. Ms. Furey respectfully refers the OSC to her complaint in this matter, which identifies the other individuals who participated in the personnel actions against her.

The above conduct by the designated officials constitutes prohibited personnel actions as specified in 5 USC §2302 (b)(8) and (b)(9).

14. Provide details of the actions or events shown in your response to question 13.

See response to question number 13.

15. What action would you like OSC to take in this matter (that is, what remedy are you asking for?)

File an action for corrective action, file an appeal seeking official confirmation of Ms. Furey's SK-16 status, back pay as an SK-16, back pay for denied compensation raises, interest on back pay, attorney's fees and continuing jurisdiction to prevent future reprisals.

Additionally, Ms. Furey requests that the OSC seek an order imposing appropriate discipline or sanctions against all those who participated in the reprisals against her.

PART 2. REPRISAL FOR WHISTLEBLOWING

A. What information was disclosed? (Describe whistleblower disclosure)

Ms. Furey incorporates by reference the original complaint filed in this matter and Attachment A hereto as if set forth herein in full.

1. When was the disclosure made?

   Ms. Furey incorporates by reference the original complaint filed in this matter and Attachment A hereto as if set forth herein in full.

2. To whom (Name and title) was the disclosure made?

   Ms. Furey incorporates by reference the original complaint filed in this matter and Attachment A hereto as if set forth herein in full.

3. Disclosure of information evidenced.

   Ms. Furey incorporates by reference the original complaint filed in this matter and Attachment A hereto as if set forth herein in full.

4. What personnel action(s) occurred, failed to occur, or was threatened because of the disclosure?

   Ms. Furey incorporates by reference the original complaint filed in this matter and Attachment A hereto as if set forth herein in full.

5. When did personnel action(s) or threat(s) occur?

   Ms. Furey incorporates by reference the original complaint filed in this matter and Attachment A hereto as if set forth herein in full.

3. If you are **not** the person who actually made a disclosure described in boxes A, B, C, D above, please check below to specify the disclosure involved, and provide the name, address, and telephone number of the person who made the disclosure, if known.

   Ms. Furey incorporates by reference the original complaint filed in this matter and Attachment A hereto as if set forth herein in full.

4. Explain why you believe that the personnel action(s) listed above occurred because of the disclosure(s) that you described. *(Be as specific as possible about any dates, locations, names, and positions of all persons mentioned in your explanation. In particular, identify actual and potential witnesses, giving work locations and telephone numbers, if known. Attach a copy of any documents that support your statements. Please provide, if possible, a copy of the notification of the agency's proposal and/or decision about the personnel action(s) covered by your complaint.*

   Ms. Furey incorporates by reference the original complaint filed in this matter and Attachment A hereto as if set forth herein in full.

5. What action would you like OSC to take in this matter (that is, what remedy are you asking for)?

   File an action for corrective action, file an appeal seeking official confirmation of Ms. Furey's SK-16 status, back pay as an SK-16, back pay for denied compensation raises, interest on back pay, attorney's fees and continuing jurisdiction to prevent future reprisals.

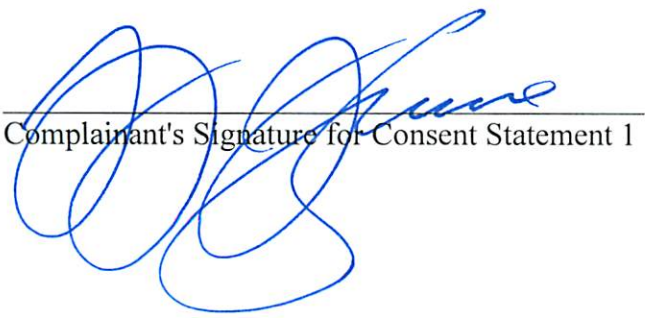
   Additionally, Ms. Furey requests that the OSC seek an order imposing appropriate discipline or sanctions against all those who participated in the reprisals against her.

PART 3: CONSENT TO CERTAIN DISCLOSURES OF INFORMATION

Ms. Furey consents that the OSC may question the SEC staff regarding the matters stated above and in Attachment A, but not to disclosures unnecessary to ascertain information relevant to the allegations stated herein.

PART 4. CERTIFICATION AND SIGNATURE

I certify that all of the statements made in this complaint (including any continuation pages) are true, complete, and correct to the best of my knowledge and belief. I understand that a false statement or concealment of a material fact is a criminal offense punishable by a fine of up to $250,000, imprisonment for up to five years, or both. 18 U.S.C. § 1001.



Complainant's Signature for Consent Statement 1

17 April 13

Date signed

Attachment A

Attachment A to Amendment to Complaint

Introduction

The three-year ascent of Kathleen Furey ("Furey") to higher levels of official responsibility and pay[1] came to an abrupt halt in 2008, shortly after she was forced to become a whistleblower. In August or September of 2007, Furey approached Assistant Regional Director George Stepaniuk ("Stepaniuk"), her level-2 supervisor, to discuss the investigation of [redacted] which seemed to be floundering, just like many investigations of other investment companies or advisers had floundered in the past. Furey believed that [redacted] had violated both the Investment Company Act of 1940 ("ICA"), and the Investment Advisors Act of 1940 ("IAA"). Stepaniuk responded that his group—approximately twenty lawyers in the SEC's Division of Enforcement ("Enforcement")—"does not do IM cases." In essence, Stepaniuk had arrogantly admitted that he was flouting two of the four major securities acts that Congress and the Code of Federal Regulations had mandated the SEC and its staff enforce.

Furey faced a dilemma: should she join in Stepaniuk's decision to flout the law and thereby violate the oath she took when she became an SEC employee[2] or risk angering Stepaniuk by disclosing his personal moratorium on enforcing the IAA and ICA to his supervisors, the next logical step to correct the problem. In October 2007, Furey approached Associate Regional Director David Rosenfeld ("Rosenfeld"), her level-3 supervisor, and requested a transfer out of Rosenfeld's group.[3] Furey told Rosenfeld about Stepaniuk's self-imposed moratorium on "IM cases." Rosenfeld reacted with indifference. Consequently, Furey took her concerns about Stepaniuk's IM moratorium a step higher—to the Regional Director of the New York Regional Office ("NYRO"), Mark Schonfeld ("Schonfeld").[4] Schonfeld offered Furey two options: she could recant her statement about what Stepaniuk told her or she could inform the staff of the SEC's Inspector General ("IG"), David Kotz ("Kotz") of her allegations. In this way, Furey was forced to become a whistleblower.

One year later—before the sting of her whistleblower disclosures to Rosenfeld, Schonfeld, and IG Kotz had worn off—NYRO's indifference to enforcing the securities acts against one prominent investment manager—Bernard Madoff—would produce the worst failure or perhaps more accurately the worst scandal in the SEC's history.[5] Over the next year, the SEC leadership would be publicly humiliated before the Congress[6] and in the media.[7] Some would

[1] See personnel records for the period between 2005 and 2007, Exhibits 1 through 13 and 18.

[2] As required of all SEC employees, Furey gave an oath when she began her employment with the SEC that she would "well and faithfully discharge the duties of the office of which I am about to enter. So help me God." See also 17 CFR § 200.55.

[3] See Furey's email of Nov. 27, 2007, to Schonfeld and [redacted] Ex. 35.

[4] *Id*. See also email chain between Furey, Schonfeld and others on Dec. 6, 2007, Ex. 39.

[5] See Zachary A. Goldfarb, *The Madoff Files: A Chronicle of SEC Failure*, Washington Post, Sep. 3, 2009, available at http://articles.washingtonpost.com/2009-09-03/business/36909577_1_david-kotz-madoff-probe-bernard-l-madoff.

[6] *SEC Slammed during Madoff Hearing for Ignoring Alleged Ponzi Scheme*, PBS News hour, Feb. 4, 2009, available at http://www.pbs.org/newshour/bb/business/jan-june09/madoff_02-04.html.

call for the SEC to be scrapped.[8] At the center of the scandal were NYRO and its leadership. They had failed to recognize the largest Ponzi scheme in history, even though an external whistleblower, Harry Markopoulos, had delivered a blueprint of Madoff's fraud to NYRO's leadership and pounded on NYRO's front door begging to be heard.[9] In this light, Furey—an internal whistleblower who had zeroed in on NYRO's indifference to prosecuting IM cases—became instantaneously persona non grata. Instead of, "shoot the messenger," SEC leadership refined Shakespeare's metaphor to "shoot the whistleblower."

The combined impact of Furey's disclosures and the Madoff scandal had a devastating impact on Furey's promising career. The formal promotions would stop. The pay increases would slow and then stop. The awards slowed and then stopped. The performance evaluations would slip from exceptional, to acceptable, to needs improvement.

