



U.S. Department of Justice

Office of the Deputy Attorney General

Associate Deputy Attorney General

Washington, D.C. 20530

May 23, 2012

James A. Goeke, Esquire
Assistant United States Attorney
2 East Yakima Avenue
Suite 210
Yakima, Washington 98901

Re: Disciplinary Proposal of Kevin A. Ohlson, Chief, Professional Misconduct
Review Unit

Dear AUSA Goeke:

I have been designated to serve as the deciding official in this disciplinary matter arising out of the August 15, 2011 report of investigation by the Office of Professional Responsibility (OPR) entitled *Investigation of Allegations of Prosecutorial Misconduct in United States v. Theodore F. Stevens, Crim. No. 08-231(D.D.C. 2009) (EGS)* (Report). Because the Report contained findings of professional misconduct against Assistant United States Attorneys (AUSAs), the Report was forwarded to the Professional Misconduct Review Unit (PMRU) for consideration of disciplinary action. Kevin Ohlson, Chief of the PMRU, made a determination that the OPR findings were supported by the evidence and the law and as a result, assigned the matter to PMRU attorney Terrence Berg for consideration of disciplinary action. Berg solicited *Douglas*¹ factor information from Michael Ormsby, the United States Attorney in your current district, and from Karen Loeffler, the United States Attorney in your former district. Berg reviewed the Report and disagreed substantively with its conclusion that you committed professional misconduct. Consistent with procedures in the PMRU, Berg submitted a draft memorandum to Chief Ohlson. After reviewing Berg's draft memorandum, Chief Ohlson remained convinced that the OPR findings of misconduct were supported by the evidence and the law. Therefore, he sought authorization from the Deputy Attorney General (DAG) to serve as the proposing official. On December 3, 2011, the DAG authorized Chief Ohlson to issue a proposal, but the DAG also directed that Chief Ohlson provide Berg's draft to the employees at issue if he (Ohlson) issued a disciplinary proposal. Accordingly, Chief Ohlson provided copies of Berg's draft memorandum to you and your counsel. On December 9, 2011, Chief Ohlson issued a proposal that you be suspended for a period of fifteen days. Chief Ohlson's proposal was based on a charge that you recklessly disregarded your disclosure obligations in the *Stevens* case. The

¹*Douglas v. Veterans Administration*, 5 MSPR 280 (1981).

charge contained one specification which was based on a finding contained in the Report. On January 23, 2012, you submitted your written response to the proposal. On March 14, 2012, you provided your oral response. The matter is now ripe for decision.

I. Background

OPR investigates allegations of attorney misconduct to determine whether an “attorney committed professional misconduct in the exercise of his or her authority to investigate, litigate or provide legal advice.” OPR Analytical Framework (Framework).² OPR finds professional misconduct when it concludes that an attorney “intentionally violate[d] or act[ed] in reckless disregard of an obligation or standard imposed by law, applicable rule of professional conduct, or Department regulation or policy.” *Id.* The Framework provides, “If OPR concludes that an attorney did not commit professional misconduct, OPR determines whether the attorney exercised poor judgment, engaged in other inappropriate conduct, made a mistake, or acted appropriately under all the circumstances.” *Id.* OPR uses a preponderance of evidence standard to reach factual determinations. Report p. 125.

In this matter, OPR concluded that you engaged in professional misconduct in reckless disregard of your disclosure obligations created by law (*Brady v. Maryland*, 373 U.S. 83 (1963)) and Department policy (USAM § 9-5.001). Report p. 671. OPR considered whether your conduct violated D.C. Rule of Professional Conduct (DCRPC) 3.8(e), but determined that the evidence was insufficient to support a finding that you intentionally failed to disclose exculpatory evidence to the defense. *Id.* at 193. OPR also considered whether you violated DCRPC 4.1(a)(knowingly making a false statement of material fact to a third person), but likewise concluded that you did not. *Id.*

Chief Ohlson’s proposal charged you with violating your discovery obligations arising out of your failure to disclose exculpatory information provided by witness Robert “Rocky” Williams. I will address the merits of that charge herein. In doing so, I have considered the Report; your response to the Report and its attachments, which included the Berg memorandum (Berg memo); your oral response; and your testimony before Henry F. Schuelke, III and William B. Shields, who conducted a criminal contempt investigation and who shared their deposition transcripts with OPR. In evaluating your conduct I will apply OPR’s Framework.

²<http://www.justice.gov/opr/framework.pdf>.

II. Charge and Specification

Charge: Reckless Disregard of Your Disclosure Obligations under *Brady* and Department of Justice Policy

Specification: Failure to disclose information from trial preparation sessions with government witness Robert "Rocky" Williams

Factual Background

The charges against Senator Stevens arose out of alleged non-disclosures in a Financial Disclosure Statement he was required to file annually with the Senate. Count 1 of the Indictment alleged that Stevens "engaged in a scheme to conceal a material fact, that is, his continuing receipt of hundreds of thousands of dollars' worth of things of value from a private corporation and its chief executive officer by, among other things, failing to report them, as was required, on Stevens' required yearly Financial Disclosure Forms." Indictment p. 4. The indictment alleged that Bill Allen and his company VECO provided the unreported things of value to Stevens. *Id.* at 4-5. Count 1 of the Indictment lists the undisclosed things of value as follows:

- (1) The exchange of a new 1999 Land Rover valued at \$44,000 for \$5000 cash and a 1966 ½ Mustang valued at \$20,000;
- (2) Improvements to Stevens's residence in Girdwood, Alaska, between the summer of 2000 and December 2001, valued at over \$200,000;
- (3) Improvements to the Girdwood residence in 2002, valued at approximately \$55,000;
- (4) Improvements to the Girdwood residence in 2004 and 2005, valued in excess of \$305 for each of those two years; and
- (5) Labor costs for improvements to the Girdwood residence in 2006, valued in excess of \$1,000.

Id. at 6-11. Counts 2-7 charged Stevens with making a false statement in a matter within the jurisdiction of the United States by filing in each of years 2002 through 2007 Financial Disclosure Forms that failed to disclose either that he had received the listed items as a gift from Allen or that he owed a liability to Allen for the cost of the goods or services provided. The OPR finding of misconduct against you relates to item 2 above.

The Stevens prosecution was part of a larger investigation dubbed Operation Polar Pen. Report p. 44. You were asked to participate in the investigation in late 2005, after your United States Attorney's Office was recused from the case and as the matter was assigned to the Public

Integrity Section (PIN) of the Criminal Division. Transcript³ p. 38-39; Report p. 46. Your role in the investigation included the trial of *United States v. Peter Kott* in September 2007. Transcript p. 13; Report p. 214. You tried that case with PIN Trial Attorney Nicholas Marsh. Transcript p. 13. The other prosecutors working on the investigation included Alaska Assistant United States Attorney Joseph Bottini and PIN Trial Attorney Edward Sullivan. Report p. 47. FBI Special Agent Mary Beth Kepner was the case agent. *Id.* at 48. During the time leading up to the Stevens indictment and trial, William Welch was the PIN Chief, and Brenda Morris was his Principal Deputy Chief. *Id.*

On July 14, 2008, the prosecution team met with Matt Friedrich, the Acting Assistant Attorney General for the Criminal Division, and his Principal Deputy Rita Glavin to make a presentation regarding possible indictment. *Id.* at 54. Stevens had executed an agreement to toll the statute of limitations until July 31, 2008, so a decision to charge or seek an additional tolling agreement needed to be made before that date. *Id.* at 57. Sometime after a July 22, 2008 meeting among defense counsel, the Deputy Attorney General, Friedrich, and Welch, the Criminal Division made the decision to indict the case, and the indictment was presented on July 29, 2008. *Id.* at 1, 56. The day before the indictment, Welch advised the prosecution team that Morris would serve as lead counsel in the case, Bottini would be second chair, and Marsh would be third chair. *Id.* at 59. Sullivan and you would have no courtroom role, and you were told you would have a subordinate role in the case. *Id.*, Oral response⁴ p. 32. Stevens was arraigned on July 31, 2008, and during the arraignment his counsel requested a speedy trial so that the trial would precede the November 2008 election in which Stevens was a candidate. Report p. 2. United States District Judge Emmet G. Sullivan suggested beginning the trial on October 9, 2008, but Morris countered with a proposal to begin trial on September 22, 2008. *Id.* at 3. In so doing, she assured the court that the suggestion was informed by the government's consideration of its discovery obligations. *Id.*

During the weeks leading up to the trial, you were in Alaska assisting with the preparation of witnesses and ensuring the transfer of relevant documents to Washington. Oral response pp. 32-34. You advised, "As soon as the indictment was returned, Joe [Bottini] and I were in the office seven days a week up until we left for Washington, D.C. So whatever needed to be done, I would do it." *Id.* at 34.

Robert "Rocky" Williams was a VECO employee and worked on the renovations that were performed at Stevens's home in Girdwood in 2000 to 2001. During the course of the

³Citations to "Transcript" reference the transcript of your interview by Messrs. Schuelke and Shields.

⁴Citations to "Oral response" reference the transcript of your March 14, 2012 oral response to me.

investigation, he testified before the grand jury and was interviewed on three occasions resulting in the preparation of an IRS Memorandum of Interview and two FBI 302s. Report pp. 279 and 283. You were present for Williams's grand jury testimony on November 7, 2006. *Id.* at 283. OPR set forth in its Report the substance of the information that Williams provided in interviews *Id.* at 279-283. Among other things, Williams said that Allen selected him to serve as foreman of the Girdwood improvement project and that he was on VECO's payroll while working at Stevens's house. *Id.* at 280-81.

