

Patricia Donahue v. U.S. Government Accountability Office

Docket Nos. 08-05, 09-04

Date of Decision: April 8, 2011

Cite as: Donahue v. GAO, Docket Nos. 08-05, 09-04 (4/8/11)

Before: Steven H. Svartz, Administrative Judge

Headnotes:

Performance Appraisals

Prohibited Personnel Practices

Retaliation

DECISION AND ORDER

Specifically, Petitioner contends that her supervisors “punished her” by “removing or diluting AIC [Analyst-in-Charge] duties, minimizing and denigrating her work, blaming her for delays in the engagement when the supervisors themselves were responsible for the delays, and lowering her performance appraisals, causing her to lose pay.” Petitioner’s Post-hearing Brief (Pet. Brief) at 1-2. GAO asserts that its actions were lawful and that Petitioner has failed to establish a nexus between her protected activity and the appraisals at issue. GAO’s Response to Petitioner’s Post-hearing Brief (GAO Response) at 1. The Agency argues that it “provided extensive evidence substantiating the legitimate reasons underlying Petitioner’s ratings, and the record overwhelmingly demonstrated that Petitioner’s supervisors genuinely believed that they rated Petitioner accurately.” GAO’s Post-hearing Brief (GAO Brief) at 2.

The evidentiary hearing in this matter took place on September 22-25, 2009 and November 16-20, 2009.²

The parties filed post-hearing briefs on March 23, 2010 and reply briefs on April 23, 2010.³

² The court reporter paginated both the September and November transcripts beginning with page 1. The September transcripts are referred to herein as “STR” and the November transcripts as “NTR.” Also, page references for Friday, November 20, 2009 correspond with those on the miniscript starting on page 1514; this pagination reflects a large gap in numbering and is not consistent with the full text version of the November 20, 2009 transcript.

³ On May 3, 2010, GAO filed a "Motion to Strike Appendix C from Petitioner's Reply Brief." GAO asserts that Appendix C should be stricken because its inclusion violates §28.60(a) of the Board’s regulations (4 C.F.R. §28.60(a)), which states: “Principal briefs shall not exceed 60 pages and reply briefs 30 pages, exclusive of tables and pages limited only to quotations of statutes, rules and the like.”

On May 7, 2010, Petitioner filed "Petitioner's Opposition to GAO's Motion to Strike Appendix C from Petitioner's Reply Brief, or, in the Alternative, Petitioner's Nunc Pro Tunc Motion to File Extended Reply Brief." Petitioner contends that: (1) the inclusion of Appendix C is consistent with the regulations; and (2) if it is determined that the inclusion of Appendix C would cause the Reply Brief to exceed the page limitation of §28.60, Petitioner requests that her submission be considered a *nunc pro tunc* motion to enlarge her Reply Brief and should be granted for good cause shown.

For the reasons set forth below, I find that Petitioner has not established by a preponderance of the evidence that GAO committed a prohibited personnel practice by retaliating against her for engaging in protected activity.

II. FACTS

A. Factual background prior to Petitioner's December 2006 Charge

1. At all times relevant, GAO operated under a performance-based compensation system (PBC), under which employees were compensated in part based on their performance.

Petitioner's Exhibit (PE) 1; NTR 533-34.

Having considered these filings, I find that the inclusion of Appendix C would result in Petitioner's Reply Brief exceeding the page limitation in §28.60. Under that provision, "tables and pages limited only to quotations of statutes, rules and the like[]" are not to be counted towards the stated page limitations. It is not at all clear that formatting a narrative rebuttal to proposed findings of fact in two columns of material makes the document a table. Moreover, even if Appendix C were considered to be a table, the letter and intent of §28.60 excludes from computation of page limitations only those tables that consist solely of quotations of statutes, rules and the like. Without having to define precisely the scope of "the like," Appendix C is so dissimilar from statutes and rules that it does not qualify as "the like."

Having found that Appendix C's inclusion would violate §28.60, I next consider Petitioner's request that her submission be considered a *nunc pro tunc* motion to enlarge her Reply Brief. As an initial matter, I note that much of Appendix C repeats material set forth in Petitioner's Brief and Reply Brief. Moreover, I note that at the conclusion of the last day of the lengthy hearing in this case, counsel for Petitioner referred to the 60-page limit for filing post-hearing briefs and suggested raising the limit for this case to 75 pages. In response to that suggestion, I stated that "I would rather wait and see how things go," while recognizing that the case "has an extensive record, both in terms of the transcript and the number of exhibits." NTR 1799-1800. Thus, counsel anticipated that it might be a challenge to comply with the page limits for briefing set forth in the regulation. In these circumstances, an appropriate course of action would have been to file a timely request for an enlargement of the applicable page limits, but no such motion was timely filed.

Nonetheless, in the absence of any apparent precedent discussing the meaning of §28.60 and construing Petitioner's argument as a non-frivolous (but erroneous) interpretation of the provision, I will consider Petitioner's submission as a *nunc pro tunc* motion to enlarge her Reply Brief and I will grant the motion. However, in the future, if counsel in cases before the PAB have uncertainty about the meaning or applicability of procedural regulations relating to briefing such as §28.60, they are expected to seek resolution thereof at the earliest appropriate time (preferably before briefs are filed).

2. Petitioner began working at GAO in 1992; at the time of the hearing, she had been employed there for 17 years. NTR 544, 546.

3. From 1998 to 2004, Ms. Donahue had served as an Analyst-in-Charge (AIC) on roughly five to ten work projects, known in GAO parlance as engagements. NTR 546, 548. On approximately five of those engagements, she had worked with large databases. *Id.* at 551.

4. In March 2004, Petitioner, then a Band II Senior Analyst, began serving a two-year detail in GAO's Learning Center as a Course Manager and Instructor. *Id.* at 544. Petitioner viewed this as an "AIC equivalent position." NTR 854. Among other duties, she taught a course on GAO's engagement process. *Id.* at 544-66. She was supervised by Carol Willett during her detail. *Id.* at 544.

5. In January 2006, GAO restructured its Analyst Bands. *Id.* at 554-55. Until that time, the Analyst corps had been divided into three pay Bands—I, II, and III. The restructuring resulted in Band II being split into Band IIA (the lower pay band or job members) and Band IIB (the higher pay band or job leaders). *Id.*; STR 683-84. At the time of the restructuring, Petitioner was placed in Band IIA. NTR 554-55.

6. In February 2006, Petitioner and eleven other employees each filed a Charge with the Personnel Appeals Board Office of General Counsel (PAB/OGC) challenging their placement in Band IIA during the Band II restructuring. Respondent's Exhibit (RE) 1 at 5; NTR 555.

7. In March 2006, at the end of her detail to the Learning Center, Petitioner joined GAO's Strategic Issues (SI) team. NTR 544. In March or April 2006, she was assigned to serve as the AIC of a work project that would become known as the Grant Balances Engagement

(GBE).⁴ PE 3; NTR 565-66, 564, 846. The GBE evolved into an assignment that would produce a report for two U.S. Senators. Joint Exhibit (JE) 30 at 5; STR 203, 206. During the GBE, Petitioner worked on a part-time schedule and was allowed liberal use of telework. NTR 867-69; STR 147-48.

8. GAO engagements are conducted according to a prescribed process consisting of seven “gates.” These gates are: 1) engagement acceptance; 2) initiation; 3) design commitment; 4) message agreement; 5) first partner approval; 6) agency comments;⁵ and 7) product issuance. A detailed description of the various steps and processes of a typical GAO engagement is set forth at Petitioner’s Exhibit 2. These “seven gates” of an engagement were detailed during the hearing by Steven Backus, a Director in GAO’s Office of Quality and Continuous Improvement (QCI). STR 17-18, 24-104. *See also* GAO Policy Manual (Jan. 1, 2004; updated June 2007), portions of which are found at PE 219.

9. As AIC for the Grant Balances Engagement, Petitioner was responsible for “end-to-end project management,” including overseeing “all aspects of the assignment on a day-to-day basis.” NTR 1108. Her duties included supervising the work of other SI Analysts assigned to the engagement team as well as drafting sections of the report herself. *Id.* at 786, 1108. Petitioner was also responsible for working with employees from other GAO mission teams, known as stakeholders, who provided expertise and assistance but were not members of the engagement team. STR 64-65; *see* NTR 1108-09, 1577-79.

⁴ Initially, the GBE was an engagement initiated by the Comptroller General and was known by a different name. It subsequently became a Congressionally-requested engagement, and was renamed as the GBE. PE 3; NTR 564-65.

⁵ On engagements designated as medium or high risk, a sub-stage known as Second Partner concurrence takes place between first partner approval and agency comments. PE 2; STR 81-82. The GBE was considered a medium risk. STR 442.

10. At all times relevant to the GBE, Christopher Mihm was the Managing Director of SI (NTR 3-4); Stan Czerwinski was a Director in SI who also served as the Designated Reviewer of Ms. Donahue's performance ratings (STR 668-69); and Tom James was an SI Assistant Director who also served as Ms. Donahue's Designated Performance Manager (DPM) (NTR 145-47). In terms of reporting responsibility for the GBE, Mr. Mihm supervised Mr. Czerwinski (NTR 3-4); Mr. Czerwinski in turn supervised Mr. James (NTR 668); and Mr. James supervised Ms. Donahue. NTR 669; STR 146-47.

11. According to GAO's Policy Manual, "Managing Directors and Directors ensure that the engagements undertaken by their teams are those that best achieve GAO's mission and are carried out in a manner fully consistent with professional standards and GAO's core values. . . . They are responsible for determining and meeting all applicable GAGAS [generally accepted government auditing standards] for the . . . engagements. . . . They signify compliance with all GAGAS when they approve and sign a report package for final processing." PE 219 at 4.

12. As the Director overseeing the engagement, Mr. Czerwinski served as the First Partner reviewer of the report, *i.e.*, he was responsible for reviewing and approving a full draft of the GBE report before it could move forward in the review process. NTR 939. Mr. Czerwinski was also responsible for signing the report, which took the form of a letter addressed to the Congressional requesters. JE 30 at 5, 26. The GBE report could not move forward unless and until it met with Mr. Czerwinski's satisfaction. NTR 939.

13. Mr. James, as Assistant Director, was responsible for overseeing "the quality of [the engagement's] performance and the communication of results." PE 219 at 4. Normally this involves "personal involvement in key aspects of the [engagement] and supervision of the staff conducting the work." *Id.*

14. Ms. Donahue, as Analyst-in-Charge, was expected to “manage, through firsthand knowledge and supervision, the day to day audit activities” of the engagement and to ensure that the engagement complied “with all of GAO’s policies and quality assurance requirements.” *Id.* at 5.

15. As Ms. Donahue's DPM, Mr. James was responsible for rating her performance, providing feedback, and discussing performance expectations. JE 4 at 6.

16. As the Reviewer of Ms. Donahue's ratings, Mr. Czerwinski was responsible for ensuring that Mr. James properly and consistently applied the performance standards when rating Ms. Donahue, discussing the rating with Mr. James when appropriate, and providing Mr. James with perspectives based on Mr. Czerwinski's personal knowledge of Ms. Donahue's performance. JE 4 at 6-7; NTR 1105.

17. In the Spring of 2006, upon joining the SI team, Petitioner told Mr. Czerwinski that she was a member of the “Dirty Dozen.” STR 683. Mr. Czerwinski did not know what that term meant. *Id.* Petitioner explained that “the Dirty Dozen was a group of evaluators . . . who were contesting the way GAO went about splitting the Band IIs into two categories, IIAs and IIBs, the IIBs being job leaders and the IIAs being essentially members.” STR 683-84. The twelve individuals had filed Charges with the PAB/OGC in February 2006 challenging their initial placement in Band IIA. *Id.* at 683-84; NTR 555-57; *see* ¶6, *supra*. Mr. Czerwinski relayed this fact to Mr. Mihm after being informed by Ms. Donahue. STR 690-91. Petitioner’s Charge had not named any officials in SI but had individually named senior Agency officials. RE 1.