But at the heart of the SEC's treatment of Furey were hypocrisy and the hijacking of agency power to carry out a personal vendetta. Those directly supervising Furey continued to elevate her level of duties until she was operating at a de facto SK-16 level. But when Furey sought a neutral and independent audit of her work level, SEC management began tampering with her personnel records, retroactively dropping her performance evaluation to justify their misconduct in demoting her or failing to promote her.[10] When the independent auditor found that Furey was operating at an SK-16 level, SEC management decided to conceal her audit results and lie about their availability. That same management then carried out a process of reprisal by directing the Office of Human Resources to reverse its decision confirming Furey's SK-16 status.

Furey respectfully submits that Congress enacted the Whistleblower Protection Act ("WPA") and empowered the Office of Special Counsel to protect whistleblowers like herself. These shocking facts demand swift and decisive action by the Office of Special Counsel.

The OSC May Bring an Independent Right of Action to Enforce Her Rights under 5 USC § 2302(b)(8) and § 2302(b)(9)

Furey's original complaint requested the OSC to seek corrective action on her behalf under 5 USC § 2302(b)(8). The Whistleblower Protection Expansion Act ("WPEA") amended 5 USC §1221 and 5 USC § 1214 (e) to allow the Office of Special Counsel ("OSC") to investigate and bring a corrective action for a violation of 5 USC § 2302(b)(9). See: *Acha v. Dep't of Agric.*, 2013 MSPB LEXIS 1950, 2-3 (M.S.P.B. Apr. 11, 2013)("[T]he Whistleblower Protection

[7] *Supra*, n. 5.

[8] Kara Scannell, *Assured of SEC's Survival, Schapiro Now Fights to Keep Regulatory Teeth*, The Wall Street Journal, June 11, 2009.

[9] Ross Kerber, *The Whistleblower*, The Boston Globe, Jan 8, 2009, available at http://www.boston.com/business/articles/2009/01/08/the_whistleblower/?page=2.

[10] The SEC's reprisal against Furey could either be looked upon as a demotion from her de facto SK-16 position or the failure to formally promote her to an SK-16 position. This characterization matters little since in either case the SEC's reprisal constituted an unlawful personnel action.

Enhancement Act of 2012 (WPEA), effective December 27, 2012, amended 5 U.S.C. § 1221 to allow employees … to seek corrective action from the Board through an IRA appeal as a result of a prohibited personnel practice described in section 2302(b)(9)(A)(i), (B), (C) and (D)." Accordingly, Furey now requests the OSC to bring an appeal seeking corrective action on her behalf under both 5 USC § 2302(b)(8) and 2302(b)(9). Furey's cooperation with, communications to, and testimony before the SEC's IG in 2007 and 2008 and her communications to the SEC's IG in November 2011 all come within the conduct protected by 5 USC § 2302(b)(9). As established by the original complaint, this amendment, Ms. Furey's testimony, and the documentary evidence were clearly a cause of the SEC's prohibited personnel actions against her. Consequently Furey requests the OSC to seek corrective action under 5 USC § 2302(b)(9) as well.

Furey's Ascent: Her First Three Years

Furey's steady ascent during her first three years at NYRO is conclusively established by her personnel records. Furey began as a law clerk in the Enforcement Division on September 7, 2004. Less than a year later, on August 11, 2005, Branch Chief [redacted] Furey's level-1 supervisor, recommended Furey be promoted to SK-12.[11] In doing so, [redacted] observed, "During the past year, Ms. Furey has proven to be a promising attorney dedicated to the work of the Commission."[12] Two weeks later, Stepaniuk (level-2 supervisor) certified that Furey was entitled to a monetary award for her work during her first year with the SEC and specifically praised her work product on three matters, including her first trial as a lawyer: "In the administrative proceeding, Ms. Furey worked long hours on every aspect of trial preparation, examined witnesses, argued before the ALJ, and drafted pre-trial and post-trial briefs."[13] In 2006 and 2007, the same supervisors promoted Furey to SK-13 and then SK-14,[14] recommended that she receive monetary awards, and again praised her work on specific cases.[15]

The First Set of Protected Disclosures: "Stepaniuk Does Not Do IM Cases."

According to her supervisors, Furey's work on the [redacted] case in 2006 and 2007 was one of three cases that won her a promotion to SK-14 in August 2007.[16] By that point, NYRO had been investigating [redacted] since December 2004[17] and the case had still not advanced to

[11] See [redacted] memorandum of August 11, 2005, to Assistant Regional Director George Stepaniuk and Associate Regional Director David Rosenfeld, Exhibit 1.

[12] *Id*.

[13] See award recommendation and approval effective September 4, 2005, signed by supervisors Stepaniuk, Rosenfeld, and Schonfeld, Exhibit 2.

[14] See Aug. 17, 2007, memorandum from [redacted] to Rosenfeld and Stepaniuk, Ex. 11.

[15] See award recommendations and approvals for 2006 and 2007, Exhibits 6 and 10.

[16] S*upra*, n. 14, Ex. 11.

[17] See formal order memorandum in the [redacted] matter, dated April 18, 2008, Ex. 109, which confirms a referral to NYRO on December 9, 2004.

a formal investigation,[18] a necessary step for Enforcement to issue subpoenas. After watching the [redacted] case churn in place, Furey went over the head of her immediate supervisor on that case, Branch Chief Joseph Dever,[19] and brought her concerns to Stepaniuk. Stepaniuk's response was simple and direct: "We don't do investment management cases in this group."[20] As she would explain a few months later to an investigator with the SEC's Office of the Inspector General ("OIG"), "George [Stepaniuk] does not have the authority to make that determination—the Commission does."[21]

Furey decided to go up another notch of her chain of command. In October 2007, Furey approached Associate Regional Director Rosenfeld (level-3 supervisor) to request a transfer from Rosenfeld's group.[22] Furey disclosed Stepaniuk's self-imposed moratorium on IM cases. Rosenfeld was indifferent. At this point, from Furey's perspective, the default in prosecuting IM cases reached three levels at NYRO.

Furey next reached out laterally. On November 15, 2007, Furey sent an email to [redacted] (Human Resources) and [redacted] again expressing her concern: "If George [Stepaniuk] continues not to want to do investment management cases, perhaps one solution is for the [redacted] case to move with me."[23] By her email of November 27, 2007, Furey also made the same disclosure ("Stepaniuk's group does not do IM cases") to the Office of Compliance Inspections and Examinations ("OCIE") Senior Attorney Adviser James Capezzuto ("Capezzuto") and OCIE Associate Regional Director Tom Biolsi ("Biolsi").[24]

Finally, by her email dated November 27, 2007, Furey took her concerns to the highest official within NYRO, Associate Regional Director Schonfeld. Her email told Schonfeld: "George [Stepaniuk] stated to me that 'we don't DO investment management cases in this group.'"[25] On December 2, 2007, Furey again confirmed Stepaniuk's statement about not doing IM cases to [redacted] and Schonfeld.[26] In response to Furey's disclosures, Schonfeld convened a meeting at his office with Furey and Rosenfeld on December 6, 2007.[27] At the

[18] The [redacted] matter would not advance to a formal investigation until April 18, the same day the OIG report of its investigation, in part on Stepaniuk's group, was published. See OIG Report in Case No. OIG-478, Ex. 213. See also Stepaniuk case list, Ex. 212.

[19] Furey was assigned to work under Dever on the [redacted] case, but continued to report to [redacted] on all other matters.

[20] Furey would confirm Stepaniuk's statement (we don't do IM cases) in several emails. See exhibits 34, 35, 36, 38, 39, 41, and 42.

[21] In her email of Dec. 18, 2007, to OIG investigator [redacted] Regional Director Schonfeld, and [redacted] Furey explained in principle why Stepaniuk's statement (we don't do IM cases) violated the Exchange Act of 1934 and SEC rules and regulations. See Ex.41.

[22] See Furey's email of Nov. 27, 2007, to Schonfeld and [redacted] Ex. 35.

[23] Ex. 34.

[24] Ex. 36.

[25] Ex. 35.

[26] Ex. 38.

[27] See email chain confirming the meeting at Schonfeld's office, Ex. 39.

meeting, Schonfeld offered Furey two options in the presence of Rosenfeld: she could recant her disclosure of Stepaniuk's self-imposed moratorium on IM cases or she could make her allegations to the staff of the SEC's inspector general. As she had requested in an earlier email,[28] Furey expressed her preference that Schonfeld investigate the situation himself and correct the problem quietly and internally. When Schonfeld declined to correct the problem himself, Furey had only one option which was consistent with her oath as an SEC employee and the Code of Federal Regulations: she disclosed Stepaniuk's misconduct to the staff of the SEC's IG.