Subsequent to the indictment, Bottini and you met with Williams in Alaska to begin preparing him to testify. You were also, or perhaps primarily, present to interview him in connection with another Polar Pen case that you were handling. In particular, you met with Williams on August 20, 2008. *Id.* at 286. Special Agents Kepner and Chad Joy were present, and Marsh and Sullivan participated by phone for at least part of the interview. *Id.* 286-87. Your notes reflect that during the interview, Williams reported that Stevens said he wanted to pay for the renovations and that Williams was on VECO time when he worked at Girdwood. *Id.* at 288. Your notes and Bottini's notes differ about what Williams said about VECO expenses being added into the Christensen Builders' (CB)⁵ invoices. Bottini's notes reflect that Williams said he did not add his time to CB's bills. *Id.* at 288. Your notes said, however, "RW supposed to go through Augie's⁶ bills →supposed to have RW's time and Dave's time applied to the billing." *Id.* at 288 (footnote added).

Williams met with Bottini, Joy and you again on August 22, 2008. *Id.* at 289. Berg set forth Bottini's notes from that meeting as follows:

Augie's bills –

→to Rocky ____.

Signed off on Augie's stuff –

Verified that Vern and Mike were there

→Check their time out

⁵Christensen Builders was a contractor retained in 2000 to perform a significant portion of the work on the Girdwood house.

⁶Augie Paone owned Christensen Builders.

Letter to James A. Goeke, Esquire
Subject: Disciplinary Proposal of Kevin A. Ohlson, Chief, Professional
Misconduct Review Unit

Page 6

8-5 – 5x week –
After verified –
-took to VECO main
office –
showed to Bill.

-- Left with Bill –
for him to add my time +
Dave's →

– If Bill was there
– IF not – then left it there
w/ Sec'y or w/ Billie –

**It was understood that we were
down there –
and that any VECO time / labor
would be added in**

--- Part of the original agreement
--- as long as we got paid back –

--- **Rocky assumed this based
on what TS had said in 1999 –**

--- **Never saw what BA forwarded
to TS + CAS –**

--- **DON'T KNOW WHETHER
HE ADDED IT IN OR NOT, ETC.**

– **Knew Bill was under
a microscope – didn't think
that he would do anything
to hurt TS, etc.**

*– No conversations w/ TS or CAS
re: whether VECO stuff was added
into Augie's bill -- . . .

--- No conversations w/ TS or CAS
re: does this cover everything?? ---
NO.

Berg memo, pp. 51-52 (Emphasis in Berg's original; footnotes omitted). From these notes, it appears that Williams told you that he understood that Anderson's and his time would be added to the bills after Williams gave them to Allen, but that he did not know whether that ever happened. The notes also reflect that Williams knew Allen was under a microscope regarding the project and that he did not think that Allen would do anything to hurt Stevens. Berg and you disagreed with OPR regarding the meaning of that portion of the notes referring to the "original agreement."

Your notes from that meeting were generally consistent with Bottini's. In relevant part they provided:

-How Augie's bills handled.

* * *

(3) then took to VECO main ofc →
**left with Bill to add whatever
VECO time etc. was left to add** →
then send down to TS; →

-Usually on front would sign and put date

-would give to Bill to add time for
Rocky and Dave

-**understood that TS was going to pay
for everything**

-charge for work force, etc. – would come through VECO;

→**part of original agreement**

→**As long as paid back then everything
would be fine**

→**original discussion**

→**assumption that was going on . . .**

→Subsequent conversations.

Any conversations with --

TS
CAS
that bills were all inclusive?

--- NO

--- Had to know under a microscope . . .

* * *

assumed ground rules were
VECO would bill TS.

Id. at 53-54 (Emphasis in Berg's original; footnotes omitted).

You asked Joy to write a 302 regarding Williams's assertion that he had not discussed his billing assumptions with Catherine or Ted Stevens. Report p. 291. Because this interview was part of a trial preparation session, you otherwise would not have expected an agent to summarize it in a 302. Transcript p. 20. You explained that you asked Joy to write a 302 only with respect to the specific information noted above because you thought that information was new whereas you had the impression that the remainder of the information he provided was not new. Report p. 292.

On that same date, August 22, 2008, PIN attorney Sullivan emailed the prosecution team regarding his review of documents provided by the defense. Among other things, Sullivan noted:

[I]t's fairly apparent that TS will say that CAS handled the bills, CAS coordinated with Rocky, and TS didn't know VECO wasn't paid b/c CAS never told him. To further insulate TS, CAS will likely testify that Rocky told her the VECO costs were rolled into the large Christensen bills. Alternatively, if CAS doesn't testify, then they try to squeeze this point out of Rocky on cross. If they make this point, TS can then argue that CAS didn't tell him about the VECO costs b/c she thought the VECO costs were included in the Christensen bills.

Id. at 293.

Williams met again with Bottini, Joy, and you on August 31, 2008, and he provided similar information about his review of Paone's bills. He once again indicated that he reviewed the bills, provided them to VECO, and assumed that Anderson's and his time would be added. *Id.* at 296.

On August 25, 2008, the government sent to the defense a *Giglio* letter that Bottini drafted and had others review. The letter advised the defense that Williams "had a 1984 felony conviction for negligent manslaughter; a 1986 felony conviction for Failure to Assist/Aid; and a 1999 misdemeanor conviction for Driving While Intoxicated." *Id.* at 298-99. It also reported that the government was aware of rumors that Williams abused alcohol and that he may have an alcohol dependency problem. *Id.* at 299.

While you were still engaged in trial preparation activities in Alaska, you understood that a *Brady* review was ongoing in Washington. Transcript pp. 114-15. The final September 8, 2008 *Brady* letter included one paragraph about Williams. That paragraph read in its entirety:

On September 1, 2006, Robert Williams stated there were no formal plans for the addition at defendant's residence and that Williams sketched the plans for the addition based upon conversations with defendant. Williams also stated that, although he was the general contractor on the project, he did not deal with the expenses and did not recall reviewing Christensen Builders invoices. In a memorandum of interview from the same meeting, a federal law enforcement agent noted that Williams estimated that 99 percent of the work was done by Christensen Builders. In a subsequent interview, Williams stated that he did not recall ever saying that Christensen Builders performed 99 percent of the work, and that such a figure was inconsistent with what he knows to have occurred.

Id. at 301-02.

Marsh and Bottini met with Williams in Washington on September 20, 2008. *Id.* at 308. During this trial preparation session, Williams provided information consistent with the information provided during his earlier sessions. *Id.* Bottini annotated a typed outline that he had prepared for Williams's direct examination. The annotations indicated that Williams confirmed that he reviewed Paone's bills and then provided them to Allen, assuming that Anderson's and his time would be added. *Id.* Bottini's outline noted that no one told Williams that his time was being added on, but that he assumed it. *Id.*

Bottini and you met with Williams again the next day, and you conducted a mock cross-examination of him. *Id.* at 308-09. Because Williams's health had become a major concern, the government decided to have him return to Alaska for medical treatment. *Id.* Because the

government anticipated that Williams would testify, the government would have been obligated to disclose his grand jury testimony no later than after his direct examination during trial. 18 U.S.C. § 3500. The government was not treating FBI 302s or IRS MOIs as Jencks Act material; therefore, the government did not anticipate providing those documents to the defense. Nonetheless, as a result of developments during the trial, the government provided the grand jury testimony and reports of interview to the defense during the trial on September 28 and October 1, 2008, respectively. *See* Berg memo p. 65 n. 267.

OPR's conclusions

OPR concluded that information provided by Williams during the trial preparation sessions was exculpatory and that *Brady* required its disclosure. In particular, OPR cited four exculpatory bits of information that the prosecution should have disclosed as follows:

- (1) Stevens said he wanted to pay for all the Girdwood renovations;
- (2) Stevens wanted a contractor he could pay because the work was “over the limit;”
- (3) Williams reviewed the Christensen Builders invoices and passed them along to Bill Allen (or a VECO employee); and
- (4) Williams thought his and Dave Anderson’s hours, and possibly all VECO costs, were added into the Christensen Builders bills.

Report pp. 26, 280. OPR concluded that no government actor intentionally withheld the information, and therefore concluded that no government actor violated DCRPC 3.8. *Id.* at 354-59. On the other hand, OPR found that you committed professional misconduct by recklessly disregarding the *Brady* and USAM disclosure obligations. *Id.* at 26, 363. This finding underlies Chief Ohlson’s charge and specification.

Your Response

In your response to the proposal, you contend that Berg was duly assigned, pursuant to Department policy, to address your conduct in the Stevens prosecution and that his determination that you did not engage in misconduct should have been the end of the matter. Your substantive response to the charge consisted of an analysis and endorsement of Berg’s review, and you also attached *inter alia* your earlier response to OPR’s draft report and your prior response to the special prosecutor. In your oral response, you emphasized three points. First, you contended that you “properly relied on others who were drafting the *Brady* letter, that [you were] not assigned the *Brady* review of Williams, [and] that other *Brady* reviews that were assigned to [you] were exceedingly inclusive.” Oral response p. 10. Second, you also contend that Williams’s statement that he assumed that Allen added in Anderson’s and Williams’s time to the CB bills was not *Brady* information for two reasons. You note that his mere “assumption” was not

exculpatory especially since Williams confirmed that he never discussed his assumption with Ted or Catherine Stevens. *Id.* at 44-45. You also were familiar with the CB invoices themselves and knew that they were detailed and did not include VECO employees' time. *Id.* at 40-41. Third, you noted that you considered your disclosure obligations, including your review of the *Brady* letter, in light of your understanding that the government would disclose Williams's , which you recalled included much, if not all, of the information Williams reported during the trial preparation sessions. *Id.* at 65.