18. Around May 2006, Ms. Donahue applied for competitive placement in Band IIB. NTR 1098. As part of this process, Mr. James prepared a mid-cycle appraisal for her, covering the eight-month period from October 1, 2005 to May 30, 2006. JE 1; NTR 1098-99. Because

Ms. Donahue had been on the SI team only since March 2006, Mr. James obtained input from Ms. Donahue's previous supervisor in the Learning Center (Ms. Willett) regarding her performance there from October 2005 through March 2006. NTR 1099-1100.

19. Mr. James and Mr. Czerwinski told Ms. Donahue that Ms. Willett had proposed a rating of five "exceeds expectations"⁶ for Ms. Donahue, but that they were going to "bump that up" to a rating of seven out of seven "exceeds expectations." NTR 558-59. As a result, Ms. Donahue received ratings of "exceeds expectations" in all her job competencies as a Band IIA. *Id.*; JE 1. Mr. James based Petitioner's ratings predominantly on Ms. Willett's feedback because it represented "the majority of the time being covered" by the appraisal and work on the GBE was still in its infancy. NTR 1099-1100; STR 281.

20. Mr. Mihm, as Managing Director of SI, served as the selecting official for Band IIB placements within SI and interviewed Petitioner during the mid-cycle 2006 competitive placement opportunity. NTR 3, 10, 61, 559, 848. Mr. Czerwinski helped to prepare Ms. Donahue for the interview. *Id.* at 559.

21. In June 2006, Ms. Donahue prepared the Job Initiation Paperwork Package for the GBE, which Mr. Mihm described as a "[v]ery thoughtful engagement and design!" PE 6; PE 8; NTR 649. Also in June 2006, Ms. Donahue created a Power Point presentation for a GBE team discussion of issues and possible engagement designs. PE 5; NTR 643, 649. Mr. James and Mr.

⁶ The Analyst evaluation system allowed for four possible ratings: 1) "meets expectations," described as "the expected rating" and defined as "[t]he individual almost always performs as described by the 'Meets Expectations' standards for his or her Band level"; 2) "exceeds expectations," where the individual's performance "is described at least as often by the 'Role Model' standards as by the 'Meets Expectations' standards for his/her Band level"; 3) "role model," where the individual "almost always performs as described by the 'Role Model' standards for his/her Band level"; and 4) "below expectations," where the individual "does not almost always perform as described by the 'Meets Expectations' standards for his/her Band level." Analyst, Specialist, and Investigator Performance Management and Appraisal System, Policy and Operations Manual (Oct. 2004) (JE 4 at 16). The specific descriptions of standards for Band IIB are set forth in JE 3 (Band IIB GAO Analyst, Specialist and Investigator Performance Standards, Oct. 2006).

Czerwinski gave her positive feedback on the presentation and on how the meeting was conducted. NTR 649-50.

22. In July 2006, Mr. Mihm selected Petitioner for competitive placement in Band IIB. *Id.* at 10; NTR 558. Mr. Czerwinski left her a congratulatory voice mail on the morning of July 17: “I’m really pleased for you and it’s very much the right thing and you put your best foot forward in that, like the job that you are leading now. . . . You are absolutely right, it does mean a lot to me. . . .” PE 223; NTR 562.

23. On July 17, 2006, the GBE team approved the Job Initiation Report (JIR). PE 7. The JIR establishes what issues the engagement is to study, sets forth the engagement’s objectives, and provides a brief explanation of the scope and methodology to be used, as well as tentative time frames. STR 36.

24. On July 18, 2006, Mr. James asked for Petitioner’s assistance in preparing “financial benefit” language for the GBE. Ms. Donahue promptly did so and Mr. James characterized her language as “perfect.” PE 10.

25. In the Summer of 2006, Ms. Donahue came up with the concept of a search engine tool that would allow the GBE team to simultaneously search Inspector General websites of multiple federal agencies. NTR 725-27. Building on her concept, the Agency’s Knowledge Services Office (KSO) developed an Inspector General (IG) search engine. Development of the search engine would enable the Grant Balances Engagement team to search multiple agency Inspector General websites for relevant information in a streamlined electronic fashion. NTR 725-26. In September 2006, Mr. Czerwinski complimented Ms. Donahue on her role in the development of the search tool, and contacted Mr. Mihm about her making presentations of that tool at an SI business meeting and at a GAO Managing Directors’ meeting. PE 13A; PE 13B.

26. On September 14, 2006, KSO demonstrated the Inspector General search tool to high-ranking Agency officials during a knowledge fair at GAO Headquarters.⁷ STR 702-04; NTR 729; PE 13A. As Mr. Czerwinski had envisioned a roll-out of the tool through SI, he sent an email to Mr. Mihm, advising him of that demonstration, and writing “It looks as if [someone from KSO] started to run with this to the INFO Fair without us knowing ahead of time. No problem, as it is all good news.” PE 13A; *see* STR 704-06; NTR 727-29. Mr. Czerwinski testified that he sent the email as “damage control,” in order to “put the most constructive best face on it. . . . [T]he merits of the search engine remained the same; it’s a good tool and a good idea, and I wanted us to focus on that as opposed to it being rolled out at the info fair without my boss, without Pat’s and Tom’s boss knowing about it.” NTR 931-32.

27. On September 20, 2006, the GBE team held a brainstorming meeting for which Ms. Donahue prepared slides. PE 15; PE 17. In Petitioner’s view, she received “very positive” feedback on this. NTR 664-65.

28. On October 4, 2006, two United States Senators issued a formal request letter for the Grant Balances Engagement. They asked GAO to “review grant balances, looking across federal grant programs and examining a selected subset of programs or agencies to identify: (1) grant programs that have a pattern of slow drawdown rates by their recipients; (2) characteristics of these particular grant programs and their agency oversight; and (3) actions federal agencies or Congress could take to facilitate more timely draw downs by recipients or to recapture unspent balances from these programs.” PE 22; NTR 665-66.

⁷ Petitioner testified that KSO conducted the fair in the center hallway of the Agency, and that she learned informally that the presenters were planning to present the IG search tool as it was about to take place. *See* NTR 729.

29. On October 23 and October 24, 2006, Mr. James emailed Mr. Czerwinski and Ms. Donahue suggesting that the IG search engine project and the Grant Balances Engagement be discussed at an upcoming SI business meeting. PE 23; PE 24.

30. On October 27, 2006, Mr. James sent an email to Ms. Donahue, Mr. Czerwinski, Mr. Mihm and all SI staff advising the staff of Ms. Donahue's contribution and SI's role in developing the IG search engine. PE 27.

31. In October 2006, Mr. James prepared a performance appraisal for Ms. Donahue covering the period from her July 2006 placement in Band IIB until October 14, 2006, the end of the 2006 appraisal period (the 2006 appraisal).⁸ JE 2; NTR 1101-02. Consistent with GAO policy, and after confirming that policy with his superiors, Mr. James based Petitioner's ratings only on her Band IIB performance. NTR 1102. In Mr. James's view, during this period Petitioner "had been doing preplanning work on . . . what became known as the grant balances job." *Id.* at 1103. Petitioner received two "exceeds expectations" ratings (in the competencies of Maintaining Client and Customer Focus and Developing People) and six "meets expectations" ratings in the remaining competencies for the 2006 appraisal.⁹ JE 2. In addition to being Petitioner's first rating as a Band IIB, the 2006 appraisal was also the first time her performance

⁸ Although the appraisal indicates that it encompassed the period of October 1, 2005, to October 14, 2006 (a full-year appraisal cycle), it is undisputed that the appraisal evaluated only Ms. Donahue's work performance subsequent to her competitive placement in Band IIB. NTR 850-51 (Testimony of Ms. Donahue); STR 151, NTR 1102 (Testimony of Mr. James).

⁹ See n. 6, *supra*. Band IIB Analysts were rated on an additional competency— Developing People—not applicable to Band IIAs. See JE 3 at 15; compare JE 1 with JE 2.

was rated based solely on her work in SI. STR 281-82; NTR 846-52. Ms. Donahue did not file a Charge challenging the substance of the ratings that she received.¹⁰

32. In the Fall of 2006, Ms. Donahue presented a briefing on the IG search tool to high-level GAO officials, including the Acting Comptroller General, the Chief Administrative Officer, and Mr. Czerwinski. NTR 729-30. Petitioner testified that they all were pleased with and complimented her on that presentation. *Id.* On November 7, 2006, Mr. James requested that the search engine be demonstrated at an upcoming SI business meeting. PE 28. On November 22, 2006, Ms. Donahue sent Mr. Mihm and others an email noting plans for such a demonstration of the IG search tool; Mr. Czerwinski responded by email to Ms. Donahue: “well done!” PE 32.

33. On November 17 and 21, 2006, the GBE team held entrance conferences with three federal agencies.¹¹ PE 30A, 30B, 30C.

34. The telephonic entrance conference with officials from the Department of Health and Human Services (HHS) involved Mr. Czerwinski, Ms. Donahue, Susan Mak (a Band IIB Analyst in SI) and Betsy Holser (a Band IIA Analyst in SI) discussing the GBE and the Payment Management System (PMS) data at HHS. NTR 666-67; PE 30B. Mr. Czerwinski did not participate in the entire conference, stating in a handwritten note to Ms. Donahue that he needed to do something else and that she “clearly [has] this meeting well-in-hand.” PE 31.

35. Ms. Donahue and her KSO colleagues conducted a briefing of the IG search engine at an SI business meeting in late November 2006. NTR 668-70, 732. Mr. Czerwinski attended that meeting and, in Ms. Donahue’s view, gave her “very positive” feedback on her presentation.

¹⁰ As noted above (n.1) and discussed more fully below (§41 *et seq.*), Petitioner did file a Charge challenging the fact that the appraisal took into account only her performance subsequent to competitive placement in Band IIB.

¹¹ The purpose of an entrance conference is for the GAO team members who are engaged in the audit to meet with the audited agency and to establish the audit’s parameters. STR 50-51.

NTR 669-70, 732. Mr. Czerwinski's testimony was that the "presentation, while technically correct, was not as good a presentation as [he] would have hoped." STR 705. He elaborated that "[w]e were very much in the weeds. We weren't quite so responsive to read our audience and, frankly, it took on somewhat a lecturing, pedantic tone." *Id.* at 705-06. As a result, he determined that it was no longer advisable for the Grant Balances team to present the IG search engine at a Managing Directors' meeting, and that KSO should develop the tool through their own methods. *Id.*

B. Petitioner's performance expectations for FY 2007

36. GAO's policies with regard to setting employee expectations are contained in its Analyst, Specialist, and Investigator Performance Management and Appraisal System, Policy and Operations Manual, October 2004 (Policy Manual). JE 4. For each performance appraisal cycle, DPMs set performance expectations with their employees. *Id.* at 9.

37. The Policy Manual states that employee expectations are set "primarily by using the GAO competency model and performance standards and supplemented by engagement/role information, as applicable." *Id.* at 10. The expectations do not replace GAO's written performance standards; when evaluating employee performance, employees are rated against the performance standards rather than their expectations. STR 193; NTR 512, 518; *see* JE 4 at 9. The purpose of setting expectations is to provide additional clarity as to the employee's expected role during the upcoming appraisal period. JE 4 at 9; STR 194; NTR 512, 518-19, 1109-10. The Policy Manual states that when discussing expectations with an employee, the DPM "should provide engagement-specific information such as the employee's role, objectives, scope and methods, anticipated products, and time frames." JE 4 at 9. The Policy Manual also states that "[t]he level of detail appropriate for an expectation setting discussion will depend on the

employee's prior knowledge related to the work, his or her experience level, and the information available to the DPM about the engagement." *Id.* Performance expectations are not required to be in writing; nor is it required that an employee agree with the performance expectations set by his or her DPM. STR 194; NTR 515, 539-40; *see* JE 4 at 9-10.

38. Mr. James testified that he had been a DPM for about 30 employees over seven or eight years in SI and therefore had experience in setting expectations, including those for Band IIB Analysts and AICs. NTR 1096-97, 1110. He did not usually provide written expectations to employees, and, in his experience, employees who were not in the Professional Development Program (PDP) did not request written expectations. NTR 1112, 1148-49; STR 194.