Furey's Disclosures Described Wrongful Conduct Specified in 5 U.S.C. § 2302(b)(8)

Furey's disclosures regarding Stepaniuk's self-imposed moratorium on IM cases satisfied four of the standards specified in 5 U.S.C. § 2302(b)(8). In a nutshell, she had disclosed a violation of law, gross mismanagement, gross waste of funds, and abuse of authority. A few weeks after her disclosure to Schonfeld, Furey's email to an OIG investigator explained that Stepaniuk's declared moratorium on IM cases constituted a violation of the Exchange Act of 1934, the IAA and the ICA.[29] Further, multiple SEC regulations require SEC staff to enforce the securities acts enacted by Congress, including the IAA and the ICA. For example, 17 CFR § 200.55 provides in part: "In administering the law, members of this Commission should vigorously enforce compliance with the law by all persons affected thereby."[30] These regulations apply equally to Commission staff. 17 CFR 200.51.

Likewise, Stepaniuk's refusal to bring IM cases also constituted an abuse of authority, gross mismanagement and gross waste of funds. See Wheeler v. Department of Veterans Affairs, 88 M.S.P.R. 236, 241-42 (2001) ("'Abuse of authority' is defined as 'an arbitrary or capricious exercise of power by a federal official or employee that adversely affects the rights of any person or that results in personal gain or advantage to himself or to preferred other persons.'") See also Ting v. Dep't of the Treasury, 2011 MSPB LEXIS 1677 (M.S.P.B. Mar. 16, 2011). See also Schaeffer v. Department of the Navy, 86 M.S.P.R. 606, P 8 (2000) ("Gross mismanagement means management action or inaction that creates a substantial risk of significant adverse impact on an agency's ability to accomplish its mission,…") See also: de Jeremy Cruz McGowan v. EPA, 2012 M.S.P.B. 120 (M.S.P.B. 2012) ("The Board has defined a gross waste of funds as 'a more than debatable expenditure that is significantly out of proportion to the benefit reasonably expected to accrue to the government.'")

[28] Furey's email of Dec. 2, 2007, to [redacted] and Mark Schonfeld, Ex. 38: "Regarding the fact that George 'doesn't do IM cases,' I am referring this to management with ***trust*** that Mark will look into this."

[29] See Furey's email of Dec. 18, 2007, to [redacted] Schonfeld and [redacted] Ex. 41.

[30] See also: 17 CFR § 200.54 ("The members of this Commission have undertaken in their oaths of office to support the Federal Constitution. Insofar as the enactments of the Congress impose executive duties upon the members, they must faithfully execute the laws which they are charged with administering.") and 17 CFR § 200.53(a) ("Members of the Securities and Exchange Commission are entrusted by various enactments of the Congress with powers and duties of great social and economic significance to the American people. It is their task to regulate varied aspects of the American economy, within the limits prescribed by Congress, to insure that our private enterprise system serves the welfare of all citizens. Their success in this endeavor is a bulwark against possible abuses and injustice which, if left unchecked, might jeopardize the strength of our economic institutions.")

Furey Reasonably Believed the Evidence That Stepaniuk Did Not Bring IM Cases

The evidence on this issue is overwhelming. To begin with, Stepaniuk made the statement to Furey on two occasions that his group did not do IM cases. Furey had no reason to disbelieve Stepaniuk's stunning admission. To the contrary, shortly after disclosing Stepaniuk's declared moratorium on IM cases, Furey sent numerous emails to the SEC's OIG describing how the conduct of Stepaniuk and his subordinates confirmed his statement that his group did not bring IM cases.[31]

Further, Stepaniuk prohibited Furey from consulting with the SEC's Office of Investment Management ("OIM") regarding the [redacted] informal investigation,[32] the SEC office with specialized expertise regarding compliance with the IAA, the ICA and the rules implementing those acts. Consultation between Enforcement staff and other SEC offices with specialized expertise is a routine step in an informal investigation and often a required step for it to be elevated to a formal investigation. Curiously, though prohibiting Furey from consulting with OIM after the Madoff scandal broke, a few months later Stepaniuk's group would specifically state in their application for a formal order they had consulted with OIM regarding the [redacted] investigation.[33]

Furey's belief in 2007 that Stepaniuk's group did not do IM cases is now supported by evidence as hard as granite. Furey has presented the OSC with a list of Stepaniuk's active matters from January 2002 through September 2010.[34] It lists 60 line items of cases, formal investigations, and other matters under the Securities Act of 1933 and the Securities Exchange Act of 1934, but not a case relating to violations of the IAA or the ICA until April 18, 2008, when Stepaniuk's group requested a formal investigation be opened on the [redacted] matter.[35] This was the same day the SEC IG issued his report in part dealing with allegations relating to Stepaniuk's handling of the [redacted] investigation. matter.[36] Likewise, NYRO never got

[31] In her email of Dec. 20, 2007, to OIG investigator [redacted] Furey describes in detail three IM cases being handled by Stepaniuk's group that were going nowhere: [redacted] and [redacted] (Ex. 42). In another email, Furey told OIG investigator [redacted] how SEC staff had fumbled obtaining ten critical audio tapes from [redacted] and how Dever "just wanted to come and tank the case [redacted] then by finding something wrong with what [redacted] said." (See Furey's email of Jan. 15, 2008, Ex. 46) In her email of January 15, 2008, Furey provided more information to [redacted] on how other IM investigations were killed (Ex. 45).

[32] In her email of Jan. 15, 2008, to [redacted] Furey noted, "Did I ever tell you that George has *refused* to let me speak to IM in DC about [redacted] when I questioned people here could not answer because there was no precedent?" (Ex. 45) Furey also documented Stepaniuk and Dever's refusal to permit her to consult with the SEC's IM office in her email of Jan.31, 2008, to Rosenfeld, Stepaniuk and Dever (Ex. 51), her emails of Jan. 30, and Feb. 4, 2008, to [redacted] (Exs. 48, 49, 50 and 53), and Feb. 7, 2008, emails to OIG Investigator [redacted] (Exs. 54 and 55).

[33] The first two pages of the Formal Order Memorandum, dated April 18, 2008, have been submitted as Exhibit 109-A. These two pages specifically state that Enforcement staff had consulted with or OIM prior to that date regarding the [redacted] investigation.

[34] See Stepaniuk's case list, Ex. 212.

[35] Ex. 109-A.

[36] See OIG report, Ex. 213.

around to filing the [redacted] case until eleven months after the media broke the Madoff Ponzi scheme.[37] Further, Stepaniuk's group did not get serious about opening formal investigations of violations of the IAA or the IIA until January 2009. By that time, NYRO specifically and the SEC in general were under a scathing attack by the media and Congress for failure to detect or prosecute the worst IM fraud of all time, the Madoff $60-billion Ponzi scheme.[38] As Madoff began to get Congressional and media attention in January 2009, Stepaniuk's interest in IAA and ICA cases sharply increased. [39] The failure of NYRO Enforcement staff to pursue IM cases was also apparent to SEC OCIE staff. In January 2009, Biolsi, OCIE Associate Regional Director for NYRO, told then Acting Regional Director James Clarkson: "Jim, one of the things we have tried to do since I returned is to track the progress of our enforcement referrals. When I started, there were dozens of referrals that were not being actively pursued (emphasis added)."[40]

The Process of Reprisal

A whistleblower is rarely a witness to the decision of senior agency officials to engage in a reprisal against the whistleblower because of his or her disclosure. The whistleblower is not invited to the meeting where senior management makes that decision. The whistleblower is not copied on the email between management officials making that decision. Nor does the whistleblower participate in the phone call between two management officials making such a decision. The Whistleblower Protection Act ("WPA") would be meaningless prose if a whistleblower could only establish his or her case through direct evidence.

And Congress wisely understood these pragmatics when it enacted the WPA. In this regard, 5 USC § 1221 provides: "The employee may demonstrate that the disclosure or protected activity was a contributing factor in the personnel action through circumstantial evidence…" In a recent MSPB decision, Special Counsel ex. rel. Butterfield v. Dep't of Homeland Sec., 2011 MSPB LEXIS 4250 (M.S.P.B. July 5, 2011) Chairman Grundmann observed: "[I]n order to meet the contributing factor element an employee only need demonstrate by preponderant evidence that the fact of, or the content of, the protected disclosure was 'one of the factors that tended to affect in any way the personnel action.'" In her Butterfield decision, Chairman Grundmann incorporated the analysis in Marano v. Department of Justice, 2 F.3d 1137 (Fed. Cir. 1993). Citing the WPA's legislative history, the Federal Circuit explained the term "contributing factor" as follows:

> The words "a contributing factor"… mean any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision. This **test is specifically intended to overrule existing case law,** which

[37] See Rosenfeld's email of Nov. 5, 2009, Ex. 110.

[38] Charles Ferguson, *Post-Mortem on Madoff's Fraud While Scandal Is Still Quivering*, The N.Y. Times, Apr. 25, 2011; available at http://www.nytimes.com/2011/04/26/books/diana-b-henriques-on-madoff-in-wizard-of-lies-review.html?pagewanted=all.