Berg generally advanced the same arguments you later made during your oral response. He gleaned them primarily from the transcript of your interview conducted as part of the Schuelke investigation. Berg memo pp. 73-74. Berg concluded that *Brady* required disclosure of the Williams information. *Id.* at 45-46. He later noted the existence of an argument that *Brady* did not require disclosure of the Williams assumptions, but indicated that he would assume for purposes of his analysis that *Brady* applied. *Id.* at 58 n. 245. Ultimately, he concluded, however, that you did not commit professional misconduct on the ground that your conduct was not objectively unreasonable. *Id.* at 75.

Analysis

Procedural Issue

In your response to the proposal, you contend that Berg was duly appointed to serve as the proposing official and that Chief Ohlson's request to substitute himself as the proposing official was arbitrary, capricious, and an abuse of authority. Response p. 3. Thus, you contend that Berg's assessment should have been the Department's final verdict on this matter.

The PMRU was created to address a number of perceived shortcomings in the disciplinary process involving OPR findings of misconduct. The memorandum creating the PMRU (the creation memo) briefly described the pre-existing procedures, noting that the authority to issue discipline based on OPR findings rested with management, but that management could not unilaterally reject OPR findings. The creation memo provided, "In those situations where management disagrees with OPR's professional misconduct findings and/or recommended range of discipline, it may submit an objection to the [Report of Investigation] to the Associate Deputy Attorney General (ADAG) outlining its arguments in support of the objection." Creation memo p. 3. Thus, prior to the creation of the PMRU, the Department insisted that disciplinary officials seek authority from the Office of the Deputy Attorney General prior to rejecting OPR findings of misconduct.

The creation memo notes that the PMRU Chief will be assigned within or report to the Office of the Deputy Attorney General. *Id.* The memo provides that the Chief will be assisted by Department attorneys detailed for that purpose who will work on a "rotating basis." *Id.* at 3-4.

The creation memo also provides that the Chief will refer a matter to a PMRU attorney for discipline only after the Chief has determined that OPR's findings are supported by the evidence and the law. *Id.* Once a matter is assigned to a PMRU attorney, that attorney issues a reprimand, proposes discipline, or determines not to impose discipline based on the *Douglas* factors. *Id.* at 5. Nothing in the memo authorizes the PMRU attorney to reject the OPR findings of misconduct over the objection of the Chief, who has already determined that the findings are supported by the evidence and the law. This interpretation of the creation memo is consistent with the Department's longstanding policy that only officials within the Office of the Deputy Attorney General can authorize the rejection of OPR findings of misconduct. Thus, it was proper for Berg to advise Chief Ohlson that he did not believe that he could impose discipline based on OPR's findings because he disagreed with the findings. It was equally proper for Chief Ohlson, who remained unpersuaded by Berg's arguments, to request from the Deputy Attorney General authorization to propose discipline based on the findings that he had previously endorsed.

Your response criticizes Chief Ohlson for not explicitly addressing Berg's arguments. However, as the proposing official, Chief Ohlson was under no obligation to specifically address Berg's points because he understood that you would have an opportunity to respond to his proposal and that any of Berg's arguments that you adopted would be addressed by the deciding official. For all of these reasons, I find that the disciplinary process followed in this case is consistent with law and Department policy.

Substantive Issues

The three arguments you raised in your responses regarding the OPR finding of misconduct are somewhat inextricably intertwined, but I will first address your contention that the information Williams disclosed was not *Brady* information. You testified before Schuelke:

MR. MENCHEL:⁷ . . . I just want the record to be clear about this. At the time, and I'm talking about in August and September of 2008, did you consciously go through the exercise of thinking about whether or not there were portions of Mr. Williams' testimony that ought to be disclosed one way or the other?

THE WITNESS: No.

MR. MENCHEL: Okay, and so the discussion that we're having now wasn't one that you -- about whether or not this is arguably *Brady* or not arguably *Brady* with respect to Mr. Williams' mental

⁷Matthew I. Menchel, Esq., represented you in connection with the Schuelke investigation.

impression. Was that something that you undertook to think about at the time one way or the other?

THE WITNESS: No, absolutely not.

Transcript pp. 107-08 (footnote added). Because you did not make an assessment of the information at the time, the determination of whether the information was actually *Brady* information would resolve the misconduct issue only if the information is clearly not *Brady*. The USAM requires that prosecutors take a broad view of materiality and err on the side of disclosing information that is exculpatory. USAM §9-5.001.B.1. Thus, if the information is actually *Brady* or should have been disclosed pursuant to the USAM, then the next question would be to address your personal responsibility for its non-disclosure, which question would involve your role in the prosecution and your understanding that the prosecution would disclose the grand jury transcript.

In assessing whether *Brady* required disclosure of the Williams information, it is useful to examine more closely the four components of the Williams information that OPR identified. As Berg points out, the government is not under an obligation to disclose to a defendant information of which the defendant is already aware. In *United States v. Mahalick*, 498 F.3d 475 (7th Cir. 2007), a defendant charged with being a felon in possession of a firearm argued that the government violated its *Brady* disclosure obligations by failing to provide information to the defendant regarding a statement he had made to an ATF agent upon arrest. The court observed, “[T]he government cannot be said to have suppressed evidence of what the defendant himself said, ‘because the defendant [], being part[y] to the conversation, [was] equally aware. *Brady* requires disclosure only of exculpatory material known to the government but not to the defendant.’” *Id.* at 478 (Brackets in internal quotation in original; citations omitted). As Berg and you also point out, the *Brady/Giglio* outline on the Department’s intranet website cites *Mahalick* as an example of a case illustrating the point that “*Brady* cannot be violated if the defendant has actual knowledge of relevant information.” In its discussion of the government’s *Brady* obligations, OPR noted, “The government does not, however, have an obligation to produce *Brady* material known to the defense or in the possession of the defense. *United States v. Agurs*, 427 U.S. 97, 103 (1976); *United States v. Derr*, 990 F.2d 1330, 1335 (D.C. Cir. 1993).” Report p. 127.

The USAM policy addressing disclosures of *Brady* and *Giglio* information requires disclosure of more information than *Brady*, but it does not specifically require that the government disclose information about which the defendant is already aware. In its discussion of the USAM, OPR recognized that the USAM requires broader disclosures, but it did not address whether the USAM requires the government to disclose information of which the defendant is already aware. For these reasons, I generally agree that you were not under a clear and unambiguous obligation to disclose Williams’s report of statements Stevens made.

At the time of the trial preparation sessions, the government intended to call Williams as a witness in the case. Therefore, the government would have been under an obligation to disclose Williams's grand jury testimony. 18 U.S.C. § 3500. Williams testified in the grand jury that he reviewed CB's bills. Thus, at the time of the trial preparation interviews and the issuance of the *Brady* letter, you understood that the prosecution would have disclosed Williams's assertion that he reviewed CB's bills no later than after Williams's testimony on direct examination. Further, the transcript was actually provided to the defense on September 28, 2008, even though Williams had not testified. Report p. 353. OPR considered and rejected the argument that the information that Williams reviewed the CB bills was therefore timely disclosed. *Id.* OPR noted that the defense did not attempt to use the information at trial, *id.*, so any assessment of the defense's ability to use that particular information effectively is somewhat speculative. The rule in the District of Columbia also appears to be that *Brady* trumps Jencks so that a timely Jencks disclosure might not necessarily satisfy *Brady* obligations. See *United States v. Safavian*, 233 F.R.D. 12, 16 (D.D.C. 2005) ("*Brady* always trumps . . . Jencks . . .," citing *United States v. Tarantino*, 846 F.2d 1384, 1414 n. 11 (D.C.Cir.1988)). Regardless of whether the disclosure of the information that Williams reviewed CB's bills was timely, however, the fact remains, as OPR observed, that the "far more exculpatory information" that Williams understood that VECO's costs would be added to CB's bills was never disclosed.

Even if you did not need to disclose to Stevens the statements that Williams attributed to him and the government timely disclosed the information that Williams's reviewed CB's bills, those conclusions would not warrant consideration of the non-disclosure of Williams's assumptions about Allen's adding VECO's costs to CB's bills in isolation. The Supreme Court has observed:

While the definition of *Bagley* materiality in terms of the cumulative effect of suppression must accordingly be seen as leaving the government with a degree of discretion, it must also be understood as imposing a corresponding burden. On the one side, showing that the prosecution knew of an item of favorable evidence unknown to the defense does not amount to a *Brady* violation, without more. But the prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of "reasonable probability" is reached. This in turn means that the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police. But whether the prosecutor succeeds or fails in meeting this obligation (whether, that is, a failure to disclose is in good faith or bad faith, see *Brady*, 373 U.S., at 87, 83 S.Ct., at 1196-1197), the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable.

Kyles v. Whitley, 514 U.S. 419, 437-38 (1995). Furthermore, the USAM provides, “Recognizing that it is sometimes difficult to assess the materiality of evidence before trial, prosecutors generally must take a broad view of materiality and err on the side of disclosing exculpatory and impeaching evidence.” USAM § 9-5.001.B.1.