39. On November 28, 2006 and December 7, 2006, Mr. James and Ms. Donahue met to discuss her performance expectations for the 2007 appraisal period. JE 8; JE 9; NTR 1111-12. Although he considered Petitioner's request for written expectations atypical, Mr. James honored that request.¹² NTR 1112.

40. The written expectations for the 2007 appraisal period included completing the design phase of the GBE by February 2007 and issuing the GBE report in October 2007. JE 8 at

1. Among other duties, Ms. Donahue was expected to:

- develop and implement a design matrix and audit plan
- collect agency documents and reliable data; interview agency officials; analyze evidence and identify possible findings
- write workpaper summaries and draft the report
- perform administrative duties and other duties as appropriate
- complete interim assignments in a timely fashion

¹² There is a dispute in the record as to which exhibit reflects the expectations set for Petitioner at the start of the 2007 appraisal cycle. Petitioner testified that with Mr. James's permission, she added additional text to her initial expectations (contained at JE 7), and that her final expectations are found at JE 8. NTR 720-22. However, Mr. James testified that the expectations contained at JE 8 were not a part of Petitioner's expectation-setting discussion and that JE 7 was the final version of expectations set with Petitioner at the start of the appraisal cycle. STR 288-89. I find that the discrepancy between the two versions does not affect the outcome of this case.

- keep the SES and AD team members informed of progress and provide feedback; ask for clarification or assistance as needed
- coach and instruct staff on the performance of tasks.

Id. The expectations did not specifically address interim deadlines for completing data analysis, drafting performance appraisals of other GBE team members, or providing a written product. *Id.*

C. Petitioner's Charge of December 6, 2006

41. On December 6, 2006, Petitioner filed a Charge with the PAB/OGC over her 2006 appraisal (December 2006 Charge). JE 23; NTR 602. The Charge alleged that her “rating as a Band IIB for the period 10/05 to 10/06 was improper and determined in violation of law and GAO orders.” JE 23 at 4.

42. Petitioner left the section of the charge form blank that asks the charging party to identify which persons are responsible for the actions that form the basis of the charge; she did not name any individuals—including Messrs. James, Czerwinski, or Mihm—as the persons responsible for the actions alleged in her Charge. JE 23 at 4. Ms. Donahue testified that she did not name them as the alleged responsible parties because she thought that was “self-evident” since they had rated her for that time period. NTR 603-04.

43. Soon after filing the December 2006 Charge, Petitioner informed Messrs. James and Czerwinski that she had filed a Charge and told them “that it was nothing personal with either of them.” NTR 604, 929; STR 157-58. Petitioner told them that she believed they had received bad advice or had misinterpreted the guidance from GAO’s Human Capital Office (HCO) on the procedures for rating employees who had been competitively placed in Band IIB during the appraisal period. NTR 604-05, 929; STR 157-58.

44. Ms. Donahue testified that when she told Mr. Mihm of the Charge in her office, he “got red in the face and said, it's always personal, or words to that effect[,]” and immediately left

her office. NTR 605. Mr. Mihm did not recall having had a conversation with Petitioner at the time of the December 2006 Charge, but testified that such a response was unlikely because he doesn't "take these things personally at all." NTR 117-18.

45. Messrs. James and Czerwinski testified that they understood that Petitioner's December 2006 Charge was a challenge to a GAO policy rather than an action against them personally. NTR 928-30; STR 157-58.

D. Performance from December 2006 up to mid-point feedback

46. In December 2006, the GBE team met with representatives of the agencies selected for study, completed the entrance conferences and were "find[ing] out what the data was." *See* NTR 606-07.

47. On December 15, 2006,¹³ Mr. James emailed Petitioner about a meeting they had had with Mr. Czerwinski on the 14th. PE 37. As to data-based work, the email stated: "No fatal flaws in approach—we should continue as planned." *Id.* Mr. James noted several items on the "to do" list and pointed out that he and Ms. Donahue needed to keep Mr. Czerwinski "in the loop from now on so he can help us find our way through the data to the message." *Id.*

48. In January 2007, the GBE team was preparing for a meeting known as the Design Summit, then envisioned for late February 2007. NTR 1136. In preparation for the Design Summit, the team was developing a Design Matrix, which sets forth the proposed research questions, the methodology to be used to address the questions, the limitations on what the team will be able to say in answering the questions, and the anticipated answers to the questions. STR 54-56, 62-63; PE 66C; NTR 952-53. Steven Backhus, a Director in the Office of Quality and

¹³ Petitioner's Reply (at 17) inaccurately states that this email was dated December 1, 2006, prior to her filing of the December 2006 Charge. The record reflects that this email was dated on the 15th of December—nine days after the Charge was filed.

Continuous Improvement (QCI), explained that at the Design Summit “all of the key participants in the engagement come together to discuss [the] proposed engagement,” the matters outlined in the Design Matrix, “what the ultimate commitment dates are going to be, . . . [a]nd eventually, all sign the [D]esign [M]atrix.” STR 63; *see* STR 54-56, 62-63.

49. On January 4, 2007, Mr. James emailed Petitioner a summary of items that needed to be addressed for the Grant Balances Engagement, as determined in discussions that he had with Mr. Czerwinski in December 2006. These included the need to “start working on a report outline so we can clearly communicate to stakeholders . . . what the story line of our report work will be. Once we have a good feel for what the message is going to be, we can be more targeted in filling in the data/support gaps.” Included on the “to do” list was the need to “set up and actively manage a pre-Design mtg [meeting] with Budget, OGC [GAO Office of the General Counsel], and FMA [Financial Management and Assurance team].” PE 45.

50. On January 9, 2007, Ms. Donahue sent an email to Susan Biggs, Administrative Assistant for Managing Director Mihm, stating, in pertinent part, “We would like to schedule the [D]esign [S]ummit for the [GBE] for February 28th from 1-3 p.m. Can you schedule this time for Chris if he is available? . . . ” PE 44; STR 749-50. Mr. Czerwinski then sent the following email to Mr. James: “I hope we have met my criteria before the time of the [D]esign [S]ummit or we will have to reschedule it. Also, I feel it is more appropriate to ask Susan Biggs about Chris's availability around a certain date instead of telling her we are doing it at a certain time and place and then seeing if Chris is available.” *Id.*

51. Mr. James replied to Mr. Czerwinski on January 10, 2007, stating that the team did “plan to get our stuff together and through you before the end of February. I have told the team that we must have a design check meeting with you in late-January or early-February. However,

I sense that you have your doubts about this given how things have been going so far. I share your concerns and am continually trying to get the team moving faster on them. (It's almost becoming my full-time job.) So . . . you have a point—I hope we don't have to move the Design Summit into March, but we'll have to see on that. Second, I think Pat [Donahue] checked with Susan before sending the message, so she knew that Chris was available for that day and time." PE 44.

52. On January 16, 2007, Mr. James sent Ms. Donahue an email stating that Mr. Czerwinski also wanted a completed case study before the Design Summit. PE 45. The email also stated that Mr. James wanted to discuss with Ms. Donahue, among other issues, the "[d]ata analysis—what do we have?; what will it tell us?; when will we have some answers for selecting more case studies?" *Id.* Mr. James testified that "we were shooting for the end of February to have our [D]esign [S]ummit, and Stan was concerned that we weren't ready. I thought things were taking a while—taking too long and we needed to move faster, kind of along the lines of cost-effective methods and what's the message and larger significance, and let's get to the point because this can't go on too much longer if we're going to hit the deadline to get the report done." NTR 1136.

53. By mid- to late January 2007, Messrs. James and Czerwinski had become concerned about Petitioner's management of the engagement and the progress of the job. PE 44; NTR 1136. Mr. James was concerned about Petitioner's failure to take the lead on the day-to-day management of the entire engagement. STR 316-20; NTR 1130. In his view, Petitioner had focused primarily on data analysis and had neglected her overall project management duties. STR 316-21; PE 48. According to Mr. James, although it is the AIC's responsibility to keep track of the details and tasks necessary to reach important milestones on the engagement,

Petitioner was not adequately doing so. STR 316-20; NTR 1127-29. As such, Mr. James felt compelled to become more involved than he normally would in managing the engagement, including sending detailed task lists to Petitioner and the engagement team. STR 316-19, 339-42, 346; PE 48; PE 54A; NTR 1127-29.

54. On January 29, 2007, Mr. James sent Ms. Donahue an email asking her to provide her "take on who will be doing what and how the [GBE] workload will be distributed over the next month or so[.]" PE 48. The email listed several "[t]asks that come to mind" followed by the names of team members, including "[o]verall project management (Tom & Pat)" and "[m]anaging Budget assistance (Tom)[.]" *Id.*

55. By late February 2007, the scheduled Design Summit date had been pushed back one month because, *inter alia*, the case study had not been completed and Mr. James continued to perform tasks that he considered to belong to the AIC. STR 340-41, 345-46; NTR 1008-10; *see also* PE 45.

56. Mr. James testified that both he and Mr. Czerwinski repeatedly expressed concern to Petitioner about the amount of time it was taking for the data analysis on the engagement to come together. NTR 1154-55. Betsy Hosler, then a Band I Analyst who worked on the Grant Balances Engagement from July 2006 until April 2007, testified that "the data analysis took a long time to come together, it took a long time to get the data, it took a long time to analyze it. . . ." NTR 1720, 1727, 1739. She observed Messrs. James and Czerwinski expressing continuing concerns to Petitioner "about meeting time lines and missing time lines" and the uncertainty as to "what would ultimately come of the data." NTR 1727-28. She also observed them urge Petitioner to broaden her approach to the engagement, in case the data analysis did not result in usable information. *Id.* at 1746, 1749.

57. From her perspective as a team member, Ms. Hosler observed that Petitioner resisted the expressions of concern by Messrs. James and Czerwinski and would simply assert that tasks would get done and continue to focus on data analysis, to the exclusion of other aspects of the job. *Id.* at 1722-23, 1729, 1737. Ms. Hosler believed it was an “ongoing source of tension, that they [Mr. Czerwinski and Mr. James] were not convinced that the job was moving forward as they hoped it would.” *Id.* at 1729. She did not see Petitioner’s reaction as “a response that one might necessarily expect when your boss has that great of a concern.” *Id.* at 1737.

58. Ms. Hosler began to report directly to Mr. James in part because “there was some concern that [the case study section] . . . was not being followed up on . . .” NTR 1722-23. According to Ms. Hosler, this arrangement was unusual, because generally the AIC “is the focal point for all the work on the job.” *Id.* at 1723.

59. Working with Petitioner was “a very frustrating experience” for Ms. Hosler. *Id.* at 1738. She found that Petitioner’s management style could be “very difficult and kind of demoralizing with the condescending nature.” *Id.* at 1739. Ms. Hosler also observed that Petitioner did not “really hear you when you’re trying to express your ability to do something or your opinion on something.” *Id.* at 1736. In conversations with Susan Mak, then a Band IIA Analyst on the GBE, she concluded that this “seemed to be an across the board” problem for Petitioner. *Id.* at 1736; STR 532.

60. Ms. Mak observed similar issues with Petitioner’s resistance to suggested changes and her difficult working style. STR 549-50. In particular, during a meeting to discuss the project plan in advance of the Design Summit, Mr. Czerwinski raised concerns with Petitioner that she had built only a few days into the proposed schedule for him to review and provide comments on a draft report before it would move forward to the next stage of the review process.

Id. at 549-50. Ms. Mak testified that Mr. Czerwinski repeatedly asked Petitioner to make sure that she built in enough time so that she could meet the deadlines and complete the work without the team having to work nights and weekends. *Id.* at 550-51. Nevertheless, according to Ms. Mak, Petitioner ignored Mr. Czerwinski's suggestions and continued to assert that the work would be so "perfect" that it would require little revision. *Id.* at 551. Ms. Mak viewed Petitioner's attitude as both "presumptuous" and not "politically wise," as it made little sense to fight the Director on the engagement when he was trying to provide sufficient time to perform the work. *Id.* at 551-52. Noting Mr. Czerwinski's annoyance, Ms. Mak elaborated further that "if you're not listening when someone keeps asking you the same question three or four times, that's an indication that they really don't agree with your answer and you should really kind of reconsider. . . ." STR 552. Ms. Mak also testified that she asked Mr. James if she could "work more clearly, directly for him, on a specific part" of the GBE, because Petitioner was trying to involve her in more aspects of the job than she wanted as a team member; consequently, Ms. Mak worked with Mr. James on drafting the section on Inspector General reports. STR 554-56.