[39] See Stepaniuk cases, Ex. 212. From 29 January 12, Stepaniuk's next nine cases included IAA or ICA claims.

[40] See Jan. 16, 2009, email, Ex. 90.

> requires a whistleblower to prove that his protected conduct was a "significant", "motivating", "substantial", or "predominant" factor in a personnel action in order to overturn that action.

As established below, the evidence of reprisal against Furey far exceeds the standard articulated in 5 USC § 1221, as explained by the Federal Circuit in Marano and by Chairman Grundmann in Butterfield. This evidence clearly establishes that senior SEC officials have engaged in a continuous process of reprisal against Furey—sometimes rising to the level of personnel actions and sometimes not—since her protected disclosures in late 2007. Sadly, those reprisals continue unabated to this moment. The evidence is equally clear that these same senior SEC officials have tried to cover up their reprisals against Furey by tampering with her personnel records and lying about and concealing compelling evidence that Furey was entitled to an SK-16 promotion. Perhaps the most shocking aspect of the cover-up was its clumsy and transparent execution.

After Furey's disclosures in late 2007, her immediate supervisors (Assistant Director Stepaniuk and Branch Chief Dever) would have little opportunity to engage in any reprisals in the form of personnel actions against her. Their decisions about such staff promotions, pay raises, and bonuses for 2007 had already been made and implemented before Furey's disclosures. Further, since the SEC transferred Furey from Enforcement to OCIE on March 31, 2008, Enforcement officials could not directly deny Furey a bonus, pay raise, or promotion based on her 2008 performance. Those decisions would not be made until late 2008. Nonetheless, though suppressed for the moment, their hostility toward Furey was palpable. It would continue to smolder for the next eighteen months, finally expressing itself when NYRO Director George Canellos ("Canellos") delicately informed Furey in September 2010 that Enforcement officials wounded by her disclosures had become an obstacle to her SEC career.

Though not in the form of personnel actions, the air of hostility toward Furey revealed itself shortly after she disclosed Stepaniuk's moratorium on IM cases to Rosenfeld in October 2007. In early November 2007, Dever called Furey to his office. When she arrived, Dever closed the door, glared at her, and said he was "now on the case [redacted] and Furey could see if she "liked that." Shortly after this intimidating experience, Furey emailed [redacted] (OHR) and [redacted] about "being punitively reassigned." Dever's hostility towards Furey continued into March when he sent her an email saying, "you should not communicate with me one-on-one. All communications between us should be limited to email only and should include a cc: to George, David [Rosenfeld] and Mark [Schonfeld]." Dever went on to say "you should know that I am keeping a record of your campaign to harass me and how your conduct has adversely impacted the progress and quality of the [redacted] investigation. I

have been reporting, and will continue to report, the same to the appropriate people within the Commission (emphasis added)."[41]

The most stunning aspect of Dever's declared vendetta was not merely the fact he had bypassed and thus violated internal SEC regulations mandating how performance evaluations of SEC staff are to be conducted. Rather, Dever sent his email declaring his personal vendetta against Furey to all of his supervisors—Stepaniuk, Rosenfeld and Schonfeld— thereby revealing his confidence that his entire chain of command believed his vendetta against Furey was an appropriate way to deal with her whistleblowing. Neither Stepaniuk, nor Rosenfeld or Schonfeld even responded to Dever's declaration of vendetta against Furey. In effect, through their silence, Stepaniuk, Rosenfeld and Schonfeld adopted Dever's vendetta against Furey as their own.

Obviously, Dever's threat was intended to instill fear in Furey. The failure of Dever's entire chain of command to intervene illustrates their willingness to condone the climate of fear that Dever was creating. This climate of fear was nothing new. The SEC IG reported on this atmosphere of fear in his April 18, 2008, report which dealt in part with Stepaniuk's group. He found, "There are, however, issues that must be addressed at NYRO, including …the great fear of retaliation by management expressed by many staff…" This "strong" or "great" fear of retaliation was mentioned seven times in the Inspector General's report.[42] And the IG apparently found that the strong fear of reprisal was even stronger in relation to Stepaniuk.

The OIG report obtained by Furey under FOIA redacted the names of senior NYRO management who were responsible for instilling the strong fear of reprisal in SEC staff. However, if the OSC obtains an unredacted copy of the IG report, we believe it will read in part as follows:

> The OIG found a strong fear of retaliation by many staff attorneys, particularly by those working under [Stepaniuk]. While most staff could not provide the OIG with any specific examples of retaliation, the staff told us that [Stepaniuk] would generally make life difficult for them and assign them bad cases and not give them good work as a result of cooperating with the OIG's investigation. One staff attorney stated that she felt she had suffered retribution because [Stepaniuk] formed an unfavorable early opinion of her and she has not been promoted or given good cases.[43]

With the support of the SEC employee's union and the OIG, the SEC transferred Furey from Enforcement to OCIE at NYRO on March 31, 2008.[44] Furey soon learned that the transfer did not mean she would be free from her whistleblower legacy. On April 17, 2008, Furey's email told OIG investigator [redacted] that there were potential restrictions on Furey's contacts with

[41] See Dever's email of March 6, 2008, to Furey with copy to Stepaniuk, Rosenfeld and Schonfeld, Ex. 59.
[42] OIG report, Ex. 213.
[43] *Id*.
[44] See notification of personnel action, dated April 24, 2008, Ex. 14.

Enforcement staff on matters which OCIE had referred to Enforcement. This was potentially a major interference with Furey's work, since OCIE examinations which revealed serious securities violations were routinely referred to Enforcement.[45] Indeed, Furey's description of her job, affirmed by her supervisor and an independent auditor, specifically included her work with Enforcement staff. [46]

After the setback over attending meetings with Enforcement staff, Furey appeared to resume her upward ascent. Three months after she reported to OCIE, Biolsi offered this evaluation of Furey's performance:

> Since joining the investment management inspection program, Kathleen has been an outstanding team member. She has quickly developed a keen understanding of our program and has taken on a number of new challenges. … I am very happy that Kathleen has joined our team and expect that her role and influence will continue to grow throughout this next year."[47]

On August 27, 2008, the SEC approved the recommendations of Furey's supervisors that she receive a pay increase.[48] On October 10, 2008, after Furey completed a project, Biolsi's message was simple: "You're the best."[49] On November 20, 2008, Furey's supervisor found that she was acceptable in all performance criteria.[50] Finally, on November 21, 2008, Biolsi confirmed that Furey was on track for promotion to SK-16 if she continued to grow at the same pace.[51]

But Furey's whistleblower legacy would soon catch up with her. In December 2008, her disclosures about Stepaniuk's moratorium on IM cases and NYRO's indifference to his moratorium, took on a new meaning. The worst SEC failure in its history—an IM case—abruptly became front page news and the focus of the US Congress for months. It was not merely that the SEC had failed to detect the largest Ponzi scheme in history and many of its victims were retirees and charities. It was not merely that Madoff was an investment advisor who violated the IAA, as the SEC OIG would later find.[52] Even more stunning, an external whistleblower, Harry Markopoulos, had repeatedly presented compelling evidence to different offices of the SEC,

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[45] See Furey's email of April 17, 2008, to [redacted] and [redacted] Ex. 61.

[46] In May 2011, as discussed later in this letter, Furey filled out and submitted a questionnaire to obtain a desk audit to verify that she was functioning at an SK-16 level. In the document, Furey stated, "I routinely review reports, referrals to Enforcement." She also stated, "My contacts are my internal 'client' base: … the Enforcement staff when they need IAIC expertise or are working on one of our Referrals." Associate Regional Director Capezzuto reviewed the questionnaire before it was submitted, and did not disagree with Furey's description of her job. Later, the desk audit effectively verified that Furey was accurately describing her duties. See text of this letter at pages 15-16.

[47] See Biolsi's evaluation of Furey dated July 8, 2008, Ex. 16.

[48] Ex. 17

[49] Ex. 73.

[50] Performance plan and evaluation, Ex. 15.

[51] Email exchanges between Biolsi and Furey, Ex. 75.

[52] See SEC OIG Report No. OIG-509, *Investigation of Failure of the SEC to Uncover Bernard Madoff's Ponzi Scheme*, Aug. 31, 2009, available at http://www.sec.gov/news/studies/2009/oig-509.pdf.

including NYRO, that Bernard Madoff was running a Ponzi scheme of epic proportions.[53] The notion that an internal whistleblower (Furey) had blown the whistle on NYRO's indifference to Stepaniuk's moratorium on IM cases was salt in a hemorrhaging wound.

Ironically, the process of reprisal against Furey began with the Madoff case itself. Shortly after the story broke in December 2008, [redacted] assigned Furey to work on it. Furey participated in key team meetings [redacted] One of her assignments was to search Madoff's office, desk and files. However, senior NYRO officials soon realized that Furey had blown the whistle on the same practice inside the SEC—NYRO's indifference to IM cases—that was at the core of the Markopoulos' whistleblowing: NYRO's indifference to fraud by Madoff, an investment adviser. Even worse, Furey had warned her supervisors to rethink their indifference to IM cases, because it "may save the Agency from a great deal of embarrassment."[54] As history would tell, Furey understated her point.