Whether or not the government technically was required to disclose Stevens’s own statements about his desire to pay for the entirety of the Girdwood renovation and for a contractor he could pay, that information puts Williams’s assumption about the adding in of VECO costs in a context that is relevant to assessing its exculpatory value. Berg focused on whether Williams’s assumption reflected an “original agreement” to combine invoices. He disagreed with OPR’s assessment that the notes from the trial preparation sessions reflected an original agreement to combine invoices. You testified that you could not recall what you thought Williams’s reference to an original agreement meant at the time, but that you believed at the time of your testimony that it referred to the “original discussions about how to do the chalet.” Transcript p. 117. You noted also that Paone was not in the picture during those original discussions. *Id.* at 119. Berg also observed that your notes are consistent with the interpretation reflected in your testimony, to wit that the “adding in” of VECO costs would have required the creation of a physical invoice that Allen would then include with the CB bill that was sent to Stevens. Berg memo p. 75. He concluded that your interpretation of your own notes raised fewer, if any, *Brady* red flags particularly since you were aware that no separate VECO expenses were reflected on the CB invoices that Stevens received. *Id.*

Your notes reflect, however, that Williams’s assumption arose out of his understanding of the “original agreement” and were part of the “original discussion.” The fact that Stevens had told Allen, from the inception of their discussions, that he wanted to pay for the renovations was relevant to any assessment of the basis for and import of Williams’s assumption that Allen was adding VECO’s costs to CB’s bills even if there was no explicit agreement to combine invoices. Williams’s further statements that Stevens wanted to pay because the project was “over the limit” and Williams’s recognition that Allen was “under a microscope” both likely contributed to his assumption that everyone was going to follow the rules and his belief that Allen would not “do anything to hurt TS.” In short, if Williams believed based on conversations among Allen, Stevens, and himself, that Allen would be adding VECO costs to the CB bills *somehow*, then perhaps that is what Stevens thought too. In my view, Berg places too much emphasis on what he believes to be OPR’s erroneous conclusion that there was an original agreement to combine invoices and on your view on the mechanics of the combination. Williams seemed to be clear that his assumption arose from what he believed to be Stevens’s desire to pay for everything. The government knew that Stevens had received and paid no VECO bills, but had specifically anticipated that Stevens would defend the charge by contending that he had paid in full for the renovations because he paid the CB invoices. Furthermore, the defense that PIN attorney Sullivan anticipated assumed that “TS will say that CAS handled the bills, CAS coordinated with Rocky, and TS didn’t know VECO wasn’t paid b/c CAS never told him.” Report p. 293. Hence,

the government anticipated that Stevens would testify he never actually saw the bills. Therefore, the fact that the bills on their face did not reflect any VECO expenses would not have been fatal to the defense as envisioned by PIN attorney Sullivan and communicated to you on the day that you met with Williams. Therefore, any "err on the side of caution" assessment of whether the evidence was exculpatory should have resulted in a decision to disclose the information from Williams that he understood that Stevens would be billed the full cost of the renovation. Finally, the relevance of this component of Berg's analysis is a bit unclear. He recognized that you testified that you never actually considered whether to disclose the information yet seemed to conclude that the analysis that you did not conduct was objectively reasonable. Perhaps his assessment is intended to address your failure to alert to the issue at the time, suggesting that since you understood Williams as you did, there was little or nothing that would cause notice. Nonetheless, because you did not actually evaluate the evidence that Williams provided during his trial preparation sessions to determine whether it was *Brady*, my determination that the information he provided should have been disclosed pursuant to Department policy only leads to the next issue, that is whether you had a personal obligation regarding the disclosure that you failed to meet.

Without question, your role in the Stevens prosecution was limited. You did not have a courtroom role, were not assigned to handle any witnesses, and made yourself available to preform whatever tasks were assigned to you. Friedrich and Glavin made the determinations of the respective roles of each attorney on the team, and Welch communicated them. In this context, DCRPC 1.2 provides, "A lawyer shall abide by a client's decisions concerning the objectives of representation, . . . and shall consult with the client as to the means by which they are to be pursued." In this scenario, Friedrich, Glavin, and Welch spoke for the client, and therefore, your assignments were as they were designated. However, the broad description of your non-trial role does not fully define your discovery obligations. For example, during your oral response, we discussed your responsibility regarding exculpatory information that might have been disclosed in the trial preparation sessions with Williams:

MR. SCHOOLS: What would your -- how would you perceive your personal responsibility in one of these meetings with Rocky if he had said something that was clearly exculpatory? Suppose he had said, you guys should know I told Catherine Stevens that if they paid the Christensen bills, they paid the entire cost

--

MR. GOEKE: We would absolutely have to disclose it.

MR. SCHOOLS: And what would you personally have done at that point?

MR. GOEKE: I would have said, Joe, I don't think I've ever heard him say that. It seems that we would -- we've got [sic] disclose it. I don't know if we do it in a letter or if we've got to do a 302. At that point, with an agent there, I would have said, do a 302, disclose it.

MR. SCHOOLS: And how would you characterize your responsibilities to make sure that happens, given the role you had in this case at the times that you were interviewing Rocky Williams or you were in those trial prep sessions?

MR. GOEKE: I think I would -- I would have had a co-equal responsibility with Joe [Bottini].

Oral response pp. 45-46. You expounded on this response by stating that you would have met your responsibilities by consulting with Bottini to determine the mechanics of disclosure rather than simply making the disclosure yourself. *Id.* at 46-47. In my view, you accurately described your responsibilities. Although you had specific assigned tasks regarding discovery, such as reviewing the Paone and Bob Persons that would not have meant that you had no responsibility with respect to new, exculpatory information discovered during trial preparation sessions that you attended. I have earlier concluded that there was no clear and unambiguous obligation to disclose to Stevens his own statements to Williams or to disclose the information that you anticipated would be provided in his grand jury transcript. Thus, the misconduct question depends on whether you met whatever obligations you had with respect to Williams's assumptions about the bills. You have acknowledged that you did have obligations with respect to exculpatory information provided during trial preparation sessions that you attended, I concluded that the Williams's assumptions were disclosable at least under the USAM policy, and there is no dispute that you took no action to cause disclosure of that information. It follows that you did not meet that obligation. I will address these conclusions in the context of OPR's analytical framework after discussing the *Brady* letter.

The *Brady* letter disclosures with respect to Williams were deeply flawed. The letter stated, "[T]he government has completed its review of agents' notes, formal memoranda, and grand jury transcripts for Brady/Giglio material. . . . The following information is being furnished to you in a manner consistent with our prior agreement." *Brady* letter p. 1. Although the letter notes that it does not contain the entire universe of *Brady* and *Giglio* information, it infers that in combination with the August 25, 2008 *Giglio* letter and prior disclosures, it completes the *Brady/Giglio* picture. *Id.* This inference was incorrect for multiple reasons.

Paragraph 15 of the letter pertains to Williams. With one exception it discloses only information Williams provided during a September 1, 2006 interview, all of which was inconsistent with information Williams later provided. In that sense, the letter appears to have been designed to facilitate cross-examination of Williams if he testified; however, the letter did not disclose its purpose. In other words, the letter did not disclose Williams's subsequent statements that were inconsistent with his September 1, 2006 interview except with respect to the one statement that was exculpatory on its face. For example, the letter noted that Williams said that there were no plans for the renovations. *Id.* That statement does not appear to be exculpatory on its face, but the government knew that statement to be inconsistent with Williams's later confirmation that VECO's John Hess drew plans. Report pp. 94-95. The letter

disclosed that Williams said on September 1, 2006, that he did not review CB bills. *Brady* letter p. 3. That statement likewise does not appear to be exculpatory on its face, but the government knew that it was inconsistent with Williams's expected testimony. Report p. 95. The letter notes that Williams said on September 1, 2006, that CB performed 99% of the work at Girdwood. *Brady* letter p. 3. That statement is exculpatory on its face, but the letter explicitly reports that Williams later explained that he meant only that CB performed 99% of the work that VECO did not perform. *Id.*

The team began circulating drafts of the *Brady* letter beginning on September 7, 2008. Report p. 92. On that date at 5:10 pm, Sullivan sent a draft to you and others that contained a precursor paragraph to the final Williams paragraph that read:

On September 1, 2006, government agents interviewed Robert Williams. Williams stated that there were no formal plans for the addition at defendant's residence and that Williams sketched the plans for the addition based upon conversations with the defendant. Williams also stated that, although he was the general contractor on the project, he did not deal with the expenses. Williams further stated the majority of the work on the property was completed by Christensen Builders, estimating that 99 percent of the work was done by Christensen Builders and the remaining portion performed by subcontractors.

Id. at 94. On September 8, 2008, at 12:37 pm, Sullivan sent a revised draft, but the Williams paragraph remained unchanged. *Id.* at 97. Later that evening, at 8:53 pm, Marsh circulated another draft that again made no changes to the Williams paragraph. *Id.* at 98. On September 9, 2008, at 10:16 am, Sullivan sent a revised draft that retained the Williams paragraph. *Id.* at 99. At 12:09 pm, Sullivan sent another draft of the letter that made only minor format changes to the Williams paragraph. *Id.* at 100. At 6:50 pm, Marsh sent another draft that contained a modified Williams paragraph that read:

On September 1, 2006 Robert Williams stated that there were no formal plans for the addition at defendant's residence and that Williams sketched the plans for the addition based upon conversations with the defendant. Williams also stated that, although he was the general contractor on the project, he did not deal with the expenses *and did not recall reviewing Christensen Builders invoices. In a memorandum of interview from the same meeting, a federal law enforcement agent noted that Williams estimated that 99 percent of the work was done by Christensen Builders. In a subsequent interview, Williams stated that he did not recall ever saying that Christensen Builders performed 99 percent of the work, and that such a figure was inconsistent with what he knows to have occurred.*

Id. at 101 (Italicized section new). Finally, at 8:09 pm, Marsh sent the final version of the letter having made no changes to the Williams paragraph. Although OPR indicates that you were fully engaged on the letter with respect to the contents of a paragraph pertaining to Bill Allen, OPR's report reflects no input from you or anyone else regarding the Williams paragraph.

You thereafter traveled to Washington, and you conducted a mock cross-examination of Williams on September 21, 2008. When you testified in the Schuelke investigation, you indicated you could not recall whether you cross-examined Williams about CB's bills but indicated you "very well could have." Transcript p. 143. Williams flew back to Alaska to visit his doctors, and although he was never called as a witness, the government disclosed his grand jury transcript to the defense on September 28, 2008, and disclosed his interview memoranda on October 1, 2008. His assumptions about the billing were not contained in those documents and that information was never disclosed. You testified, however, that you thought the only new information Williams provided was that he did not discuss billing with Ted or Catherine Stevens. Transcript p. 123.