61. In February 2007, the GBE draft data analysis plan encompassed data from a number of sources, including data from the Treasury Department Automated Standard Application for Payments (ASAP) system and the Health Resources and Services Administration (HRSA) of HHS. PE 51; PE 55; STR 299-300; NTR 679-80.

62. In early March 2007, the GBE team abandoned a case study based upon an analysis of multi-year Payment Management System (PMS) data for HRSA. STR 353-54; *see* PE 58, 60, 61, 62. The data source identified ultimately was the PMS administered by HHS, which covered several agencies and a large portion of Federal grants. PE 5; PE 58; PE 60; NTR 226-27; STR 694-95.

63. On the adjusted schedule, aiming for the Design Summit at the end of March, a project plan was due on March 12, 2007. PE 54B; STR 345.

64. On March 15, 2007, Mr. Czerwinski, Mr. James, Ms. Donahue, and Ms. Hosler met with Susan Irving, Director of the SI Budget team and Carol Henn, a member of that team, to review the Design Matrix. PE 63; STR 359.

65. On March 28, 2007, Ms. Donahue sent a Design Summit packet to Mr. Czerwinski, Mr. James and the GBE team. The packet included a Design Matrix reviewed with the SI budget group. For the question, “what are some common characteristics of these grant programs and of their federal agency oversight?” (Researchable Question No. 2 or “grant characteristics section”), the Design Matrix identified the scope and methodology as “Crosswalk analysis of PMS Close Out Report data with descriptive CFDA program information to identify common characteristics among grant programs with undistributed funds at close out.” PE 66C at 2.¹⁴

66. The Design Summit was ultimately held on March 29, 2007, one month beyond the original schedule. PE 67; *see* NTR 1008-10; STR 344-45; PE 66A. By that time, the Grant Balances Engagement team had determined the basic structure of the report, covering unspent money in grants funded by the federal government. STR 203, 224-25; PE 66C. In particular, the report would focus on unspent funds in grant accounts for which the period of availability had ended, *i.e.*, “expired grants.” STR 203, 224-25; PE 66C. The first section of the report focused on the extent of the problem and sought to identify how much money remained in expired grants. STR 203, 224-25; PE 66C. The second section sought to identify and discuss “some of the

¹⁴ As explained in the Grant Balances Engagement report, a closeout report lists “expired grant accounts that remain open, and for each account includes data on the funds made available and the amount of funds disbursed.” JE 30 at 12-13. The Payment Management System operated by HHS “was the largest of nine civilian federal payment systems. . . . [It] handled about 70 percent of all federal grant disbursements in 2006, serves nine federal departments, an independent agency, [and] a government corporation. . . .” *Id.* at 12. The Catalog of Federal Domestic Assistance (CFDA) is a large online database that provides descriptions of federal grant programs and other domestic assistance programs. *Id.* at 10; STR 295.

common characteristics” of these expired grants (the “grant characteristics section”). STR 203, 224-25; PE 66C. The third section consisted of a synthesis of audit reports issued by GAO and various inspectors general offices that addressed the issue of unspent grant funds. STR 203, 224-25; PE 66C.

67. By the time of the Design Summit, the team had decided to focus on the Payment Management System of HHS “and not to include other grant payment systems such as Treasury’s ASAP system. . . .” PE 67 at 2.

68. Following the Design Summit, the team contacted the Congressional requesters and agreed to issue the report by October 31, 2007. NTR 1150; STR 207; PE 71B at 2.

69. On April 2, 2007, Mr. James circulated Ms. Hosler’s draft writeup of the Design Summit to the GBE team and noted, among other things, that Mr. Czerwinski "**expects this to be a short report**—*e.g.*, 20-25 pages. He envisions something like 7-10 pages of narrative on PMS analysis, 5 pages on grant characteristics, and 5-10 pages on how and what the audit community has done/is doing in this area. He says if the first draft comes in too long, he won't read it." PE 68 (emphasis in original).

70. Ms. Hosler rotated off the Grant Balances Engagement in early April 2007. NTR 1739. When she did so, she asked SI’s Staffing Manager, Rebecka Derr, not to assign her to work with Petitioner again because working with her had been "a very frustrating experience." *Id.* 1737-38; STR 646. Ms. Hosler also asked Ms. Derr not to assign new Professional Development Program (PDP) employees to work with Petitioner because her "management style can be very difficult and kind of demoralizing with the condescending nature." NTR 1739.

E. Performance and events around 2007 mid-point feedback

71. On April 11, 2007, Mr. James held a mid-point performance feedback session with Ms. Donahue. JE 31 at 1; NTR 1113-14. A formal mid-point review session between the DPM and the employee is required and must be documented. Analyst, Specialist, and Investigator Performance Management and Appraisal System, Policy and Operations Manual (Oct. 2004) (JE 4) at 19; NTR 1113. It provides a DPM the opportunity to give specific feedback regarding an employee's performance up to that point in the appraisal period; "you are giving someone a sense of where they stand while there is still an opportunity for them to make adjustments if they want to. . . ." NTR 57, 1113-14. During the midpoint session, DPMs inform employees "where their rating would be on that day if the rating were to be given that day, what the checkmark would be. . . ." NTR 1114. Mid-point feedback is advisory; it is not a formal rating and has no impact on an employee's pay or standing on the SI team. *Id.* at 933-34, 1113-14.

72. Mr. James prepared notes to assist him in the midpoint feedback session. STR 160. During that session, he informed Petitioner that if she were to receive an appraisal that day, she would be rated as "exceeds expectations" in one competency—Maintaining Client and Customer Focus—and as "meets expectations" in the remaining seven competencies. JE 31 at 1-3. Mr. James discussed each competency and made specific references to his prepared notes and the Band IIB performance standards in explaining the advisory rating. *Id.*; NTR 1114-15, 1119.

73. As to the competency of Maintaining Client and Customer Focus, Mr. James noted that Petitioner had participated in a meeting with the Congressional requesters' staff that had gone very well, and specifically, that she had responded well to questions of the Congressional staff. NTR 1117-18. He further observed that Petitioner had worked to develop solutions to address the Congressional requesters' needs. JE 31 at 1. Based on these and other observations,

Mr. James concluded that “exceeds expectations” was the appropriate midcycle feedback because “at that point . . . [Petitioner] was role model about a little more than 50 percent of the time” in this competency. NTR 1118.

74. In the competency of Achieving Results, Mr. James determined that Petitioner “needed to do more in terms of end-to-end project management” rather than focus primarily on the data analysis aspect of the job. NTR 1118-20; *see* JE 31 at 1. In particular, he believed that Petitioner had not demonstrated “fully integrated project management” in preparing the engagement in the run-up to the Design Summit. NTR 1119-20; *see* JE 31 at 1. Mr. James pointed out that the job had been progressing more slowly than expected and that going forward in the appraisal period, the team “needed to kind of pick up the pace a little bit” and Petitioner needed to demonstrate that the team could meet deadlines. NTR 1119-20; *see* JE 31 at 1. Overall, according to Mr. James, Petitioner was doing her job well—at the “meets expectations” level—but “some things [weren’t] happening yet” NTR 1120.

75. As to Presenting Information in Writing, Mr. James found that Petitioner’s basic written work products, such as interview write-ups, were competently written but did not rise above “meets expectations.” JE 31 at 1; NTR 1120-22. For example, he noted that “there was an awful lot of revising of the design matrix and the outline that we had at that time” NTR 1121. Mr. James observed in his feedback notes that Petitioner still needed “to demonstrate writing at [the] summary and report level,” as there had been no “written products to date other than interview write-ups, EMPF [Engagement Management Product File] memos, etc.” JE 31 at 1; NTR 904. During the hearing, Mr. James explained that he did not expect Petitioner to have already produced a draft report by the time of the feedback session and did not base Petitioner’s feedback on the fact she had not done so. NTR 1121.

76. In the competency of Thinking Critically, Mr. James found “a weakness in terms of the integrated project management, understanding the right level of detail, tailoring messages, and understanding that we need to come up with issues of larger significance, that comes right out of the standards; making connections between pieces of information, we were still struggling with that; and also this [sic] cost-effectively analyzing and integrating information.” NTR 1122; *see* JE 31 at 1-2. Overall, he saw her performance at that time as “meets” rather than “exceeds expectations.” JE 31 at 1-2. Mr. James raised with Petitioner his concern that she had a tendency to “go down paths that were very labor-intensive for very little payoff.” NTR 1122-23. His feedback to Petitioner emphasized that as the engagement proceeded, she needed to consider the return on any investment of resources and make “well-founded, defensible, and timely decisions,” rather than focusing exclusively on the data analysis. *Id.*

77. As to Presenting Information Orally, Mr. James found Petitioner’s performance to be at the “meets expectations” level—acceptable but short of “exceeds expectations.” NTR 1123-24. In particular, he noted some issues with Petitioner’s presentation at the Design Summit. JE 31 at 2; NTR 1124. He had observed that she made an unnecessarily detailed slide presentation that distracted from the discussion; he also noted technical problems with the presentation, including the fact that some slides were not readable. JE 31 at 2; NTR 1124. In addition to the issues at the Design Summit, Mr. James also provided feedback about Ms. Donahue’s tone in meetings with other GAO teams who were providing the Grant Balances Engagement team with advice and assistance. JE 31 at 2; NTR 1124-25. In his view, Petitioner often appeared as if she already had the answers rather than soliciting input from others. JE 31 at 2; NTR 1124-25. Mr. James thought that Petitioner’s “tone and approach” could be improved for more effective oral communication. NTR 1124-25.

78. As to the competency of Collaborating with Others, Mr. James noted that Petitioner had collaborated well with stakeholders on GAO's Applied Research and Methods and General Counsel teams. JE 31 at 2; NTR 1125-26. This performance did not rise above "meets expectations," however, because Petitioner's interaction with others, including those within SI, showed a tendency to "resist other people's input" and "take the position that she was right and they were wrong and, no matter how long it took" she was going to convince them of that. NTR 1127. Mr. James emphasized that Petitioner needed to work on "listening and understanding what others are saying, including our superiors, the directors, the others, the managing directors." *Id.* at 1126; JE 31 at 2.

79. In the competency of Leading Others, Mr. James's feedback noted that "[p]roject planning needs to come from AIC," the "[t]eam needs to present solutions, not just problems," to the Director and Assistant Director, and that "[r]eview of team members' work needs to first and foremost come from AIC." JE 31 at 2-3; NTR 1128. Mr. James believed that Petitioner had not articulated "a clear direction" for the engagement team. JE 31 at 2; NTR 1127. He wanted to make clear to Petitioner that as AIC she was responsible for providing the day-to-day team guidance that he had been providing. JE 31 at 2; NTR 1127-31. His feedback also noted that the AIC was responsible "to review draft report sections before they go to AD," since he "had been asked to review work papers . . . from other team members that hadn't been fully reviewed" by Ms. Donahue. JE 31 at 3; NTR 1128, 1132.

80. In the final competency of Developing People, Mr. James also found that Petitioner was "again, meeting but not exceeding expectations." NTR 1134. He noted that Petitioner needed "to fully engage two remaining staffers (both IIAs) to get the job done," and pointed out that she "[d]id not prepare rating for PDPer." JE 31 at 3. To illustrate this feedback, Mr. James

testified that he had alerted Petitioner to the need to fully engage Ms. Mak, who was working on the engagement from GAO's San Francisco field office. NTR 1134. Ms. Mak had informed Mr. James that she was having difficulty working with Petitioner and did not feel that Petitioner fully respected her or her ideas about the engagement. *Id.* at 1134-35. Mr. James wanted to ensure that these interpersonal problems between Petitioner and Ms. Mak did not impede the job or prevent Ms. Mak from being "fully employed and productive." *Id.* As to the PDP rating, Mr. James testified that "there was an opportunity to provide feedback, but Pat did not take the opportunity" to assist him in drafting a rating for Ms. Hosler; because time was short, he "went ahead and did it." NTR 1133; JE 31 at 3.