On January 6, 2009, Associate Director Biolsi directed Furey to drop the Madoff investigation,[55] a prohibition he again confirmed a couple weeks later in another email.[56] He also directed her not to attend any meetings with Enforcement on Madoff or even say she was involved in the investigation in any way. Later, Biolsi told Furey that he only invited trusted staff to these meetings, which she confirmed in an email.[57].

Since Furey was one of only two attorneys [redacted] NYRO's abrupt flip flop on her participation in the largest IM fraud case in the SEC's history was inexplicable. Furey expressed her bewilderment over Biolsi's decision with this response: "??????????????"[58]

Next, after ordering Furey off the Madoff investigation, Biolsi abruptly ordered her to stop attending branch chief meetings, which she routinely had done before the SEC-Madoff scandal. In conduct that smacks of intent to humiliate, Biolsi directed Furey to leave a meeting and wait outside in the hallway until further instructions.[59] After more than a half hour standing in the hall, Furey sent an email asking if she could return. More than an hour later, Biolsi replied: "You need to take your concerns up with DC. I have no choice."[60] A few months later, a problem arose because Furey was unaware of a policy change made during a telephonic conference from which she was excluded. The policy change allowed staff to contact investors, while Furey believed an earlier policy prohibiting such contacts was still in place. Unaware of

[53] Charles Ferguson, *Post-Mortem on Madoff's Fraud While Scandal Is Still Quivering*, The N.Y. Times, Apr. 25, 2011; available at http://www.nytimes.com/2011/04/26/books/diana-b-henriques-on-madoff-in-wizard-of-lies-review.html?pagewanted=all.
[54] See Furey's email of Dec. 2, 2007, to [redacted] and Schonfeld, Ex. 38.
[55] Ex. 84.
[56] Ex. 93.
[57] See email chain of Mar. 18, 2009, between Furey and Biolsi, Ex. 105.
[58] See Furey's email of January 6, 2009, to Biolsi and Capezzuto, Ex. 103.
[59] See email chain of Feb. 18, 2009, between Furey, Biolsi, and Capezzuto, Ex. 104.
[60] *Id*.

the policy change, Furey followed the earlier guidance. When she learned of the miscommunication, she again inquired of Biolsi whether she could participate in only those portions of meetings that directly related to her work. Without explanation, Biolsi rejected her request.[61] On the same day, Biolsi criticized Furey for not being aware of the policy change during the phone call, despite his own directions she could not participate in the meeting and others where this change had been discussed.[62]

The 180-degree about-face in Biolsi's attitude toward Furey—before and after Madoff—is also confirmed by comparing his formal and informal evaluations of Furey before and after the Madoff scandal broke. Before Madoff, according to Biolsi, Furey was "an outstanding team member"[63] who did great work,[64] who was "the best,"[65] who was on her way to an SK-16 level. In stark contrast, after Madoff, Biolsi gave Furey a "mixed" performance assessment on June 11, 2009, because of her "interpersonal dealings with members of our staff in NYRO on examinations as well as with Enforcement."[66]

Biolsi's statement that Furey did not deal well with NYRO staff is unsupported by any records the SEC has thus far released pursuant to Furey's request under the Freedom of Information Act ("FOIA"). Indeed, aside from senior SEC officials who engaged in reprisals against Furey, the released records were positive. For example, [redacted] who headed the NYRO broker-dealer exam program, told Biolsi, "simply stated [Furey] has been great to work [sic] and specially able to bring the teams together and inspire mutual trust and confidence. Our dealings with her have been terrific and I look forward to working with her in future exams (emphasis added)."[67] Biolsi's response to [redacted] and Furey belied his criticism of Furey's "interpersonal dealings with staff" he would record a few months later in his evaluation. Biolsi only offered this: "Keep up the great work, Kathleen."[68] After Biolsi left the SEC in August 2009, Furey reported to the then Acting Associate Director James Capezzuto. In his performance evaluation of Furey for the review period ending in November 2010, Capezzuto stated, "She demonstrated good working relationships with the examiners [approximately 90 staff members] in her support of their activities (emphasis added)."[69] And even more obviously, Furey had no apparent problems with other staff during her first three years with the SEC, during which she received annual promotions, bonuses, and merit pay increases. Once again, this is not the first

[61] See Furey's email of May 1, 2009, to Biolsi with copy to Capezzuto, Ex. 214.
[62] See email chain between Furey and Biolsi, with copy to Capezuto, Ex. 215.
[63] See evaluation of Kathleen Furey for the period May 1, 2007, through April 30, 2008, Ex. 16.
[64] See email chain of July 11, 2008, Ex. 68.
[65] See Biolsi's email of Oct. 10, 2008, to Furey and copy to Capezzuto, Ex. 73.
[66] Ex. 21.
[67] See [redacted] email of March 26, 2009, to Biolsi with copy to Furey, Ex. 98.
[68] See Biolsi's email of March 26, 2009, to [redacted] with copy to Furey, Ex. 216.
[69] Ex.25.

time senior SEC management has groundlessly attacked a whistleblower's "interpersonal dealings with staff" to justify its unlawful reprisals. [70]

After Biolsi left the SEC in August 2009, Furey reported to Capezzuto. It becomes crystal clear during the period that Capezzuto supervised Furey that the reprisals were coming from the top down. While Capezzuto's actions demonstrate he supported the merit-based rise of Furey's SEC career, he was also implementing reprisals that came from above.

On the one hand, Capezzuto repeatedly told Furey that he would support her SK-16 promotion. Consistent with that position, he recommended Furey receive a merit pay increase in December 2009.[71] In September 2010, Canellos confirmed that Capezzuto was a real fan of Furey's work.[72] Likewise, as late as November 2010, Capezzuto offered this evaluation of Furey's performance in his own words:

> Ms. Furey is an intelligent, hard-working person who honestly cares about her work. She works hard to build and maintain her level of competency and is always willing to attend training sessions and take on-line courses. She has especially emphasized the 40 Acts while completing her CLE requirements. She demonstrates good working relationships with the examiners in her support of their activities. Her goal for the next year will be to continue to serve as a valuable and knowledgeable resource to the new Associate Regional Director—which she has done this year.[73]

Under Capezzuto's supervision, Furey continued to assume greater responsibilities within OCIE, including responsibilities that were only performed by SEC SK-16 staff. As Furey performed these responsibilities over the next year, Capezzuto continued to assure her that he was speaking to Canellos and recommending her formal promotion to the SK-16 level. Yet, that promotion never came.

Concerned that her whistleblowing in 2007-2008 was the obstacle, Furey requested a meeting in late September with Capezzuto's boss, Canellos, to inquire whether her whistleblower disclosures would impede here career. At the meeting on September 29, 2010, Furey came straight to the point: she asked Canellos whether her earlier whistleblowing as an Enforcement staff attorney would permanently block her career path at OCIE. Canellos "gently" replied that the Enforcement officials involved in the IG investigation were holding a grudge. That same evening, Furey reported her conversation with Canellos to Capezzuto in an email:

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[70] "The close connections between the complaints by the employees and the negative re-evaluations that followed strongly suggests that the motivation for the latter was retaliation for the former—not a legitimate attempt to objectively assess job performance." *The Firing of an SEC Attorney and the Investigation of Pequot Capital Management*, S. Rpt. 110-28, at 70, available at http://aguirrelawapc.com/global_pictures/Attachment_9.pdf.

[71] Ex. 23.

[72] See Furey's email of Sep. 29, 2010, to Capezzuto, Ex. 112.

[73] See Attachment to Ex. 27.

> The conversation took a different turn than I expected. …I brought out the IG report right out and said that it was only fair he let me know if that was going to hold my career back forever. That I felt THAT was the real issue holding up my promotion and I really have a right to know. I respect that he didn't avoid the issue. He said—gently—that those involved in the IG issue WERE not fans. That they did not question my intelligence, drive, abilities…[74]

Those referred to by Canellos as "involved in the IG" are easily identified. For sure, they included Furey's entire chain of command: Dever, Stepaniuk, and Rosenfeld. More than likely, they also included their sympathetic colleagues in management.

Obviously, Canellos's answer must be read in the context of the question. Furey was not inquiring whether she was popular with Enforcement staff. Rather, she asked whether her whistleblowing to the IG while an Enforcement attorney had become an impediment to her career at the SEC. In that context, Canellos's response ("those involved in the IG issue WERE not fans") did not merely answer Furey's question in the affirmative, but also identified senior enforcement officials who were blocking her path. Though this was a jolt to Furey, it was not entirely unforeseeable. Two and a half years earlier, Dever promised he would engage in a vendetta against Furey and made the threat with the knowledge and apparent consent of his supervisors, Stepaniuk, Rosenfeld and Schonfeld. Simply put, Enforcement was merely carrying out its promise. Likewise, some ten months later, Capezzuto would give Furey an equally clear message: he told her that six senior Enforcement officials must leave, and Canellos among them, before she would be promoted.