I now turn to the consideration of your actions regarding the Williams disclosures in the context of OPR's analytical framework. Your obligations under *Brady*, *Giglio*, and the USAM are clear and unambiguous, and you were aware of them. So the first prong of the reckless misconduct analysis is satisfied.

The next element of OPR's finding is whether you knew or should have known, based on your experience and the unambiguous applicability of the obligation or standard, that your conduct involved a substantial likelihood that you would violate, or cause a violation of, the obligation or standard. As noted earlier, proof of this element requires *inter alia* that the obligation or standard—in this case *Brady* and the USAM—unambiguously applies. You have argued that the Williams assumptions were not strictly *Brady* information, and Berg appears to have concluded that your determination that Williams's assumptions were not *Brady* information was objectively reasonable. You testified:

Q And what is there about that information that you think is not *Brady* material?

A Well, as I sit here and look and look at that and go -- the analysis that goes through my mind is, is Rocky's impression of something that he believed to happen that he said, "I don't know if it happened or not." Is that *Brady* or not? I think you can make an argument that it's not. You could probably make an argument that it is.

Transcript p. 98. You may be correct regarding your final two points, but those assessments certainly implicate a disclosure obligation under an "err on the side of caution" standard in the USAM. And, while your point about making an argument either way may be valid in the

abstract, where as here, Williams provided the information on the same day that Sullivan sent the email predicting the Stevens defense, the argument that the information is not *Brady* becomes less plausible. For these reasons, I find that the USAM clearly and unambiguously required disclosure of the information and that you should have known that the failure of the government to disclose the information or your failure to at least raise the question of its disclosure, involved a substantial likelihood that you would violate, or cause a violation of, the obligation or standard.

The third prong of OPR's analysis requires an assessment of whether your conduct was objectively unreasonable under all the circumstances. I find this to be a very close question for several reasons. First, you did have a limited role in the prosecution, and Bottini, who was more experienced and had a more prominent role in the trial, was present for the witness preparation sessions with Williams and did not raise the issue either. Second, as you point out, you were tasked with reviewing the Paone and Persons for *Brady* information, and you identified so much *Brady* information that PIN decided to disclose in their entirety. Third, you pressed from March 2007 through September 2008 for disclosure of information that government witness Bill Allen had previously asked Bambi Tyree to sign a false affidavit indicating that she had not had sex with him when she was underage. Fourth, you were required to be in Washington away from your wife and daughter amid what was a chaotic trial preparation period.

These circumstances, particularly your handling of the Tyree information and the review of the for *Brady* information, suggest that your conduct regarding the non-disclosure of the Williams assumptions was not intentional and also suggest that you were not generally cavalier about your disclosure obligations. However, OPR elucidates its standard by noting that "an attorney's disregard of an obligation is reckless when it represents a gross deviation from the standard of conduct that an objectively reasonable attorney would observe in the same situation." Thus, the standard invites scrutiny of discrete actions even though, as I have noted, the context in which those actions occur is also relevant.

Although Bottini's and your notes differ with respect to the substance of the August 20, 2008 trial preparation session, your notes reflect that Williams told you on both August 20 and August 22 that he thought Allen would add Anderson's and his (Williams's) time to the CB bills. On the *same day* as the second session, Sullivan sent an email predicting the Stevens defense, which was consistent with Williams's assumption at least in a broad sense. Since you acknowledge an obligation to identify *Brady* information if it came up in that context, for you not to have at least raised the issue with Bottini or others on the trial team is, in my view, in marked contrast to the actions the Department would expect of an objectively reasonable attorney. No countervailing concerns supported non-disclosure. There were no witness security concerns and no national security concerns. Although I agree that the government had plausible retorts to the information, the fact that a prosecutor can imagine a ready response to exculpatory information does not mean that the information was not favorable to the defense. On this point, you testified:

- Q Because I also recall . . . after we returned from the recess . . . you acknowledged that it was *Brady* and therefore required to be disclosed that Rocky Williams, based on a conversation he had with Ted Stevens in 1999 or 2000, understood that his time and that of Dave Anderson's were to be included in the Christensen Builders invoices.
- A That doesn't mean the testimony's bad for the government.

Transcript p. 145-46. By the same token, just because the government might use information to its advantage does not mean that it is not *Brady* when the defense might also use the evidence to its advantage. In the course of criminal prosecutions, there is much evidence that is neither all good nor all bad for one party. The Williams assumptions were that type of evidence.

Finally, my view of the objective reasonableness of your conduct is further informed by your failure to raise any questions in response to a patently flawed paragraph about Williams in the *Brady* letter. I understand that you interpreted the letter as a *Giglio* disclosure that would permit cross-examination of Williams with prior inconsistent statements if he were to testify. I also appreciate that you thought the PIN attorneys were handling the *Brady* disclosures. Nonetheless, in combination with previously provided information, the letter purported to disclose all the relevant *Brady* information. It disclosed that Allen said that Stevens would not have paid the full bill had he been sent one, but did not disclose that Williams's understanding was that Allen was supposed to provide Stevens precisely that because that was what Stevens wanted. Only Bottini and you were clearly aware of Williams's assumption that VECO costs were added to the CB bills and that his assumption was based on discussions among Stevens, Allen, and him. For that reason, you were in a different position with respect to the letter than the other prosecutors on the team. For all of these reasons, I find that your failure to raise with anyone the issue of disclosing the Williams assumptions was objectively unreasonable. Therefore, I sustain the charge and the specification.

III. Penalty

a. *Douglas factor analysis*

1. *The nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated.*

Aggravating: The offense was serious and was directly related to your responsibilities.

Mitigating: The offense was not intentional nor was it committed maliciously or for gain nor frequently repeated. I also note that you successfully completed *Brady* review of the Persons and Paone

2. *The employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position.*

Aggravating: AUSAs serve a critically important public function. The public's confidence in the justice system depends in part on its knowledge that criminal defendants who are tried and convicted in federal courts have been afforded the full benefit of their constitutional rights. *Brady* and *Giglio* are based on constitutional principles. Your actions in this case tend to undermine the public's confidence in the criminal justice system.

Mitigating: At the time of the Stevens trial, you were not in a supervisory position and played a supportive role, as opposed to a trial attorney role, in the prosecution.

3. The employee's past disciplinary record.

Aggravating: None.

Mitigating: You have not been previously disciplined since joining the Department in 2003.

4. The employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability.

Aggravating: None.

Mitigating: You have served as an Assistant United States Attorney in two different districts. The United States Attorneys from the District of Alaska and the Eastern District of Washington praised your work ethic and described your work record as "exemplary." They advise that your performance evaluations have been consistently excellent and that you are well liked and respected by your coworkers and supervisors. They further advised that you get along well with your peers and cited numerous awards including performance awards and on-the-spot awards for exemplary work. They report,

“AUSA Goeke is an outstanding attorney, is trustworthy, litigates complex and difficult cases, gets along with everyone and is not only dependable, but highly productive.”

5. The effect of the offense upon the employee’s ability to perform at a satisfactory level and its effect upon supervisors’ confidence in the employee’s ability to perform assigned duties.

Aggravating: None.

Mitigating: Your current United States Attorney reports that the allegations have had no impact on your supervisors’ confidence in your ability to perform at an exemplary level and that you have continued to receive excellent performance evaluations since the Stevens prosecution and that you have maintained a positive reputation with your colleagues, the judiciary, and the defense bar.

6. Consistency of the penalty with those imposed upon other employees for the same or similar offenses.

Aggravating: None.

Mitigating: OPR rarely finds that Department prosecutors have committed professional misconduct in connection with their disclosure obligations. Based on my experience and awareness of OPR matters for six of the last seven years, the proposed 15-day suspension is longer than actual punishments received by Department attorneys found to have engaged in misconduct in the past.

7. Consistency of the penalty with the applicable agency table of penalties.

Not applicable: The Department does not have a table of penalties.

8. The notoriety of the offense or its impact upon the reputation of the agency.

Aggravating: The Department’s failures in this case have been extraordinarily notorious although the particular non-disclosure that underlies the charge was not the precise subject of the public attention. Nonetheless, when the Department learned of certain non-disclosures of information in the case, the Department not only

Subject: Disciplinary Proposal of Kevin A. Ohlson, Chief, Professional
Misconduct Review Unit

agreed to vacate Stevens's conviction but to dismiss the indictment against him. The Department was chastised harshly by the trial judge even when it moved to dismiss the indictment. The court found the violations so serious that he appointed a Special Prosecutor to investigate whether the Department attorneys had committed criminal contempt of court. The results of that investigation, recently made public, have prompted the submission of proposed legislation that would alter in favor of criminal defendants the carefully crafted constitutional balance between a defendant's right to a fair trial and the public's right to see that justice is done. In part in response to the violations in this case, the Department issued new discovery guidance for prosecutors, appointed a National Criminal Discovery Coordinator, and implemented new training requirements for prosecutors new and experienced. These measures were designed not only to ensure future compliance with discovery obligations but to repair the damage that this case did to the reputation of federal prosecutors everywhere. You were or should have been aware that this defendant was a sitting Senator and that discovery failures in this case could have an impact much broader than the already significant impact on the case. I am loathe to endorse weighty consideration of the notoriety of your conduct for fear that it could be misperceived as a determination that my assessment of the appropriate punishment depends in part on the identity of this defendant. A failure to disclose material exculpatory information is serious misconduct in ANY case. The law compels, however, that I consider the notoriety of the conduct, and this conduct was extremely notorious.

Mitigating: None.