81. Petitioner informed Mr. James during the April 11, 2007 feedback session that she disagreed with his assessment of her performance. NTR 1115, 1138. According to Mr. James, she gave him "a lot of pushback," and she disagreed "with anything that would have been a 'meets expectations'." *Id.* at 1115, 1138. It became clear to Mr. James that Petitioner wanted "really detailed examples of her performance." STR 160; NTR 1115.

82. Realizing "that Pat [Donahue] was not going to be in agreement with [him] in terms of her performance," Mr. James decided thereafter to "keep a running log of each day's events, so that [he] could keep the details straight and the sequence of the details." STR 160. From April 11, 2007 forward until the end of the Grant Balances Engagement, Mr. James kept detailed, chronological notes on Petitioner's performance and the progress of the engagement. JE 31; STR 160-61; NTR 1114-16.

83. Mr. James's notes included his assessment regarding Petitioner's performance. JE 31; NTR 1115. In creating these notes, he electronically copied and pasted copies of the text of

what he viewed as "relevant" emails and documents into a Word document.¹⁵ NTR 1115; STR 160. Although Mr. James supervised other AICs at that time, he kept notes only on Ms. Donahue. NTR 1621-22.

84. On April 24, 2007, Mr. Czerwinski emailed Petitioner to let her know that he and Mr. James “were pleased that the grant balances job went through ERM [Engagement Review Meeting] today without a single question from [the then Acting Comptroller General]. I just thought you would want to know. Thanks.” RE 25.

85. On April 25, 2007, Mr. James, Mr. Czerwinski and Ms. Donahue met again so that Ms. Donahue could explain why she thought “her mid-point performance assessment was too low.” JE 31 at 5. Ms. Donahue brought notes to that meeting, and Mr. Czerwinski asked her to provide him with a copy. NTR 700-02 (Testimony of Ms. Donahue). Petitioner testified that she told Mr. Czerwinski that she “would think about it” (*id.* at 702), to which Mr. Czerwinski replied that Petitioner’s not sharing her notes made him wonder about her commitment to teamwork. *Id.* Petitioner’s transcribed notes reflect that she also pointed out that Mr. James had not provided copies of his notes relating to her performance during their feedback meeting, and that Mr. James had stated that he would have provided his notes if she had asked for them. PE 230 at 8; *see* NTR 700-02.

86. Following her mid-point feedback session, Petitioner requested that Mr. James provide her with new written expectations. NTR 1138-39. Mr. James agreed to supplement the

¹⁵ According to Petitioner, the notes did not include ten emails between Mr. James and Mr. Czerwinski that she characterized as “disparaging” of her, that are found at PE 144; PE 147; PE 156; PE 176; PE 183; PE 193; PE 198D; PE 198F; PE 230; RE 61. *See* Pet. Brief at 44; *see also* JE 31. The Agency counters that Petitioner cites only nine emails, one of which does not refer to her. GAO Response at 25 (PE 230 is a transcription of Petitioner’s notes). *See* n.46, *infra*.

expectations that he and Petitioner had discussed in December 2006 even though neither he nor other DPMs usually set expectations with employees following mid-point feedback.¹⁶ *Id.*

87. On May 2, 2007, Mr. James emailed Petitioner his proposed supplemental expectations for her. JE 31 at 7-8; *see also* NTR 1140-41. On May 9, 2007, they met for an hour to finish discussing her mid-point feedback and “to discuss the updated expectations through the end of the assignment.” JE 31 at 21-22; NTR 1141. Petitioner asked if she could clarify the proposed expectations by adding detail. JE 31 at 21-22; NTR 1141. Mr. James told Petitioner “it was not possible to anticipate every step along the way” and that the expectations he provided were sufficient for his purposes. JE 31 at 21-22; NTR 1141. He reminded her that “all performance competency standards would apply and should be considered as part of expectations.” JE 31 at 22. Mr. James did agree that Petitioner could add detail to the expectations, “anticipating that we could, with one round of back and forth, we could get it all resolved.” NTR 1141.

88. On May 4, 2007, Petitioner sent her first set of charts (slides) based on early data analysis for the job to Mr. James and Mr. Czerwinski. Mr. James supplied comments the next day, indicating that he anticipated a story line developing that would point to the need for agencies to “pay added attention to grant accounts with certain characteristics.” JE 31 at 8. Ms. Donahue responded to Mr. James by noting that analysis of current data “will only be able to describe the ‘condition’ – expired grant accounts with undistributed funding” and that “[t]hese data will not be able to explain the ‘cause’ (‘the why’) for the observed condition.” JE 31 at 10-11. Mr. Czerwinski commented on the slides by suggesting that the GBE team “attempt to

¹⁶ The GAO Policy Manual provides that expectations are to be set “at or near the beginning of the appraisal cycle” and “at or near the beginning of each engagement,” and that “[f]urther meetings to clarify expectations should be held when changes have been so substantial as to constitute a new engagement.” JE 4 at 9-10.

identify targets of opportunity where we would be more likely to find those grants where there are undistributed funds in expired accounts. I am guessing we are in the very early stages of this analysis, as it is not clear to me that these slides show any viable targets.” PE 76 at 1; JE 31 at 23.

F. The filing of the first amended Charge (May 10, 2007) and subsequent events

89. On May 10, 2007, Petitioner filed an amended Charge with the PAB/OGC alleging that “the process used to prepare the midpoint performance feedback was improper because it did not consider written expectations” and that her “mid-point feedback was given in retaliation” for her December 2006 Charge. JE 24 at 6. In this amended Charge, Petitioner named Messrs. James, Czerwinski, and Mihm as responsible individuals. *Id.*

90. Mr. Mihm met with Mr. James and Mr. Czerwinski on May 16, 2007, and informed them of the Charge related to mid-point feedback. JE 31 at 29.

91. On May 25, 2007, Petitioner emailed Mr. James a significantly longer and more detailed version of the expectations he had proposed. JE 31 at 31-33; NTR 1142. Although Mr. James believed that the amount of detail in Petitioner’s proposed expectations was “excessive” and “unproductive,” he nevertheless thought “maybe we can still get agreement on these even though this is way over the top in terms of detail.” NTR 1142-43. However, he objected to provisions added by Petitioner that would relieve her of accountability if she did not meet deadlines. *Id.* at 1142-44. For example, Petitioner proposed including the statement, “[t]hese expectations assume the timely cooperation with other GAO units and [the U.S. Department of Health and Human Services (HHS)], and no unforeseen developments.” JE 31 at 33. Mr. James believed that unforeseen developments happen on every GAO engagement, and he emailed Mr.

Czerwinski that he saw Petitioner’s proposed revision as including “an all-purpose out for not delivering on time.” *Id.* at 33-34; NTR 1144.

92. By the end of May, Mr. James had made repeated requests that Petitioner promptly prepare expectations for Sharon Hogan, a Band II Analyst who had recently joined the engagement. JE 31 at 8, 29-30, 36, 40-41; NTR 1155-56. On May 31, he noted that he had been “actively . . . pushing to get [Petitioner to prepare the expectations] for a month now. Before that, I had only mentioned it without following up with emails to document my requests for input from Pat.” JE 31 at 36. Despite Mr. James’s multiple requests and Petitioner’s assurances that the task would be completed before the end of May, Ms. Hogan drafted her own expectations which were sent to Mr. James on June 5. *Id.* at 8, 29, 36, 40-41.

93. The Message Agreement meeting was the next major milestone on the Grant Balances Engagement. NTR 1151-52. The purpose of Message Agreement was for the engagement team to discuss with the Director, Managing Director, and stakeholders the proposed content and message of the report; as Mr. Backhus testified, “it’s an opportunity to sit down and gauge where they are and . . . try to decide what the product’s going to say.” STR 72-73; PE 87; PE 88. Mr. Czerwinski testified that this stage is “pretty far down the road. . . . You . . . should’ve done your field work; you have synthesized your message; you’re now talking about how best to present it.” NTR 1050-51. The team was, therefore, expected to have completed most of the data analysis before Message Agreement, so that they could have a meaningful discussion on the substance of the report. STR 72; NTR 1050-54.

94. The GBE team had determined, by the time of Message Agreement, that one of the key features of the report would be a recommendation to the U.S. Office of Management and Budget (OMB). PE 88 at 2. As Mr. Mihm explained, GAO’s “fundamental responsibility is to

provide information that decision-makers [Congress or other federal agencies] can use in order to make decisions.” NTR 142-43; *see* STR 221-25; NTR 987-88. The recommendations in a GAO report are an important aspect “[b]ecause reports have to have some utility. . . . [E]ither the Congress . . . or the agencies have to be able to do something with it.” STR 221-22. The anticipated recommendation in the GBE report was “doing better management, doing better close-out processes on grants.” STR 224. As Mr. James testified, this recommendation stemmed from the analysis underlying the first (“the extent of the problem”) and third (“what kind of grant management policies and procedures can be, should be in place to do grant close-outs”) sections of the report, but did not depend on the second section of the report regarding grant characteristics (*i.e.*, “which grants are most likely to have leftover balances”). STR 223-25.

95. Mr. Czerwinski testified that the report’s bottom line is important, but reporting all the steps along the way “clutter[s] up the issue.” NTR 987-88; *see* NTR 142-43; STR 221-25.

96. On May 31, 2007, Petitioner, Ms. Mak, Mr. James, and Anna Maria Ortiz—a statistician from Applied Research and Methodology assigned to assist on the engagement—met with Mr. Czerwinski to discuss a partial draft of the report in anticipation of Message Agreement. NTR 1151-52; JE 31 at 36, 37; *see also* NTR 212, 217. During the meeting, the team agreed to cut off the data analysis by June 15, 2007, provide a revised draft by June 20, 2007, and hold the Message Agreement meeting on July 2, 2007. JE 31 at 36-37. Mr. Czerwinski emphasized that the team needed to stop conducting new data analysis, that they “had to wrap it up, . . . [a]nd make the best of what [they] had.” NTR 1155. Mr. Czerwinski later told Mr. James that the team was “behind the curve” and not “ready for message check,” which involved firming up the message prior to the Message Agreement meeting. NTR 1153; JE 31 at 36-37. Later that day, Petitioner told Mr. James that she thought the team had done a great

job and worked very hard in developing the draft. JE 31 at 36-37; NTR 1153. Mr. James informed Petitioner that regardless of the amount of work, the draft was not very good and they had needed Mr. Czerwinski's help to improve it. JE 31 at 37; NTR 1153. Mr. James stressed to Petitioner that their performance would be evaluated on the quality of their finished product, and not just the amount of effort they expended in the process. JE 31 at 37; NTR 1153-54.

97. On June 1, 2007, Mr. James emailed Petitioner a revised version of her proposed expectations after simplifying them and removing those portions he found unacceptable. NTR 1145-46; JE 31 at 38-40. Petitioner was not prepared to discuss the revised expectations until June 21, when they met for another hour to go over them. JE 31 at 42, 49, 61. Petitioner remained dissatisfied and Mr. James again agreed to revise them. *Id.* at 61; NTR 1146.

98. On June 18, 2007, Mr. James emailed the team that Mr. Czerwinski expected “*a fully developed recommendation that will allow us to get financial savings down the road,*” regardless of the level of detail in the GBE report. JE 31 at 49 (emphasis in original).

99. On June 20, 2007, Ms. Donahue sent her first Message Agreement draft report outline to Mr. James. JE 31 at 50-60. The draft included, among others, the recommendation that agencies monitor and resolve undistributed funding in expired grants. *Id.* at 57-58.

100. The draft results section noted that the total amount of undistributed funds ranged from \$500 million to 1.3 billion dollars for each quarter, with a footnote stating that the figures are “adjusted for inflation.” JE 31 at 52. On June 21, 2007, Mr. James asked Petitioner and the team to explain why the adjustment for inflation had been made. *Id.* at 60.