Another recent decision by Chairman Grundmann is clearly relevant to the statement by Canellos to Furey regarding the impact of her earlier whistleblower disclosures to the SEC's IG. In de la Cruz MaGowan v. EPA, 2012 M.S.P.B. 120 (2012), the administrative law judge found the passage of more than seven years between appellant's 2003 disclosure to the agency's OIG and the reprisal to be too long an interval to satisfy the knowledge-timing test. In reversing the administrative judge, Chairman Grundmann observed, "However, the appellant alleged in her submissions below that when she requested a promotion in May 2010, Ms. Lowery specifically asked her about the 2003 OIG disclosure (emphasis added)." The OSC is not dealing with allegations. The unequivocal evidence—supported by emails—demonstrates that senior Enforcement officials (Dever with the approval of Assistant Director Stepaniuk, Associate Director Rosenfeld, and Regional Director Schonfeld) had threatened a vendetta against Furey and later senior Enforcement officials (Canellos and later Capezzuto) in simple terms told Furey in September 2010 and July 2011, as discussed below, that this threat was being carried out.

Furey did not give up. She took another path to bypass the obstacles created by Enforcement management. Reasoning that NYRO could not ignore the findings of an

[74] See Furey's email of Sep. 29, 2010, to Capezzuto, Ex. 112.

independent auditor, Furey informed Canellos and Capezzuto on November 19, 2010, that she was requesting a desk audit to verify that she was working at an SK-16 level.[75] However, after she met with Canellos, and sensed his anger over her request for the desk audit, and after Capezzuto's assurances of his support, she decided to try to resolve the matter on an informal basis.[76]

Finally, in May 2011, when nothing had happened, Furey proceeded with the request. As part of the application process, she filled out a questionnaire stating the grounds on which she was entitled to the SK-16 promotion.[77] Before submitting the application to the Office of Human Resources, Furey gave it to Capezzuto for his approval. Furey described her de facto position at OCIE as follows:

> I serve in the exact same function as the other attorneys who hold my position in the other major offices, and who are compensated at the grade 16 level for the specialist legal work that we do. The position is part "General Counsel" for the individual OCIE group, part on the spot specialist '40 Act attorney, part resource person on IM law for both OCIE and ENF staff, part right hand project head for the Associate, part project manager, part exam specialist. Our position works on ENF referrals as well as the more mundane exam questions, like working with asset verification reviews. We also serve as an informal liaison to various specialist legal areas in the Commission, such as the Division of IM, and Trading and Markets. We also are the external legal liaisons to other regulators (Department of Labor, OCC, the Fed, FSA, etc.) and SRO's.[78]

Capezzuto and Furey discussed both the application's wording (Capezzuto worked with Furey on the wording in his office for over half an hour) and the strategy of using the desk audit procedure to assure that Furey's de facto rank was recognized in fact. Capezzuto expressed his opinion that once the desk audit confirmed Furey's rank, Canellos would not act to reverse it. Furey made the edits suggested by Capezzuto and went back to his office, where Capezzuto pored over the document again, made minor edits in his own handwriting and returned it to Furey.[79] In short, Capezzuto did not dispute the facts and grounds which Furey alleged to support her contention that she had been operating at an SK-16 level for more than a year. Indeed, he made suggestions to strengthen the application.

The desk audit was completed on May 27, 2011. The report states that the audit was conducted under an SEC Universal Classification Standard. The auditor assessed six factors, including whether Furey was providing expert legal advice and assistance relative to the conduct of complex and high profile examinations and whether Furey represented "the agency in high-

[75] See Furey's email of Nov. 19, 2010 to Canellos and Capezzuto, Ex. 217.
[76] See Furey's email of Dec. 21, 2010, to [redacted] with copy to Canellos and Capezzuto, Ex. 218.
[77] See Ex. 219, a draft of the questionnaire.
[78] *Id*., at page 2.
[79] *Id*., pages 2 and 3 of this exhibit show handwritten corrections by Capezzuto and Furey's notes on Capezzuto's comments about the draft.

level meetings where far-reaching decisions are finalized."[80] Furey obtained a perfect score: 1,760 points out of 1,760 possible points. Significantly, a score above 1,565 was sufficient to establish she was functioning at an SK-16 level. Not surprisingly, the auditor unequivocally recommended that "if Ms. Furey continues to perform the advisory duties identified in the audit that she be promoted to SK-0905-16."[81]

Initially, Capezzuto seemed to embrace the notion that the desk audit would be implemented, i.e., Furey would be promoted to an SK-16 level if the desk audit confirmed she was operating at that level. Specifically, he was willing to allow Furey to announce the results of the audit at the weekly meeting of NYRO assistant directors.[82]

But playing fair with Furey's desk audit was not part of Canellos's plan. Furey would request her supervisors almost weekly for a copy of the desk audit, including email requests,[83] but it would take five months for Canellos to finally cough up a copy.[84] And then it was only because the SEC's IG forced him to do so.

Capezzuto's various representations to Furey why he could not release the audit to her, e.g., he was considering its recommendations, he could not find it, there was another step in the audit, etc. were blatantly false. During the five months the SEC withheld the desk audit from Furey, it was anything but lost. Redacted records released under FOIA revealed that the NYRO management, and in particular Canellos, was abuzz over how to handle the fact Furey had gotten a perfect score. Emails about the desk audit circulated continuously among SEC management and Human Resources staff beginning a week after the desk audit was completed, but the SEC has concealed the identities by redacting their names from the records.[85] The SEC and in particular its Office of the General Counsel is fully aware that FOIA does not permit the withholding of these names:

> The SEC has provided plaintiff with redacted documents (mostly e-mails) concerning plaintiff's employment, merit pay increase, efforts to examine John Mack, and plaintiff's termination. In each case the names of some SEC employees referenced in the documents have been redacted.…
>
> The redacted information does not fall within Exemption 6. First, as explained in VoteHemp, Exemption 6 does not cover "information merely identif[ying] the names of government officials who authored documents and received

[80] Ex. 27A.
[81] *Id*.
[82] Ex. 116.
[83] See Furey's email of Aug. 25, 2011, to Capezzuto (Ex. 121) and Furey's email of Nov. 2, 2011, to Canellos (Ex. 139). Additionally, there are at least nine other emails we have not submitted in which Furey requested or inquired about the desk audit. Furthermore, Furey requested the desk audit verbally in multiple occasions.
[84] Canellos sent the audit to Furey on Nov. 2, see Ex. 142.
[85] See Ex. 170, June 2, 2011, email chain. Between June 2 and Nov. 2, 2011, (when Furey finally received a copy of the audit report) there are at least five redacted chains of emails we have not submitted in which SEC management and OHR personnel exchange information about the desk audit.

> documents." Id. at 12. Second, even if these documents did constitute "similar files," they do not implicate the privacy interests of the individuals whose names have been redacted. The documents deal with various aspects of plaintiff's employment, including his compensation and termination. To the extent that there is any substantial privacy interest, it belongs to the plaintiff (footnotes omitted).

Aguirre v. SEC, 551 F. Supp. 2d 33, 55 (D.D.C. 2008). In this case, before the SEC's FOIA Office even processed Furey's FOIA request, it felt obligated to obtain the approval of Associate General Counsel Richard Humes to comply with Congress's mandates in the Freedom of Information Act.[86]

After Capezzuto knew Furey had received a perfect score on the desk audit, he had a tough time denying her access to the desk audit report and continuing to mislead her regarding his putative support with Canellos. After again lying to Furey about the availability of the desk audit in early July 2011, Capezzuto understood Furey did not believe him and was very upset. He finally decided to tell her the truth about the primary obstacle to her SK-16 promotion. He admitted he had lied to her over the past year about recommending her promotion to Canellos, because he (Capezzuto) understood that Canellos would never agree to the promotion. In words reminiscent of Canellos's concession ("those involved in the IG investigation were not fans"),[87] in September 2010, Capezzuto told Furey she would have to wait until certain senior members of Enforcement staff left the SEC before she could be promoted. Once again, the message from Capezzuto echoed Dever's threatened vendetta three years earlier, just as Canellos's statement had done so ten months before. But this time Capezzuto was even more specific, telling Furey "it isn't just what they say"… then describing how one of her former supervisors (Associate Director Rosenfeld) would make faces whenever her name came up in business meetings.