9. The clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question.

Aggravating: *Brady* is a well known, constitutionally-based rule of disclosure with which every prosecutor is familiar. The Department's policy at USAM § 9-5.001 has existed in its current form since 2006. As a prosecutor with approximately five years experience at the time of the trial, you were certainly clearly aware of your disclosure obligations.

Mitigating: None.

10. Potential for employee's rehabilitation.

Aggravating: None.

Mitigating: Your United States Attorney continues to have confidence in your ability to handle significant cases in your office. I have little doubt that whatever rehabilitation you needed has been previously accomplished by the almost three-year threat of a criminal prosecution and by the negative impact that this very public matter has had on you personally.

11. Mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter.

Aggravating: None.

Mitigating: There were a number of mitigating circumstances surrounding your actions, many of which I have previously discussed. First, although the indictment decision had been long on the table, it ultimately was resolved quickly, and the indictment was presented just two weeks after the indictment review meeting in Washington. Second, the compressed trial preparation period undoubtedly had an impact on your performance here. Although I do not find that the time compression was so extraordinary as to have altered the substantive outcome of your objections to the proposal, it is mitigating. Morris was the newest member of the trial team, and at Stevens's arraignment she proposed a trial date two weeks *earlier* than the court had suggested. She agreed to the date despite undoubtedly knowing little about the Department's level of preparedness to go to trial. By Morris's own admission, she was a reluctant participant in the case and did not assume a leadership role on the team other than in court. Report p. 64. Although Morris's efforts to ameliorate the hurt feelings of some of the team members is understandable, those efforts resulted in the team's lacking a leader during the critical preparation stages of the case. This lack of leadership resulted in confusion regarding the attorneys' roles and lack of explicit direction as to who was responsible for what. However, I did not find that this lack of

leadership directly caused the non-disclosure that is the subject of the proposal. I also note that you were asked to conduct *Brady* reviews of _____ of two witnesses, and that your careful review resulted in the disclosure of the entirety of both _____ to the defense.

12. The adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

Aggravating: As Justice Sutherland observed many years ago, “The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.” *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 633 (1935). Unlike private practitioners, AUSAs face the constant challenge of meeting their obligations to their own client—the United States—while also ensuring the fairness of the proceeding to the other side—a criminal defendant. In Justice Sutherland’s words, the prosecutor may strike hard blows, but is not at liberty to strike foul ones. *Id.* The obligation described by Justice Sutherland is solemn, and the failure to meet it is serious. Fortunately, Department prosecutors meet that obligation in the vast majority of cases, but it would be a disservice to the public that we serve if the Department were to treat lightly failures when they do occur. Although most Department prosecutors do not need the threat of serious punishment to motivate them to meet their disclosure obligations, it is important that the sanctions in such cases accurately reflect the seriousness of the conduct so that prosecutors understand the Department’s deep commitment to ensuring that the outcomes of federal criminal trials are fair and consistent with our constitutional responsibilities.

Mitigating: As I noted earlier, I am confident that you need no additional deterrence to making similar non-disclosures in the future.

b. Conclusion

Balancing the often conflicting factors cited above, I have determined that the proposed fifteen-day suspension without pay is the appropriate sanction for your conduct in this case. I noted above that the punishment is perhaps more serious than punishments in similar cases in the past, but the non-disclosure of exculpatory information in a criminal case is very serious, and I am of the view that the proposed punishment more accurately reflects the seriousness of the conduct at issue in this matter. Similarly, I have noted that you likely need no future deterrence, and I appreciate and respect your otherwise unblemished career in the Department, but the non-disclosure of exculpatory evidence is among the most serious transgressions that a Department attorney can commit. For these reasons, I find that this penalty is fully warranted and will promote the efficiency of the federal service.

IV. Right to Appeal

You may appeal this decision to the Merit Systems Protection Board (MSPB). *See* 5 C.F.R. § 752.405. The MSPB Regulations are found at 5 C.F.R. § 1201 or you may access them through their website at <http://www.mspb.gov>. In order for your appeal to be considered by the MSPB, it must be submitted no later than 30 days after your receipt of this decision. I have included an appeal form for your convenience. You may file online at <http://www.e-appeal.mspb.gov> or you may send the enclosed appeal form to:

Merit Systems Protection Board
Western Regional Office
201 Mission Street
Suite 2310
San Francisco, CA 94105-1831

If you wish to raise an issue of discrimination in relation to this action, you may file either a mixed case appeal with the MSPB at the address above no later than 30 calendar days after the date you receive this letter, or you may file a mixed case complaint by contacting the EEO Staff of the Executive Office for U.S. Attorneys at (202) 252-1450 or (877) 781-1444, within 45 calendar days of the date you receive this letter. You may not initially file both a mixed case complaint and an appeal on the same matter; whichever forum you choose first shall be considered an election to proceed in that forum.

A copy of this decision letter has been sent to you via email, on May 23, 2012, and a copy will be provided to your attorney via electronic mail today. Please acknowledge receipt of this

Letter to James A. Goeke, Esquire
Subject: Disciplinary Proposal of Kevin A. Ohlson, Chief, Professional
Misconduct Review Unit

Page 28

letter in the space provided below and either return a hard copy of the signed letter to me at the above address or e-mail a scanned copy of the same to me at

Sincerely,



Scott N. Schools
Associate Deputy Attorney General

Enclosure

cc: Bonnie Brownell, Esquire
The Brownell Law Office PC

Raymond C. (Neil) Hurley
Acting Counsel
Office of Professional Responsibility

Kevin A. Ohlson
Chief
Professional Misconduct Review Unit

The Honorable Michael C. Ormsby
United States Attorney

I acknowledge receipt of this decision as noted below:

Signature

Date



MERIT SYSTEMS PROTECTION BOARD APPEAL FORM (MSPB FORM 185)

INSTRUCTIONS FOR COMPLETING YOUR APPEAL

GENERAL: This form is intended to help you provide the Board with the information we need to process your appeal. We need this information to help us determine whether the Board has jurisdiction over your appeal, whether it has been filed within the applicable time limit, and what claims you are raising. You do not have to use this form to file an appeal with the Board. However, if you do not, your appeal must still comply with the Board's regulations. **See 5 C.F.R. Parts 1201, 1208 and 1209.** The Board will expect you to become familiar with these regulations, which are available on the MSPB website— www.mspb.gov—and in MSPB offices, many agency personnel offices and libraries, and most public libraries. The Board's website also contains electronic versions of this form, addresses and telephone numbers of the MSPB regional and field offices, and additional information that explains the Board's practices and procedures. Note, however, that if you complete one of the electronic versions of the appeal form at our website (<https://e-appeal.mspb.gov/>), you may not submit it via e-mail. If you want to file an appeal on-line, you must use the Board's e-Appeal site listed at the bottom of this page.

WHAT PARTS TO COMPLETE: You may use this form for any of the following matters over which the Board has jurisdiction:

- An appeal of a Federal agency personnel action or decision that is appealable to the Board under a law, rule, or regulation;
- An appeal of an administrative decision or action by the Office of Personnel Management (OPM) or a Federal agency affecting your retirement rights or benefits;
- An Individual Right of Action (IRA) appeal under the Whistleblower Protection Act (WPA);
- An appeal under the Uniformed Services Employment and Reemployment Rights Act (USERRA); or
- An appeal under the redress procedure of the Veterans Employment Opportunities Act (VEOA).

Complete **Part 1** of this form regardless of which type of appeal you are filing. **Your appeal must contain your signature, or the signature of your representative, in question 12 of Part 1. If it does not, your appeal will be rejected and returned to you.**

Complete **Part 2** if you are appealing a Federal agency personnel action or decision, other than an action or decision affecting your retirement rights or benefits. **See 5 C.F.R. 1201.24(a).**

Complete **Part 3** if you are appealing an administrative decision or action affecting your retirement rights or benefits. **See 5 C.F.R. 1201.24(a).**

Part 4 lists certain other claims you may raise in addition to an appeal of an agency personnel or retirement action or decision. If you wish to raise any of these claims at this time, check the appropriate box (or boxes) in **Part 4** and provide supporting information as an attachment to this form. You may raise such claims and provide the information later—but no later than the close of the conference(s) held to define the issues in your appeal. **See 5 C.F.R. 1201.24(b).**

Complete **Part 5 ONLY** if you are filing one of the following types of appeals:

- An IRA appeal under the WPA. **See 5 C.F.R. 1209.6;**
- A USERRA appeal. **See 5 C.F.R. 1208.13;** or
- A VEOA appeal. **See 5 C.F.R. 1208.23.**

See **Part 5** for an explanation of these three types of appeals.

If you complete **Part 5**, you **must** provide the additional information required by the Board's regulations for the particular type of appeal as an attachment to this form. The Board may consider **ONLY** the claim that the agency violated the particular law involved and may **NOT** consider the merits of the underlying action or decision.

If you wish to designate someone to represent you in this appeal, also complete and **sign Part 6, Designation of Representative.** **See 5 C.F.R. 1201.31.**

**If you prefer to file your appeal electronically, please visit
MSPB e-Appeal Online—<https://e-appeal.mspb.gov>**

WHERE TO FILE AN APPEAL: You must file your appeal with the Board's **regional or field office** that is responsible for the geographic area where your duty station was located at the time the agency took the action or made the decision you are appealing. If you are appealing a nonselection under USERRA, VEOA, or in an IRA appeal, you should file with the regional or field office that is responsible for the location of the agency to which the application was made. If you are appealing a retirement or suitability decision by OPM, you must file your appeal with the Board's regional or field office that is responsible for the geographic area where you live. See **5 C.F.R. Part 1201, Appendix II, 5 C.F.R. 1201.4(d), and 5 C.F.R. 1201.22(a)**. If you have any questions, please contact the regional or field office with which you will file your appeal.