101. On June 25, 2007, Mr. James sent Petitioner another draft of her expectations. JE 31 at 61-63. He considered them to be the final revision of expectations set with Petitioner following her mid-point feedback. NTR 1147-48; JE 9 at 1. In his experience, he had never

seen a GAO employee treat the expectation-setting process as Petitioner had. NTR 1148-49. Setting expectations usually took place during one or two discussions within a week and required no more than three hours of his time. *Id.* at 1148-49; JE 4 at 9-11.

102. On June 26, 2007, Mr. James alerted Mr. Czerwinski to “a side issue that the team wants to include” in the message check, that is, “oddities” in the PMS Closeout Report data. JE 31 at 63. Ms. Donahue suggested reporting the anomalies separately in a Management Letter to HHS, but Mr. James believed that the team could “develop ‘workarounds’ for [their] analysis,” since PMS had received a clean audit opinion from PriceWaterhouseCoopers in August 2006. *Id.*

103. On or about June 27, 2007, Mr. James sent Mr. Czerwinski a packet for the Message Agreement meeting, including an updated Design Matrix that listed the same scope and methodology for the grant characteristics section as the previous Design Matrix. PE 87; JE 41 at 63. The report outline attached to the packet presented results adjusted for inflation. *Id.* at 4 n.2.

104. On June 28, 2007, Petitioner sent a revised concluding statement for the report that stated: “When we examined a large population of expired grants from numerous agencies, we found grants with certain program characteristics were more likely to have greater amounts or higher proportions of undistributed funding. Awarding agencies can use this information to both refine their grant monitoring methods and track their progress in minimizing these balances, over time.” PE 86.

G. Message Agreement meeting and subsequent events

105. On July 2, 2007, the GBE team held the Message Agreement meeting. SI Managing Director Chris Mihm, Director Susan Irving, and four SI Assistant Directors were in attendance, along with the Grant Balances Engagement team of Director Stan Czerwinski,

Assistant Director Tom James, AIC Pat Donahue, and Senior Analysts Susan Mak and Sharon Hogan. Additional participants included three representatives from ARM (including Ms. Ortiz) and an attorney from OGC. RE 5.

106. Ms. Hogan prepared a draft memorandum of the meeting, documenting that the meeting took place and who attended, and summarizing team agreements. RE 5; NTR 1158-59. After making minor revisions, Petitioner provided the memorandum to Mr. James. NTR 1158-59; RE 5 at 1. He thought the document to be too detailed and too long—as “basically a transcript of who said what” at the meeting. NTR 1159. Mr. James returned the memorandum to Petitioner “all marked up and [with] a lot things struck out.” NTR 1159-60; JE 5. In Mr. James’s view, the quality of the draft reflected on Petitioner’s performance because he expected her, as AIC, to know “that a memo to the file on a message agreement is not an eight page write-up of what everybody said.” NTR 1159-62. He believed Petitioner should have instructed Ms. Hogan to streamline the memorandum before submitting it to him for review. *See id.*

107. The team proposed making recommendations to OMB to address the issue of “undistributed funding in all expired grants, thereby making the recommendation applicable to grants tracked by all federal payment systems, not just PMS.” PE 92 at 1. The memorandum summarizing the meeting’s results did not note that any concerns were raised about results being reported in inflation-adjusted (“real”) dollars. *Id.*

108. On August 3, 2007, Petitioner sent Mr. James a full draft of the report, which he did not see until the following Monday, August 6. RE 78; NTR 1163. Petitioner intended that Mr. James would give Mr. Czerwinski a draft for First Partner review within a week. *Id.* at 1163; RE 78 at 1. The draft noted that the team

decided to focus on those grants that shared a common payment system, were still open after their expiration date, and had unspent funds in the form of

undistributed balances. We then set out to answer three questions: (1) to what extent are there undistributed balances in expired grant accounts for grants in a selected federal payment system?; (2) are there common grant program characteristics and grants management issues associated with these expired grants?; and, (3) what actions have federal agencies taken to improve the timeliness of grant closeout and diminish undistributed balances?

RE 78 at 1-2 (footnote omitted); JE 31 at 73-74.

109. Mr. James found that the draft “was not street ready” and “needed a lot of work,” with the grant characteristics section being “the most problematic.” NTR 1164-69; RE 78. Mr. James illustrated his point by noting that the draft included confusing line graphs that reflected increases and decreases that the team could not explain. NTR 1164-67; RE 78 at 9, 12, 16. Although Mr. James “understood that [the team] couldn’t explain” what caused the changes reflected in the graphs, he believed it was inappropriate to include these “question-begging” graphs in a GAO report, particularly because they were not “integral to the message or recommendation or anything else.” NTR 1165-67.

110. Despite Mr. James’s concerns, Petitioner “resisted the idea that we take out all graphic representations” from the draft. *Id.* at 1167-68. Her position was that GAO’s report reviewers would have to accept that any questions raised by the graphs would have to be answered through a subsequent engagement. *Id.* at 1165; STR 424-25. However, Mr. James knew that Petitioner’s response “was not going to pass muster” in GAO’s review process (STR 425) because GAO reports are not intended to include information simply because a team expended time to learn it or because it is interesting for its own sake. NTR 142-43, 987-88; STR 224-25. When rating Petitioner’s performance, Mr. James considered her inclusion of these graphs and continued resistance to removing them. NTR 1165-66, 1171-73.

111. Mr. James also objected to the grant characteristics section including extensive discussion of the methodology the team used to develop its findings; such information normally

is not included in the body of a GAO report, except in separate Objective, Scope and Methodology (OS&M) sections, often in an appendix. *Id.* at 1168-70; JE 11-13. Mr. James knew that Petitioner had written the grant characteristics section in this manner because the team was “grappling with the problem of . . . weak results, inconclusive results.” NTR 1170. Mr. James believed that writing the section with this emphasis on methodology and limitations would be uninteresting and confusing to readers—a belief confirmed by subsequent reviewers. NTR 1169-70 (James); NTR 139-42 (Mihm); RE 83 at 16 (Carlos Diz); RE 89 at 14 (Mihm); JE 33 at 59-63 (Allen).

112. On August 9, 2007, Mr. James forwarded the first draft of the GBE report with his initial comments to Mr. Czerwinski, who concurred with them based on a quick review. JE 31 at 73-75.

113. On August 17, 2007, Ms. Donahue sought to have the process of referencing of the report begin.¹⁷ Mr. James allowed referencing of “noncontroversial” portions (*i.e.*, introduction, background, appendices), but he did not “want to begin referencing the three finding sections” until after Mr. Czerwinski “had a chance to review the draft and provide comments.” *Id.* at 77.

114. On August 22, 2007, Ms. Donahue submitted a second draft of the report to Mr. James containing the same focus language as the August 3, 2007 draft. *Id.* at 78-79; RE 79 at 1-2.

115. On August 23, 2007, Mr. James and Ms. Donahue met to discuss the second draft. Mr. James informed Petitioner that issuance of the report on schedule (October 31, 2007) “would be ‘miraculous’ and ‘Herculean’,” as he reminded her that after securing Mr. Czerwinski’s

¹⁷ “Referencing” a report takes place when a person outside of the team “compares the draft report with the evidence to make sure that the information in the draft report is [supported] by the evidence contained in the work papers.” STR 76.

approval, the Managing Director and Second Partner must sign off, and referencing would be required. In Mr. James's view, mid-November was the "best case scenario." JE 31 at 79-80.

116. On August 28, 2007, Ms. Donahue forwarded to Mr. James preliminary comments from Ms. Ortiz (ARM) regarding the second draft. Ms. Ortiz expressed concern that the draft language implied that the GBE team had done "a multivariate analysis to distinguish the unique variance linked to a given characteristic. Needless to say, we haven't done so in this analysis." JE 31 at 81. Ms. Ortiz apologized for not having raised this concern sooner, and suggested options for resolving the issue. *Id.* at 81-82; PE 96.

117. On August 30, 2007 and September 4, 2007, Ms. Donahue submitted revised versions of the draft report to Mr. James. JE 31 at 83-84. The focus language of the drafts remained the same. *Cf.*, RE 78-80 at 1-2.

118. On September 5, 2007, Mr. James, Ms. Donahue and Ms. Ortiz met with HHS officials to "go over . . . findings in general and to discuss specific data-field issues." JE 31 at 84; PE 101.

119. On September 6, 2007, Ms. Hogan asked Mr. James whether she should drop out of a two-day training course scheduled for the following week, "due to the heavy workload and short time-frames." JE 31 at 84. After consulting with Mr. Czerwinski, Mr. James told Ms. Hogan to "[p]lease go ahead and attend as planned." *Id.* at 84-85. Upon completion of that training, Ms. Hogan was out of the office on sick leave from September 12 until October 22, 2007, because of injuries sustained in a car accident. *Id.* at 85, 88, 91, 103, 109, 121.

120. On September 10, 2007, Ms. Mak told Mr. James that Ms. Donahue had requested that she not attend several meetings and appointments because of heavy workload and tight time frames of the GBE. Mr. James told Ms. Mak to attend her previously-scheduled meetings and

appointments. *Id.* at 85. Ms. Mak was on leave October 8-12, November 5-16, and November 23, 2007. *Id.* at 98.

121. On September 10, Mr. Czerwinski returned his comments on the draft to Mr. James. RE 80 at 1; NTR 1173. Mr. Czerwinski was disappointed in the draft. NTR 940-42. In his view, the background section was not properly focused and portions of the draft failed to emphasize important issues. *Id.* at 943-47; RE 80 at 7, 9, 11, 12. Like Mr. James, he found the report's graphs to raise rather than answer questions. NTR 946-48; RE 80 at 12-15. As to the grant characteristics section, Mr. Czerwinski noted that it was confusing and took away from the report: "when you have a lot of pages of this stuff, what it does is it makes the reader lose confidence in you, and that's the problem I saw overall in this draft, is that we went to lengths to actually degrade our arguments." NTR 949; *see id.* at 943; *see also* RE 80 at 11, 16.

122. Mr. Czerwinski found the grant characteristics analysis troublesome in part because, contrary to his expectations, it did not identify the types of grants that were more likely to have unspent funds. NTR 951-52, 959. He believed that it was important for the grant characteristics section to provide useful, actionable information, and he had hoped the grant characteristics analysis would provide information grant managers could use to more effectively target grants for the recovery of unspent funds. *Id.* at 951, 959-62; *see* STR 426-27.

123. Mr. Czerwinski testified that when he began reviewing the drafts, he was unaware that the team had not obtained the data it needed to do such an analysis. NTR 952.

124. Before the Design Summit, the team had decided to use reports from the Payment Management System of HHS as its data source for the grant characteristics analysis. *Id.* at 227, 317; PE 67 at 2; *see* ¶67, *supra*. These PMS reports, known as closeout reports, contained data

on grants that had expired but had not been properly closed out.¹⁸ NTR at 317-19. This data enabled the team to identify the amount of unspent funds remaining in grants listed on the PMS closeout reports and break down that information by a given characteristic. *Id.* at 317-19; JE 30 at 33-35. The closeout reports, however, did not contain data on expired grants that had been properly closed out. NTR 317-19; JE 30 at 7-8, 33-35. Consequently, the team could not assess, for a given grant characteristic, whether the money remaining in the closeout report grants was disproportionate when compared to all of the expired grants in PMS with that characteristic. NTR 318-20.

125. Ms. Ortiz testified that it was therefore inappropriate for the Grant Balances Engagement report to suggest that, within the universe of grants in the PMS, grants with a certain characteristic were more likely than others to have unspent funds. *Id.* at 319-22. In other words, the team could not extrapolate or project its findings based on the PMS closeout report grants to the broader universe of all grants in the PMS; they “did not have the data to generalize to the PMS system as a whole.” *Id.* at 322. It was similarly inappropriate for the team to suggest that the results of the grant characteristics analysis could be used to target grants in the PMS that were more likely to have unspent funds. *Id.* at 322-23.