The withholding of the desk audit was not the first time SEC management played games with Furey's personnel records. Indeed, Capezzuto began to tamper with Furey's personnel records (likely at the direction of Canellos) shortly after Canellos learned that Furey had requested a desk audit on November 19, 2010.[88] As discussed in a separate memorandum, the tampering with Furey's personnel records began in late 2010 and continued through 2011.[89]

To briefly summarize, it is indisputable that Capezzuto retroactively altered Furey's performance evaluation for the period ending on September 30, 2010. Most significantly, after Capezzuto showed Furey her rating of 3.5, and she signed the form acknowledging receipt of her

[86] Ex. 163.
[87] See Furey's email of Sep. 29, 2010, to Capezzuto, Ex. 112.
[88] Ex. 113.
[89] Those alterations are discussed at some length in the memorandum the undersigned submitted to the OSC on May 11, 2012, and again on Feb. 19, 2013.

rating, he lowered her rating from a 3.5 to 3.3.[90] In doing so, he dropped the rating for four specific standards and clumsily tried to conceal the changes by whiting out the prior rating. Among the falsified and retroactive changes was Furey's rating on whether she demonstrated "respect, courtesy and tact in working with others" from "meets expectations" to "needs improvement." In doing so, Capezzuto contradicted his own concurrent narrative describing Furey's performance where he stated: "She demonstrates good working relationships with the examiners in their support of their activities."[91] Tampering with the whistleblower's personnel records is nothing new for the SEC.[92]

Having tampered with Furey's performance evaluations for 2010, the Canellos-Capezzuto team repeated its misconduct in 2011, but on a grander scale. As discussed below, they tampered twice with the 2011 performance evaluation, but could not make up their minds how much tampering was too much. Capezzuto met with Furey on October 31, 2011, and told her at that time that her rating would reflect the fact her performance had improved over the past year. However, since the descriptions in the SEC form did not accurately describe Furey's job, Capezzuto said he would check with the Office of Human Resources to get the correct form. Hence, on October 31, Furey signed off that she had met with Capezzuto to discuss her performance, but did not sign off that she had received the actual rating.

Approximately two months later, Furey would again meet with Capezzuto regarding her review, but he would not permit her to see her performance evaluation. Months later, a copy of the 2011 performance evaluation would suddenly appear in Furey's Employee Personnel File ("EPF"). [93] Still later, just before Capezzuto left the SEC, he claimed he had found a second copy of the 2011 performance evaluation (but with different content) in his office and had that document added to Furey's EPF.[94] Significantly, the custodian of the EPF, [redacted] ("[redacted] denied Furey access to the hard copy of her EPF until early May 2012.[95] When [redacted] finally permitted Furey access to the EPF, she found that [redacted] had added a note to the file

[90] See Ex. 27. Actually, before the tampering with the records, Capezzuto concluded that Furey should receive a rating of four in five categories and a rating of three in four categories, which adds up to a total raw score of 32 and an average score of 3.58.

[91] *Id*., at last page.

[92] David Weidner's Writing on the Wall: *Is The SEC Afraid Of The Elite On Wall Street*?, Dow Jones Business News, Dec. 7, 2006:

> In a statement sent to me [the journalist] by the senator's office, Specter said, "It wasn't rotten. It was smell ... He was doing outstanding work -- whatever language that was -- and then they manufactured a re-evaluation as the basis for firing him. Totally, totally unjustified." He said the SEC's actions have "an overtone of a cover-up."

[93] Ex. 26.

[94] For more details regarding the tampering with Furey's personnel files, we refer you to the memorandum and exhibits submitted to the OSC on May 11, 2012, and again on Feb. 19, 2013. *Supra*, note 89.

[95] Ex. 30.

disclaiming any responsibility for the authenticity of the performance evaluation Capezzuto claimed to have found in his office. [96]

One must appreciate the custodian's prudence for filing his disclaimer when Capezzuto abruptly produced a second performance evaluation for Furey for the same period, which differed significantly from the one that was in the file. The second evaluation contained handwritten notes in pencil describing a development plan for Furey. Among the ways Capezzuto concluded that Furey should improve was to drop any discussion about her entitlement to the SK-16 promotion, except at the "biannual rating meeting."

A closer look at the second performance rating indicates that either Canellos or Capezzuto toyed with the idea of dropping Furey's ratings even further with the second version of her performance evaluation for 2011. Both tampered performance evaluations gave Furey and overall rating of 2.8. However, the latter performance evaluation (Exhibit 30) differs on page six from the first one (Exhibit 26). A careful comparison of both documents reveals someone (likely Capezzuto or Canellos) had dropped Furey's rating for Critical Thinking from a three (meets expectations) to a two (needs improvement). However, apparently deciding that tampering three times with the same personnel record was one time too many, the Canellos-Capezzuto team changed Exhibit 30 again so as to restore the three rating. But the tampering is still visible at the bottom of page six of Exhibit 30.

The decision by Canellos and Capezzuto to redo Furey's personnel records was likely triggered by a combination of Furey's actions. Furey's email to Capezzuto regarding her conversation with Canellos (that her disclosures to the IG had undermined her career) would have raised a flag.[97] Her November request for a desk audit was another red flag. Canellos, Capezzuto, or both likely realized that a desk audit confirming that Furey was working at an SK-16 level, but being paid at an SK-14 level, created an inference that her prior whistleblowing was adversely affecting her career. Her supervisors came up with a creative solution: redo her personnel records so they would have an excuse for not promoting her.[98]

Furey's Second Set of Protected Disclosures to the SEC's Inspector General

After Capezzuto had denied Furey's repeated requests for her desk audit for five months,[99] she finally went to the SEC's inspector general. Just before approaching the inspector general, Furey had asked Capezzuto once more to release the desk audit and once again he refused. On the same day, October 19, 2011, Furey told IG Kotz of her many requests to

[96] In his words, [redacted] NYRO Administrative Officer, explained: "The attached document was delivered to our offices by Jim Capezzuto on 4/12/12 along with several other Performance Work Plans. Jim claimed that he found the documents in the course of cleaning out his office in preparation for his resignation." *Id*.

[97] See Furey's email of Sep. 29, 2010, to Capezzuto, Ex. 112.

[98] This would not be the first time SEC management chose to retroactively create phony personnel records. See *supra*, note 70.

[99] *Supra*, note 83.

Capezzuto for the desk audit and the many different excuses he had given her for not releasing a copy to her. Furey explained how Capezzuto had reacted that very day: "He spluttered, said he might not still have it." A few days later, Furey confirmed by email to IG Kotz that Capezzuto "cannot find" the desk audit.[100]

Furey's complaint to IG Kotz was not just about the desk audit. Rather, the desk audit was simply the proverbial last straw in a long process of reprisal. There was obviously a reason the SEC was playing hide and seek with the desk audit. In her own words, Furey's October 24 email told IG Kotz that the SEC's refusal to release the desk audit was integrally related to her prior whistleblower complaints:

> As you can imagine, I'm still angry from last time. Not at you -I'm aware people lie to save their careers. But I was forced to testify to your team. And did with explicit honesty. And my thanks was to ruin my career here. In retrospect, as Jim [Capezzuto] said, I should have left immediately. It would be over by now.
>
> But I believed HR when they said I'd be protected. And I might have been... Except for Madoff.[101]

In the same email, Kotz warned Furey, "There is the risk we discussed when things get formal." Significantly, both Capezzuto and Kotz had cautioned Furey that the price for her whistleblowing could be reprisal. Furey would later withdraw the request for a formal investigation, but that came too late to stop Canellos. In another email that same day to IG Kotz, Furey addressed how the SEC's handling of the desk audit was in fact a reprisal aimed only at her:

> No one else HAS a next step that I am aware of. Jim kept trying to decide what that next step would be. A committee of all ARDs? Old ARDs? ARDs and BCs?
>
> Yet the woman who did the desk audit claimed her recommendation (note that for me it was positive) **had never not been accepted by mgmt**.[102]

Furey would not have to wait long for the full-scale reprisal to begin. When senior SEC officials learned that Furey had complained to the SEC's inspector general, they made sure the subjects of her complaint, Canellos and Capezzuto, would know about it. Though the SEC withheld the name of the SEC staff member, a redacted email released under FOIA nevertheless confirms how "management" recommended to the SEC's inspector general that he inform Capezzuto that Furey had complained to the inspector general to get the desk audit.[103]

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[100] See Furey's email of Oct. 25, 2011, to IG Kotz, Ex. 129.

[101] Ex. 127.

[102] See Furey's email of Oct. 24, 2011, to IG Kotz, Exhibit 128.

[103] On Oct. 27, 2011, an anonymous SEC staff member instructed the SEC's OIG: "Management recommends you contact Jim Capezzuto about giving Kathleen a copy of the audit. … Ultimately, the employee should know the results of an audit so, yes, she can receive a copy but it would be good if Jim were advised first." Ex. 135.