WHEN TO FILE AN APPEAL: Except as indicated below, you must file your appeal during the period that **begins on the day after the effective date**, if any, of the action or decision you are appealing, and **ends on the 30th calendar day after the effective date, or on the 30th calendar day after the date you received the agency's decision, whichever is later**. (You may not file your appeal **before** the effective date of the action or decision.) If your appeal is late, it may be dismissed as untimely.

The 30 calendar day filing time limit may be extended if you and the agency mutually agree **in writing** to try to resolve your dispute through an **alternative dispute resolution (ADR) process** before you file an appeal. If you and the agency reach such an agreement, you have an additional 30 calendar days—for a total of **60 calendar days**—to file your appeal with the Board if you are unable to resolve the dispute through the ADR process. This extension of the time for filing does not apply to appeals that are subject to a filing time limit established by law, e.g., IRA and VEOA appeals. See **5 C.F.R. 1201.22(b) and (c)**.

If you are filing an **IRA appeal**, you must file no later than **65 days** after the date of the Office of Special Counsel (OSC) notice advising you that the Special Counsel will not seek corrective action, or within **60 days** after the date you received the OSC notice, whichever is later. See **5 C.F.R. 1209.5**.

If you are filing a **USERRA appeal**, there is **no time limit** for filing. See **5 C.F.R. 1208.12**. If you file a USERRA complaint with the Department of Labor first, you must exhaust the procedures of the Department before you may file an appeal with the Board.

If you are filing a **VEOA appeal**, you must file it **within 15 days** after the date you received notice that the Department of Labor was unable to resolve the matter. See **5 C.F.R. 1208.22**. **Note: Before filing with the Board, you must file a VEOA complaint with the Department of Labor, and the Department is allowed at least 60 days to try to resolve the matter.**

In all of the above instances, the date of filing is the date your appeal is postmarked, the date of the facsimile transmission, the date it is delivered to a commercial overnight delivery service, or the date of receipt in the regional or field office if you personally deliver it.

HOW TO FILE AN APPEAL: You may file your appeal by mail, by facsimile, by commercial overnight delivery, by personal delivery, or by electronic filing. See **5 C.F.R. 1201.22(d)**. You must submit **an original and one copy** of both your appeal **and** all attachments. You may supplement your response to any question on a separate sheet of paper, but if you do, please put your name and address at the top of each additional page. All of your submissions must be legible and on 8 1/2" x 11" paper.

PLEASE SUBMIT ONLY THE ATTACHMENTS REQUESTED IN THIS FORM. You will have an opportunity to submit other documentary evidence later in the proceeding.

Privacy Act Statement: *This form requests personal information that is relevant and necessary to reach a decision in your appeal. The Merit Systems Protection Board collects this information in order to process appeals under its statutory and regulatory authority. Because your appeal is a voluntary action, you are not required to provide any personal information in connection with it. However, failure to supply the Merit Systems Protection Board with all the information essential to reach a decision in your case could result in the rejection of your appeal.*

You should know that the decisions of the Merit Systems Protection Board on appeals are final administrative decisions and, as such, are available to the public under the provisions of the Freedom of Information Act. Additionally, it is possible that information contained in your appeal file may be released as required by the Freedom of Information Act. Some information about your appeal will also be used in depersonalized form as a database for program statistics.

Public Reporting Burden: *The public reporting burden for this collection of information is estimated to vary from 20 minutes to 4 hours, with an average of 60 minutes per response, including time for reviewing the form, searching existing data sources, gathering the data necessary, and completing and reviewing the collection of information. Send comments regarding the burden estimate or any other aspect of the collection of information, including suggestions for reducing this burden, to Office of the Clerk, Merit Systems Protection Board, 1615 M Street, N.W., Washington, DC 20419.*

PART 1—Appellant and Agency Information

Complete this part regardless of which type of appeal you are filing. Then proceed to Part 2 if you are appealing an agency personnel action or decision, to Part 3 if you are appealing an administrative decision or action affecting your retirement rights or benefits, or to Part 5 if you are filing an IRA appeal, USERRA appeal, or VEOA appeal.

Please type or print legibly.

1. Name (*last, first, middle*)

Please list your first name as it appears in your official personnel records. For example, if your first name is "William" on your official personnel records, please list it that way on the appeal form, not "Bill" or "Willy."

2. Present address (*number and street, city, State, and Zip code*)

You must promptly notify the Board in writing of any change in your mailing address while your appeal is pending.

Address:

City, State, Zip code:

3. Telephone Numbers (*include area code*) and E-Mail Address

You must promptly notify the Board in writing of any change in your telephone number(s) or e-mail address while your appeal is pending.

Home: ()

Work: ()

FAX: ()

Other: ()

E-mail Address:

4. Name and address of the agency that took the action or made the decision you are appealing (*include bureau or division, street address, city, State and Zip code*)

Agency Name:

Bureau:

Address:

City, State, Zip code:

5. Your Federal employment status at the time of the action or decision you are appealing:

- Permanent Temporary Term
 Seasonal Applicant Retired
 None

6. Type of appointment (if applicable):

- Competitive Excepted
 Postal Service SES
 Other *describe*:

7. Your position, title, grade, and duty station at the time of the action or decision you are appealing (if applicable):

Occupational Series or Cluster:

Position Title:

Grade or Pay Band:

Duty Station:

8. Are you **entitled** to veterans' preference?
See 5 U.S.C. 2108.

Yes

No

PART 1—Appellant and Agency Information (continued)

9. Length of Federal service (if applicable):

10. Were you serving a probationary, trial, or initial service period at the time of the action or decision you are appealing?

Yes No

HEARING: You may have a right to a hearing before an administrative judge. If you choose to have a hearing, the administrative judge will notify you when and where it is to be held. If you do not want a hearing, the administrative judge will make a decision on the basis of the submissions of the parties.

11. Do you want a hearing? Yes No

12. I certify that all of the statements made in this form and any attachments are true, complete, and correct to the best of my knowledge and belief.

Signature of Appellant or Representative:

Date:

PART 2—Agency Personnel Action or Decision (non-retirement)

Complete this part if you are appealing an agency personnel action or decision (other than a decision or action affecting your retirement rights or benefits) that is appealable to the Board under a law, rule, or regulation. See 5 C.F.R. 1201.3(a) for a list of appealable personnel actions and decisions. If the personnel action or decision is appealable to the Board, you should have received a final decision letter from the agency that informs you of your right to file an appeal with the Board.

13. Check the box that best describes the agency **personnel action or decision** you are appealing. (If you are appealing more than one action or decision, check each box that applies.)

- | | |
|---|---|
| <input type="checkbox"/> Removal (termination after probationary or initial service period) | <input type="checkbox"/> Involuntary resignation |
| <input type="checkbox"/> Termination during probationary or initial service period | <input type="checkbox"/> Involuntary retirement |
| <input type="checkbox"/> Reduction in grade, pay, or band | <input type="checkbox"/> Denial of within-grade increase |
| <input type="checkbox"/> Suspension for more than 14 days | <input type="checkbox"/> Furlough of 30 days or less |
| <input type="checkbox"/> Failure to restore/reemploy/reinstate or improper restoration/reemployment/reinstatement | <input type="checkbox"/> Separation, demotion or furlough for more than 30 days by reduction in force (RIF) |
| <input type="checkbox"/> Negative suitability determination | <input type="checkbox"/> Other action (describe): |

13a. **It is important that you attach a copy** of the agency's proposal letter and decision letter (if any). **If an SF-50 or its equivalent was issued and is available, attach it now. DO NOT delay filing** your appeal because you currently do not have any of these documents. You may submit them when they become available. Check the box(es) below to show which documents are attached to this form. Also **DO NOT include other documentation not requested in this Appeal Form.** You will have other opportunities to submit evidence and argument after the appeal has been docketed.

Agency's proposal letter

Agency's decision letter

SF-50

14. Date you received the agency's proposal letter (if any) (month, day, year)

15. Date you received the agency's final decision letter (if any) (month, day, year)

16. Effective date (if any) of the agency action or decision (month, day, year):

17. Prior to filing this appeal, did you and the agency mutually agree in writing to try to resolve the matter through an alternative dispute resolution (ADR) process?

Yes (*Attach a copy of the agreement*)

No

PART 2—Agency Personnel Action or Decision (non-retirement) (continued)

18. Explain briefly why you think the agency was wrong in taking this action or making this decision.

19. What action would you like the Board to take in this case (i.e., what remedy are you asking for)?

20. **With respect to the agency personnel action or decision you are appealing**, have you, or has anyone on your behalf, filed a grievance under a negotiated grievance procedure provided by a collective bargaining agreement?

Yes No

If "Yes," **attach a copy of the grievance**, enter the date it was filed (*month, day, year*), and enter the place where it was filed **if different from your answer to question 4 in Part 1**:

Agency Name:

Date Filed:

Bureau:

Address:

City, State, Zip code:

If a decision on the grievance has been issued, **attach a copy of the decision** and enter the date it was issued (*month, day, year*):

PART 3—OPM or Agency Retirement Decision or Action

Complete this part if you are appealing an administrative decision or action by the Office of Personnel Management (OPM) or a Federal agency affecting your rights or benefits under the Civil Service Retirement System (CSRS) or the Federal Employees' Retirement System (FERS). See 5 C.F.R. 1201.3(a)(6). If the decision or action is appealable to the Board, you should have received a final decision from OPM or the agency that informs you of your right to file an appeal with the Board.