126. Mr. Czerwinski testified that his mistaken view of the capabilities of the draft’s grant characteristics analysis stemmed from “inaccurate” and “misleading” statements contained in the Design Matrixes prepared by Petitioner for the Design Summit and Message Agreement meetings. *Id.* at 953-58, 962-63; PE 66C at 1-2; PE 87 at 14-15. The Design Matrix used at the Design Summit had listed only one limitation for the grant characteristics research question. It

¹⁸ When a grant’s “period of availability to the grantee has expired, the grant could be closed out and the funds deobligated by the awarding agency. Grant closeout procedures ensure that grantees have met all financial requirements, provided their final reports, and returned any undisbursed balances.” JE 30 at 6.

stated that the team would not be able to project its findings to the “entire universe of federal grants” because they only had data on grants processed through the HHS PMS;¹⁹ *i.e.*, “we’re looking at all PMS, but we can’t tell you what’s not in PMS.” NTR 957; PE 66C at 1.

127. According to Mr. Czerwinski, the Design Matrix did not state the additional, substantial limitation that the team could not project its findings even within the universe of PMS grants since they “only looked at a subset of PMS for characteristics”—namely, those that had money left. NTR 958; PE 66C at 1-2. Because of this omission from the Design Matrix, Mr. Czerwinski believed that the team would be able to project its findings to the entire universe of grants in the PMS. NTR 951-52, 955.

128. Mr. Czerwinski also believed that the Design Matrix inaccurately stated that the analysis would allow GAO to say that “[g]rants and grantees with certain characteristics may be more likely than others to have undistributed, expired grant funds” and that entities responsible for grant oversight and management “may want to review these grants and grantees as a first priority for close-out and recapture of unused funds.” PE 66C at 2. Mr. Czerwinski understood this statement to mean that the team would be able to identify grants that were more likely to have funds remaining and thus were good “targets” for grant managers. NTR 961-62.

129. The same statements in the Design Summit Design Matrix (March 29, 2007) were also contained in the Design Matrix distributed for the July 2 Message Agreement meeting. PE 66C at 1-2; PE 87 at 14-15. As a result, Mr. Czerwinski “operated for months on the assumption” that the team had the data necessary to do a targeting analysis. NTR 957-58, 962-63.

¹⁹ Mr. Czerwinski was unconcerned about this limitation because the HHS PMS was “a really big system” that processed a sufficiently large number of federal grants to provide useful information. NTR at 955.

130. It was Petitioner’s responsibility as AIC to understand and communicate to Messrs. James and Czerwinski the limitations of the grant characteristics analysis. STR 426-29; NTR 965-66.²⁰

131. Ms. Ortiz—whose responsibilities included ensuring that the team did not misstate the results of the statistical analysis—testified that it “should have been clearer” in the Design Matrix that the team was not able to project its findings to the entire universe of PMS grants. NTR at 221, 325-28. Ms. Ortiz also admitted that the Design Matrix was “ambiguous” and did not clearly state that any targeting analysis was limited to only those grants on the PMS closeout reports. *Id.* at 328-29. Ms. Ortiz further acknowledged that the issue that resulted from this ambiguity “was a source of contention throughout the job.” *Id.* at 329. It was not until mid-October 2007 that Ms. Ortiz realized that it had not been clearly communicated that a targeting analysis was not appropriate, because the team “had not conducted the analyses for targeting and . . . did not have the data for targeting.” NTR 268-69; PE 108.

132. Mr. James shared Mr. Czerwinski’s view in September 2007 that a targeting analysis was possible because of his reliance on the misleading statements in the Design Matrixes. STR 421, 426-27; NTR 1521-24; *see* ¶65, *supra*. Mr. James attributed inaccurate statements in draft reports submitted by Petitioner as supporting the erroneous view that targeting was possible. STR 421; NTR 1524-25, 1532-33, 1536-42; *see* PE 86; PE 87 at 9; PE 119A. For example, the two August 2007 draft reports inappropriately stated or suggested that the analysis the team conducted could be used to target grants in the PMS as a whole. NTR 345-51, 359, 362-64, 369-71; RE 94 at 21; RE 96 at 24. Specifically, one draft stated:

²⁰ GAO’s Policy Manual, §110 (Jan. 1, 2004, updated June 2007) states that AICs “manage, through firsthand knowledge and supervision, the day to day audit activities of the engagements for which they are responsible to ensure that these engagements comply with all of GAO’s policies and quality assurance requirements.” PE 219 at 5.

Analyses of expired grants also showed that grants with certain program characteristics were likely to have more undistributed funding than others.

PE 87 at 4.

133. Mr. Czerwinski discussed his comments on the draft with Mr. James on September 11, 2007; Mr. James thereafter explicitly incorporated a targeting²¹ analysis in the draft's "story line." JE 31 at 85-86, 88-96, 109-10; NTR 1519-20. The confusion stemming from the Design Matrix continued to influence the report drafts as the team tried to develop a targeting analysis, leading to slippage of deadlines for completing the report. STR 421, 426-27; NTR 965-66, 1519-26; *see* JE 31 at 86, 88-96, 109-10.

134. On September 17, 2007, Mr. James emailed the GBE team regarding Mr. Czerwinski's comments, noting that Mr. Czerwinski wanted a characteristics targeting tool. JE 31 at 88.

135. On September 18, 2007, Mr. James met with Ms. Donahue and Ms. Ortiz. Ms. Ortiz told them that additional analysis would be needed to support the characteristics targeting tool that Mr. Czerwinski contemplated, and Mr. James agreed to talk with Mr. Czerwinski about this. *Id.* at 87, 91.

136. On September 21, 2007, Mr. James informed Ms. Donahue and Ms. Ortiz that Mr. Czerwinski believed that there was no need to do additional analysis for a characteristics targeting tool, and that Mr. Czerwinski contemplated a simple pie chart. Ms. Ortiz sent Messrs. James and Czerwinski a pie chart that she believed responded to Mr. Czerwinski's vision. *Id.* at 92. Mr. James developed a narrative outline for the section on targeting. *Id.*

²¹ Mr. James testified as to his definition of "targeting" during the hearing: "Targeting means taking that information about grant characteristics and applying it to some other set of grants using that information in an active way to do some kind of focusing on grants with specific characteristics and thereby going to a target rich environment or place where there is a lot of money as indicated by analysis." NTR 1520.

137. On September 27, 2007, Mr. James raised concerns with Ms. Donahue and Ms. Ortiz about the pie chart. *Id.* at 104. Ms. Donahue and Ms. Ortiz developed additional responsive material and met with Mr. James to further discuss the matter. JE 31 at 106-07.

138. On September 28, 2007, Petitioner, Mr. James, and Mr. Czerwinski met for more than an hour to discuss the grant characteristics section of the draft. JE 31 at 104-05. According to Mr. James's notes, Petitioner stated that she had received new analysis that morning from Ms. Ortiz that "might shed light on what we can and cannot say about using grant characteristics to target expired grant accounts for closeout." *Id.* Mr. Czerwinski expressed concern "if this analysis was so important to our message in Section II, why were we hearing about it so late in the job—well after message agreement." *Id.* at 105. At the conclusion of the meeting, it was agreed that Petitioner would produce a revised draft of the grant characteristics section. *Id.* Mr. James urged Petitioner to consider the costs and benefits of doing any further analysis that "may not result in a stronger or more focused message." *Id.* Petitioner's notes reflect that she was expected to state in Section 2 of the GBE report, for each characteristic: "the (a) total [dollar] amount that these grants were originally authorized, (b) quarterly total [dollar] amount of undistributed funds, and (c) [proportion expressed as percentage] of undistributed/authorized [funds]." PE 230 at 17; *see* JE 31 at 105.

139. On October 9, 2007, Petitioner gave Mr. James her revisions to the grant characteristics section. NTR 1184-85; RE 81. The draft was 19 pages long and contained 22 tables. NTR 967-68, 1186; RE 81. Petitioner also prepared 32 charts which she reviewed with Mr. James but did not include in the report. JE 31 at 106. Mr. James viewed Petitioner's draft as

far too long and inappropriate for a GAO report.²² NTR 967-69; 1186-87. Mr. James testified that Petitioner’s continued effort to include a lengthier, more detailed discussion of the grant characteristics analysis was also troubling because it was not necessary to the report’s recommendation. *Id.* at 1184-87.

140. On October 11, 2007, Mr. Czerwinski and Mr. James discussed the draft analysis relating to the grant characteristics targeting tool material and concluded it was too lengthy. Mr. Czerwinski suggested that Mr. James instruct Ms. Donahue to cut that material “to no more than five pages,” and stated that “the team needed to stop generating new analysis and that this would be [Petitioner’s] last round of revision on this part of the report draft.” JE 31 at 107.

H. Petitioner's FY 2007 appraisal

141. The 2007 appraisal period extended from October 15, 2006 to October 14, 2007. JE 6 at 1. In preparing Petitioner’s 2007 rating, Mr. James reviewed the Band IIB performance standards, Petitioner’s expectations, her self-assessment, and his notes on Petitioner’s performance. NTR 1103-04, 1188-92. He also considered his personal observations of Petitioner’s performance, information he received from GAO’s Learning Center regarding Petitioner’s periodic work as an adjunct instructor,²³ and feedback from Mr. Czerwinski on Petitioner’s performance. NTR 1188-89. Based on all of these considerations, Mr. James prepared a proposed rating that Mr. Czerwinski then reviewed. *Id.*

142. According to SI procedures at the time, Petitioner’s 2007 appraisal—along with the appraisals of all SI employees—was also reviewed by SES members in SI (Managing Director

²² Mr. Czerwinski testified that in September 2007 he had indicated to both Petitioner and Mr. James that he thought the section could be written in “about five pages.” NTR 967.

²³ Mr. James testified that he sought information from the “Training Institute because Pat was an adjunct instructor” and “continued to work with them periodically to do courses.” NTR 1188; *see* JE 22.

Mihm and SI Directors). NTR 4-6, 119-20. The SES review was intended to ensure consistency in the application of the performance standards. *Id.* This review did not result in any change to Petitioner's ratings. *Id.* at 121-22, 125.

143. For FY 2007, Mr. James rated Petitioner's performance as "exceeds expectations" in the competencies of Maintaining Client and Customer Focus and Collaborating with Others, and as "meets expectations" in the remaining competencies. JE 6 at 1.

144. In the competency of Achieving Results, Mr. James testified that Petitioner was rated as "meets" rather than "exceeds expectations" because she had not used "highly cost effective methods" and "good judgment" to achieve "timely completion." NTR 1193-95. In Mr. James's view, Petitioner had spent a tremendous amount of resources to develop the grant characteristics section and continued to do so even after it was clear that it did not "even support the recommendation" of the report. *Id.* at 1180; *see id.* at 1179-81, 1186-87, 1193-95. While Mr. Czerwinski's "solution was very quick, efficient, ... cost effective, ... what [Petitioner] came back with was the opposite; it was going in the other direction, it was making it more difficult" NTR 1195. Mr. James testified that Mr. Czerwinski had stated a "couple times" that he wanted "just . . . a five page section, keep it high level" for the grant characteristics section, Petitioner continued to invest time and effort in producing a more lengthy section of twenty pages. *Id.* at 1180; *see id.* at 1179-81, 1185-87, 1193-95. Moreover, timely issuance by the October 31 deadline was no longer possible. *Id.* at 1200; *see id.* at 1193-94. Mr. James considered that Petitioner's work on the data analysis contributed to the identification of approximately \$1 billion in unspent grant funds, but he stated that in his view this one factor did not bring her rating up to a higher level when balanced against her performance for the entire year and her responsibilities for overall project management. *Id.* at 1196-1200.