Ultimately, it was Canellos who sent the desk audit report to Furey,[104] but it would come wrapped in reprisal. Canellos made very clear that Furey's perfect score was irrelevant for him. Canellos advised Furey that "we will very likely post internally and externally the position of SK-16 confidential advisor to the Associate Regional Director in charge of NYRO's investment management exam program."[105] This was a clear departure from the SEC's standard practice of promoting a staff member when the audit confirms his or her job has accreted to a higher level. Canellos also advised Furey that "If you [Furey] feel that you are or have been assigned work above your existing grade, then we would like to address that situation."[106] This was a prelude to Canellos's decision about a week later to strip Furey of certain of her duties, so the SEC could make the transparent argument that it did not have to formally promote Furey to an SK-16 level because she was not performing all of the tasks described in the desk audit.

Canellos's anger prevented him from even trying to put a veneer of propriety on his use of raw power to retaliate against Furey. The next day, November 3, Canellos's subordinate, Capezzuto, informed Furey by email that he was demanding a pre-PIP meeting "with HR."[107] Likely recognizing the transparency of his reprisal, Capezzuto withdrew the demand.[108] Upping the ante, by his email of November 8, 2011, Canellos used one of the earlier forms of reprisal employed by Biolsi: he told Capezzuto that Furey "should probably be excluded from managers' meetings too."[109] On November 10, 2011, Canellos called and warned Furey not to spread the word that she had been promoted to an SK-16 position even though OHR had already called and promoted her. In addition, Canellos abruptly directed Furey to report to a lower level within OCIE.[110] In short, Enforcement's earlier promise of a vendetta against Furey was being carried out with interest.

On a separate track, the SEC's OHR was treating Furey's perfect score on the desk audit in accordance with its established practice. On approximately November 9, 2011, IG Kotz spoke with OHR's Rebecca Pikofsky ("Pikofsky"), who confirmed Furey was being promoted to an SK-16. The next day, November 10, 2011, Pikofsky informed Furey she was then a SK-16 and that she would receive back pay.[111]

The Primary Personnel Action against Furey

Seemingly acting under pressure from Canellos, OHR began backing off its decision to formalize Furey's de facto SK-16 level a few days later. Until Furey's desk audit, OHR had invariably and routinely promoted SEC staff to the level confirmed by a desk audit. OHR

[104] See Canellos's email of Nov. 2, 2011, to Furey, Ex. 142.
[105] See Canellos's email of Nov. 2, 2011, to Furey and copy to Capezzuto and IG Kotz, Ex. 140.
[106] See Canellos's email of Nov. 2, 2011, to Furey, and Capezzuto, with copy to IG Kotz, Ex. 143.
[107] See Nov. 3, 2011, chain of emails among Furey, Capezzuto and IG Kotz, Ex. 146.
[108] See Furey's Nov. 3, 2011, email to IG Kotz and Pikofsky, Ex. 147.
[109] Ex. 153.
[110] Capezzuto disclosed to Furey that after consultation with his personal attorney, he would not implement this directive, and Furey continued to report to Capezzuto until shortly before he left the Commission.
[111] Ex. 154.

changed this policy in November 2011 when it reversed its decision to confirm Furey's SK-16 level. On November 14, Capezzuto gleefully reported back to Canellos that "I spoke with [name unlawfully redacted][112] this afternoon and she is going to have a draft job description for Kathleen at the 14 level ready by next week. I will circulate the first draft as soon as possible."[113] As a consequence, it appeared that Canellos had blocked or, perhaps more accurately, reversed Furey's SK-16 promotion.

[redacted]

[112] The SEC has refused to release emails to or from Pikofsky relating to OHR's abrupt reversal of Furey's SK-16 promotion under either FOIA or the Privacy Act.

[113] Ex. 155.

[114] [redacted]

[redacted]

[redacted]

Furey is not the only SEC staff employee who has suffered reprisals at the hands of Canellos. Canellos's threatened reprisal against [redacted] has many of the earmarks of his actual reprisal against Furey. Like Furey, [redacted] testified during the OIG investigation in 2008. [redacted] informed Furey that she testified [redacted]

Furey is informed that [redacted] testified during the 2008 OIG investigation about the investigatory status of one of the cases assigned to her, the investigation of [redacted] for suspected violations of the Investment Adviser Act of 1940 (IAA). Just as Furey reported to Branch Chief Joseph Dever on the [redacted] IAA/ICA case, [redacted] was reporting to Dever on the [redacted] IAA case. Just as Furey was worried about [redacted] derailing the [redacted] case, [redacted] was worried she would take the fall on the [redacted] case, a suspected $300 million fraud, which Dever had ignored for years and [redacted] was trying to pursue without any assistance.

Since [redacted] whistleblowing to the SEC inspector general in 2008, [redacted] career trajectory has had one common feature with Furey's: neither has been promoted. Like Furey, [redacted] has complained formally. In approximately 2010, [redacted] filed a union grievance contending that [redacted] supervisors had unjustifiably refused to promote [redacted] to an [redacted] In approximately June 2011, Furey encountered [redacted] explained [redacted] emotional state as follows: [redacted] had said "you have no idea how mean they [Khuzami and Canellos] are. They will not let you get away with it. If you prevail in your union grievance, they will come after you: they will make you lead counsel in litigation [redacted] and you will lose the case. Then, they will PIP you and fire you."[116] Consequently, [redacted] withdrew [redacted] union grievance, attributing [redacted] decision to [redacted] In essence, [redacted] actions confirm the culture of reprisal and fear at NYRO, which the SEC's own inspector general repeatedly emphasized in its 2008 report.[117]

Returning to the events of November 2011, records released by the SEC pursuant to Furey's FOIA request further confirm that OHR was in new territory when it failed to promote/demoted Furey after her desk audit confirmed she was working at an SK-16 level. Since the SEC had routinely promoted staff to the positions confirmed by desk audits, OHR staff was unfamiliar with the case law relating to the "accretion of duties." To get up to speed, OHR had to undertake legal research relating to "Accretion of duties case law/decisions."[118] Normally, one might expect such research to be conducted before an agency's OHR makes a personnel decision. The SEC and its OHR would do it differently. It literally shot first and then asked the questions later. Between November 2 and November 14, Canellos and OHR blocked the implementation of the desk audit and then stripped Furey of some of her SK-16 responsibilities. Having shot first, OHR then asked questions: whether its actions were legal. OHR staff first began to research the topic of "Accretion of duties case law/decisions" on November 22, 2011.[119] Its staff would exchange nine emails over the next ten days on the subject. This was not legal research by an agency's OHR to decide how its agency should properly make a personnel decision. Rather, this was an OHR in search of a legal defense after senior agency officials had run amok.

By letter of December 5, 2011, Furey's attorney, the undersigned, objected to the decision of OHR to demote her from a de facto SK-16 to an SK-14.[120] By letter of December 6, 2011, the undersigned inquired "what steps the SEC usually takes when a desk audit confirms a

[116] A current SEC staff attorney will corroborate the statement quoted in this paragraph. However, the staff person is deeply concerned that his identification could cause harm to others or himself if known to the SEC or made public and thus has requested anonymity. The name will be made available to OSC staff upon the condition the witness will remain anonymous.
[117] OIG Report in Case No. OIG-478, Ex. 213.
[118] See Nov. 23, 2011, email chain, Ex. 220.
[119] Ex. 157.
[120] Ex. 158.

SEC staff member is working at a higher level than their pay grade"[121] The SEC has yet to answer.

So why the impasse over conforming the personnel records to Furey's de facto work level? The decision by SEC management to assign Furey the duties customarily performed by SK-16 staff establishes their belief she was sufficiently skilled and motivated to carry out those tasks. She performed those duties under Capezzuto's direct supervision for twelve months. Neither Canellos nor Capezzuto questioned her ability to perform those duties. Indeed, Capezzuto endorsed Furey's SK-16 promotion by assisting her in drafting the grounds for her promotion in her four-page application[122] and then editing the application so it strictly conformed to his understanding of her qualifications for the promotion.

If her supervisors authorized her to deal day-to-day with SEC staff and third parties in the capacity of an SK-16, why did they object to paying her at that level? Why did the Canellos-Capezzuto team doctor her performance evaluations and lie to her about the availability of the desk audit? Why was it necessary for Canellos to override OHR's decision to approve Furey's SK-16 promotion? The OSC need not search far for the answer. Rather, Canellos, Capezzuto, and Dever have all been clear: "those involved in the IG issue were not fans" and Canellos delivered the payback.

Conclusion

Furey has established every element of her complaint under the WPA. Beyond any shadow of a doubt, she made protected disclosures on two different occasions. She reasonably believed those protected disclosures to be true. Her supervisors knew of her protected disclosures. They engaged in reprisals against her. The WPA has empowered the Office of Special Counsel to protect whistleblowers like Furey. The OSC should do so now by filing a proceeding seeking a corrective action on her behalf.

[121] Ex. 159.
[122] Ex. 219.