21. In which retirement system are you enrolled?

CSRS CSRS Offset FERS

Other, *describe*:

22. Are you a:

Current Employee Annuitant

Surviving Spouse

Other, *describe*:

PART 3—OPM or Agency Retirement Decision or Action (continued)

23. If retired, date of retirement, or if unknown, approximate date (month, day, year):

24. Are you appealing an action or decision concerning a retirement coverage error under the provisions of the Federal Erroneous Retirement Coverage Corrections Act (FERCCA)? See 5 CFR Part 839.

Yes

No

25. Describe the retirement decision or action you are appealing.

Answer either Question 26 OR Question 27, whichever applies to your appeal.

26. If you are appealing an OPM retirement decision, have you received a final or reconsideration decision from OPM?

Yes (*Attach a copy*)

No

If "Yes," on what date did you receive the OPM decision (month, day, year)?

Provide the OPM processing (CSA or CSF) number in your appeal:

27. If you are appealing a retirement decision or action by a Federal agency other than OPM, have you received a final decision from that agency?

Yes (*Attach a copy*)

No

If "Yes," on what date did you receive the agency decision (month, day, year)?

28. Why do you think the decision or action was wrong?

29. What action would you like the Board to take in this case (i.e., what remedy are you asking for)?

PART 4—Other Claims

If you completed Part 2 to appeal an agency personnel action or decision or Part 3 to appeal an administrative decision or action affecting your retirement rights or benefits, in most cases, you also may raise certain other claims in connection with that appeal. Such claims must be raised no later than the close of the conference(s) held to define the issues in your appeal. **See 5 C.F.R. 1201.24(b).** If you wish to raise any of these claims at this time, check the appropriate box (or boxes) in this part to indicate the claim(s) you are raising. Provide information supporting the claim(s), including any information required by the Board's regulations for the specific type of claim(s), on a separate sheet of paper and attach it to this form. If you prefer, you may raise such claims later—but no later than the close of the conference(s) on your appeal. **Remember that you are responsible for proving each claim you raise.**

PART 4—Other Claims (continued)

30. Check the appropriate box (or boxes) for any claim(s) that you wish to raise at this time **in connection with the action or decision you are appealing in Part 2 or Part 3**, and provide supporting information as an **attachment** to this form:

- A claim that the agency made errors in applying required procedures (harmful error), that the agency action or decision was the result of a prohibited personnel practice, or that the agency action or decision was not in accordance with law. **See 5 C.F.R. 1201.56(b) and (c)(3)**. For prohibited personnel practice claims, also **see 5 U.S.C. 2302(b)**.
- A claim that the agency action or decision was the result of prohibited discrimination (race, color, religion, sex, national origin, disability, age). **See 5 C.F.R. 1201.151 and 1201.153**. If you previously filed a **formal** discrimination complaint with the agency concerning the action or decision you are appealing, **attach a copy of the complaint**. If the agency has issued a final decision on your discrimination complaint, **attach a copy of the decision**.
- A claim that the agency action or decision was based on whistleblowing. **See 5 U.S.C. 2302(b)(8), 5 C.F.R. 1209.2(b)(2), and 5 C.F.R. 1209.6(a)**. If you previously sought corrective action from the Office of Special Counsel (OSC) concerning the same disclosure(s) and the same agency action or decision you are appealing, **attach a copy of your request to OSC** for corrective action. If you have received written notice from OSC of your right to appeal to the Board, **attach a copy of the OSC notice**. Also **see 5 C.F.R. 1209.8 and 1209.9** if you wish to request a **stay** of the agency action or decision.
- A claim that the agency violated your rights under the Uniformed Services Employment and Reemployment Rights Act (USERRA) (other than rights related to the Thrift Savings Plan for Federal employees) in taking the action or making the decision. **See 38 U.S.C. 4322 and 4324, 5 C.F.R. 1208.11, and 5 C.F.R. 1208.13**. If you previously filed a USERRA complaint with the Department of Labor (DOL) on this matter, **attach a copy of the complaint**. If you have received written notice from DOL that your USERRA complaint could not be resolved, **attach a copy of the DOL notice**.
- A claim that the agency violated a law or regulation relating to veterans' preference in taking the action or making the decision. **IMPORTANT:** If you choose to make your veterans' preference claim in connection with this appeal of an agency action or decision, you may NOT also pursue a complaint under the redress procedure of the Veterans Employment Opportunities Act (VEOA) with DOL at the same time as the appeal. **See 5 U.S.C. 3330a(e) and 5 C.F.R. 1208.26**.

PART 5—IRA Appeal, USERRA Appeal, or VEOA Appeal

Complete the applicable question in this part **ONLY** if you are filing an Individual Right of Action (IRA) appeal under the Whistleblower Protection Act, a Uniformed Services Employment and Reemployment Rights Act (USERRA) appeal, or a Veterans Employment Opportunities Act (VEOA) appeal.

VEOA Appeals under 5 U.S.C. 3330a: Preference eligibles (defined in 5 U.S.C. 2108) allege that a Federal agency violated their rights under any statute or regulation relating to veterans' preference. **See 5 C.F.R. 1208.21**. Before you may file a VEOA appeal with the Board, you must first file a VEOA complaint with DOL and allow DOL at least 60 days to try to resolve the matter. **See 5 C.F.R. 1208.21**.

USERRA Appeals under 38 U.S.C. 4324: Persons allege a violation of their rights and benefits under chapter 43 of title 38, U.S.C., e.g., by failure to reemploy them after a uniformed service period, or by discrimination based on that service or on their application or obligation to provide uniformed service. **See 5 C.F.R. Part 1208**. To pursue redress for a USERRA violation, you may either file a USERRA complaint with the Department of Labor (DOL) or file an appeal with the Board. However, if you first file a USERRA complaint with DOL, you must exhaust DOL procedures before you may file an appeal with the Board. **See 5 C.F.R. 1208.11**.

IRA Appeals: These are authorized by 5 U.S.C. 1221(a) with respect to personnel actions listed in 5 U.S.C. 2302(a)(2) that are allegedly threatened, proposed, taken or not taken because of the appellant's whistleblowing. Whistleblowing is the disclosure of information that the individual reasonably believes shows a violation of law, rule, or regulation, gross mismanagement, gross waste of funds, abuse of authority, or substantial and specific danger to public health or safety. **See 5 C.F.R. Part 1209**. If the action is not otherwise appealable to the Board, you must first file a whistleblower complaint with the Office of Special Counsel (OSC) and exhaust the procedures of that office, before you may file an IRA appeal with the Board. **See 5 C.F.R. 1209.2(b)(1)**.

Answer Question 31 ONLY if you are filing an IRA appeal.

31. Have you filed a complaint with OSC regarding the same disclosure(s) and the same agency action(s) or decision(s) underlying your IRA appeal?

Yes No

If "Yes," **attach a copy of your complaint to OSC**, provide the information required by the Board's regulations at 5 C.F.R. 1209.6(a) as an attachment to this form, and explain what action you would like the Board to take in this case. If you have received written notice from OSC of your right to file an IRA appeal with the Board, **attach a copy of the OSC notice**. Also see 5 C.F.R. 1209.8 and 1209.9 if you wish to request a **stay** of the agency action or decision.

Answer Question 32 ONLY if you are filing a USERRA appeal.

32. Have you previously filed a USERRA complaint with DOL on this matter? Yes No

If "Yes," **attach a copy of your USERRA complaint to DOL**, provide the information required by the Board's regulations at 5 C.F.R. 1208.13(a) as an attachment to this form, and explain what action you would like the Board to take in this case. If you have received written notice from DOL that your USERRA complaint could not be resolved, **attach a copy of the DOL notice**. If your USERRA complaint was referred to OSC and OSC declined to represent you, **attach a copy of the OSC notice**. If OSC is representing you in your USERRA appeal, at number 34 below, enter "Office of Special Counsel" as your designated representative.

If "No," provide the information required by the Board's regulations at 5 C.F.R. 1208.13(a) as an attachment to this form, and explain what action you would like the Board to take in this case.

Answer Question 33 ONLY if you are filing a VEOA appeal.

33. Have you filed a VEOA complaint with DOL and allowed DOL at least 60 days to try to resolve this matter? Yes No

If "Yes," **attach a copy of your VEOA complaint to DOL**, provide the information required by the Board's regulations at 5 C.F.R. 1208.23(a) as an attachment to this form, and explain what action you would like the Board to take in this case. If you have received written notice from DOL that your VEOA complaint could not be resolved, **attach a copy of the DOL notice** and provide the **date** you received it. If more than 60 days have passed since you filed your VEOA complaint with DOL and your complaint has not been resolved, **attach a copy of your notice to DOL** stating your intent to appeal to the Board and provide the **date** you sent it to DOL.

PART 6—Designation of Representative

Complete this part to designate an organization or a person who has agreed to represent you in your appeal before the Board. **If you are representing yourself, do NOT complete this part.** By designating a representative, you agree to allow the Board to give your representative all information concerning the appeal. **Any changes of this designation must promptly be sent in writing to the MSPB office handling the appeal and to the other party. See 5 C.F.R. 1201.31.**

34. Do you wish to designate an individual or organization to represent you in this proceeding before the Board? (You may designate a representative at any time. However, the processing of your appeal will not normally be delayed because of any difficulty you may have in obtaining a representative.)

Yes (*Complete the information below and sign*)

No

DESIGNATION:

"I hereby designate _____ to serve as my representative during the course of this appeal. I understand that my representative is authorized to act on my behalf. In addition, I specifically delegate to my representative the authority to settle this appeal on my behalf. **I understand that any limitation on this settlement authority must be filed in writing with the Board.**

Representative's address (*number and street, city, State and Zip code*).

Address:

City, State, Zip code:

Representative's telephone numbers (*include area code*) and e-mail address:

Office:

FAX:

Other:

E-mail address:

SIGN BELOW TO MAKE YOUR DESIGNATION OF REPRESENTATIVE EFFECTIVE

Appellant's Signature

Date