145. In the competency of Thinking Critically, Mr. James determined that Petitioner’s performance did not meet the “role model” standards more often than not and, therefore, warranted a “meets” rather than “exceeds expectations” rating. *Id.* at 1201-02. In Mr. James’s view, Petitioner continued to focus almost entirely on the grant characteristics section despite having been warned about such “tunnel vision and getting obsessed with this grant characteristics piece to the exclusion of the rest of the report, and also resisting our direct feedback from our director. . . .” NTR 1201-02. Petitioner “failed to consider the cost benefit” of her approach to the grant characteristics section, which “extended the period of back and forth on this that didn’t need to happen.” *Id.* at 1180-82, 1201-02. Instead, she continued “not listening to the director . . . but rather, just throwing more information at him in the hope that [she would] wear him down.” *Id.* at 1182. Further, according to Mr. James, Petitioner’s inclusion of confusing material not “integral to the message” reflected negatively on her Critical Thinking rating. *Id.* at 1164-67.

146. In the competency of Presenting Information in Writing, Mr. James concluded that Petitioner’s report drafts were at the “meets expectations” level. *Id.* at 1163-64, 1184-87, 1206-07. According to Mr. James, they required far more than “minimal revision” and Petitioner was not highly effective at adapting her writing style to produce draft reports that communicated effectively. *Id.* Mr. James determined that Petitioner’s performance with regard to other written work products (meeting write-ups, memos to the file) for the engagement met rather than exceeded expectations. *Id.* at 1205-06. In particular, Mr. James testified that Petitioner had failed to appropriately review and edit the Message Agreement memorandum before providing it to him, such that it contained a transcript of “who said what” rather than a “high level summary” of the message agreement. *Id.* at 1159.

147. In the competency of Leading Others, Mr. James found that Petitioner did not articulate “a clear direction for the work group.” *Id.* at 1207-08. Despite Mr. James’s emphasis during mid-point feedback that Petitioner needed to provide greater direction to the team, he found that he and Mr. Czerwinski had to continue to provide that leadership throughout the appraisal period. *Id.* at 1118-20; 1127-29, 1207-08. Mr. James believed that Petitioner’s failure to timely set expectations with Ms. Hogan also fell short of a higher rating in Leading Others. *Id.* at 1207, 1209.

148. As to the competency of Developing People, Mr. James found that Petitioner had done good work in getting Ms. Hogan up-to-speed on the engagement. *Id.* at 1208. Likewise, Mr. James considered the positive feedback he had received from the Learning Center about Petitioner’s performance as an adjunct faculty member. *Id.* at 1208-09. However, Mr. James balanced these factors with, among others, Ms. Mak’s complaints that Petitioner did not respect her contributions, and the missed opportunity to assist him with Ms. Hosler’s rating. *Id.* at 1132-35, 1208-09. Overall, Mr. James found that Petitioner’s performance for the entire appraisal period was at the “meets expectations” level in Developing People. *Id.* at 1208-09.

149. In the competency of Maintaining Client and Customer Focus, Petitioner received a rating of “exceeds expectations.” This rating meant that she performed at the “role model” level more often than not, but short of “nearly all of the time.” According to Mr. James, Petitioner had performed well in meeting with the Congressional requesters and responding to their questions early in the year. *Id.* at 1117-18, 1200. Mr. James determined that by the end of the 2007 appraisal period, Mr. James found that her “performance had come up a little bit and we were really making a good faith effort to deal with [Mr. Czerwinski’s] comments.” NTR 1199. However, it was apparent that the team would not issue the report by October 31, 2007, as agreed

to with the Congressional requesters—GAO’s client. *Id.* at 1200. Petitioner also did not “effectively and expeditiously” handle her disagreements with Mr. Czerwinski—her second level supervisor and customer on the assignment—about the best approach to the grant characteristics section. *Id.* at 1200-01.

150. As to the competency of Collaborating with Others, Mr. James determined that Petitioner “did a lot of good work” with some groups, such as ARM and General Counsel. *Id.* at 1202-03. Petitioner also had worked closely and collaborated well with officials from other federal agencies to obtain data for the engagement. *Id.* However, Mr. James noted that her collaboration with her supervisors had started to “fray” since the July 2 Message Agreement meeting. *Id.* at 1203-04. Despite Mr. Czerwinski’s explicit instructions to keep the grant characteristics section short, Petitioner continued to submit a longer, more detailed discussion of the data analysis. *Id.* at 1181-86. As the issue of the grant characteristics section became more contentious, Mr. James concluded that Petitioner had not always modeled “tact” and “respect” toward her supervisors. *Id.* at 1202-03; *see id.* at 1531. On balance, Mr. James saw Petitioner’s performance as “exceeds expectations” in Collaborating with Others.

I. Fall 2007 GBE developments

151. On October 15, 2007, Mr. James sent comments to the GBE team regarding the October 9 draft report. He stated that the grant characteristics section “has no practical significance to agency grant managers.” JE 31 at 111; NTR 258. He also noted that the team should not undertake a multivariate analysis, as “[w]e are out of time, and I don’t think it would yield anything meaningful in terms of the message.” JE 31 at 112. Ms. Ortiz emailed in response, taking issue with Mr. James:

[W]hen you say ‘If we don’t know why there is a difference, the result has no practical significance to agency grant managers,’ it suggests to me that we should not have pursued this analysis to begin with because we knew in advance that this analysis would not tell us why these things were happening. If you feel strongly that our inability to explain ‘why’ renders the analysis useless for recommendations, then we should drop the targeting portion of the analysis entirely, cut our losses and move on to other audit work . . . I feel very strongly that we should not continue to invest time in an analysis that won’t provide the level of evidentiary support you feel necessary to make useful recommendations. If you cannot envision what type of hypothetical results would make you feel these were useful recommendations, let’s refocus our efforts to make better use of limited resources.

PE 106; JE 31 at 112.

152. Mr. James then met with Ms. Donahue and Ms. Ortiz to discuss his concerns “and to try to reach agreement on a[n] analytical approach and resulting message that we could all support.” JE 31 at 113. Mr. James stated that he was not convinced that abandoning the analysis of “percentage undistributed” would be “the ultimate answer to our dilemma.” *Id.*

153. On October 16, 2007, Mr. James emailed Ms. Donahue and Ms. Ortiz a series of questions regarding the previous day’s discussion of the GBE. JE 31 at 114; RE 35 at 2-3. Ms. Donahue responded by email, stating that she and Ms. Ortiz had “answered each of these questions, at length, in yesterday’s 2½ hour meeting. Moreover, I provided additional explanations in our . . . post-meeting discussion where I used the dry-erase board and you took notes. I don’t believe I could provide any better explanations today.” Ms. Donahue then summarized the points she had raised in the October 15th meeting. PE 110 at 1; JE 31 at 115.

154. Mr. James found the tone of Petitioner’s October 16 email to be defensive, irritating, inappropriate, and non-collaborative. NTR 1527-28. He further elaborated that with such expressions of tone, Petitioner was “sort of trying to put me in my place, telling me that the analysis was sufficient, I should know that, I should see that, and, you know, there’s nothing more she can do to explain it to me.” *Id.* at 1528-29. In Mr. James’s view, “that was part of the

reason why at times the draft was advanced, . . . to Stan and to others, even though I wasn't comfortable with it. Stan wasn't comfortable with it because of this attitude of, well, you guys are wrong, so let's get somebody else involved who's smarter than you are. That was the implication if not the direct statement, in my view, with that kind of tone." *Id.* at 1529.

155. Mr. James testified that he considered Petitioner's failure to tactfully and timely address his and Mr. Czerwinski's concerns when rating her FY 2008 performance. *Id.* at 1529-32.

156. Ms. Ortiz emailed the ARM Managing Director on October 16, 2007, regarding her concerns about Mr. James's handling of the data analysis portion of the GBE: "Despite having been very clear, up front, that there were substantial limitations to the analysis, only now are we hearing that those limitations are a fatal flaw. The AD [Mr. James] has been inconsistent about applying criteria for importance and glib and quite frankly insulting about the merits of the qualitative results . . . I don't feel that the analysis is so remarkable that it is worth pushing hard to include all of it at this point. . . . what a waste of resources." PE 107.

157. On October 16, 2007, Ms. Donahue sent Mr. James and Ms. Ortiz a revised draft of the data analysis portion of the GBE report based on their conversation of October 15, 2007, showing "just the results for the amount of undistributed funding." PE 109; JE 31 at 116.

158. On October 18, 2007, Mr. Czerwinski responded to the forwarded emails between Mr. James and Ms. Donahue from October 16. He stated: "It is distressing that months after our supposed message agreement, we are still going back and forth over what is the proper analysis, which of course, then changes our message dramatically. In such an uncertain environment, I believe you [w]ere 100% right to keep probing and to urge caution on what we say in the draft. Good work, thanks." JE 31 at 120.

159. On October 23, 2007, Mr. James sent comments with additional draft language to Ms. Ortiz and Ms. Donahue. Ms. Ortiz raised concerns with Mr. James about his additional draft changes and his inclusion of language that was more than descriptive. JE 31 at 124; PE 114; PE 115. Ms. Donahue also raised concerns with Mr. James about his revision based on a conversation she had with Ms. Ortiz. Mr. James forwarded Ms. Donahue's concerns to Mr. Czerwinski, with the lead in: “nothing is simple . . . nothing is easy. . .” Mr. Czerwinski responded to Mr. James, “thankfully, you are patient and persistent.” PE 116.

160. On October 24, 2007, Mr. James told Ms. Donahue to include specific wording in the draft. She responded by noting that if that language were inserted, ARM would expect parallel revisions to other portions of the draft. Mr. James asked Petitioner to identify language ARM would require to be revised; she forwarded some language that she had drafted for four program characteristics. JE 31 at 126-28. Ms. Donahue made revisions to the draft report based on the discussions. *Id.* at 128-30.

161. On October 30, 2007, Ms. Ortiz emailed Mr. James and other GBE team members raising concerns about language that Mr. James had instructed be added to the draft: “I have one very large concern. . . . Not only is it in direct contrast with points I discussed with Stan and Tom individually last week, but it is a thorough mischaracterization of the utility of the analysis as we present it in the report.” PE 119A. Ms. Ortiz noted that Mr. James’s revisions: suggested that extrapolations could be made that, “[a]s Pat and I have discussed before,” were inappropriate; were not useful as a targeting tool; bolstered the case for additional analysis; and inappropriately targeted characteristics without controlling for other characteristics. PE 119A; JE 31 at 131.

162. On October 30, 2007, Ms. Ortiz emailed her supervisor and other ARM team members regarding her continuing concerns about Mr. James’s handling of the data analysis

portion of the GBE: "I spoke with [Ms. Donahue] about the analysis, and she understood and agreed about the fact that any wording about targeting be very general and not based on the data. As evidenced by the draft I got yesterday afternoon, the AIC was evidently compelled by the AD to keep the specific paragraph that I objected to . . . I want to impress upon the AD the significance of misusing/mischaracterizing evidence, particularly after he and I (and Stan and I) had agreed to something else during a one-on-one meeting." PE 118.

163. Mr. Czerwinski commented on the revised draft, and on November 5, 2007, Mr. James forwarded those suggested revisions to the latest draft to Ms. Ortiz. JE 31 at 137. In response, Ms. Ortiz raised concerns that the proposed additions "could open up a major can of worms." *Id.* She suggested that if Mr. Czerwinski continued to want a targeting tool, "let's just plan and do the analysis accordingly instead of trying to bend the data in a direction it shouldn't go. It would take less time to do that than more iterations with the current data." *Id.*

164. On November 16, 2007, Mr. Czerwinski told Mr. James and Ms. Donahue that he thought the GBE team had data on the amount of authorized funding for all PMS accounts, and that this would enable the team to compare expired grants with undistributed balances to all grants in PMS. PE 123; JE 31 at 142. Ms. Donahue and Mr. James explained that the team had limited its focus to closeout data since February/March 2007. PE 123.

165. On December 5, 2007, Ms. Donahue submitted another draft GBE report to Mr. James (JE 31 at 156), who forwarded it to Mr. Czerwinski. RE 82; NTR 982.

166. Mr. Czerwinski testified that he had learned by then that the team did not have the data necessary to include a targeting analysis in the report. NTR 982-83. In his view, the inability to produce a targeting analysis significantly diminished the utility of the grant characteristics section. *Id.* at 983; RE 82 at 10-14, 21. He still hoped the team could "salvage

what we have and at least talk about it with the proper caveats and limitations,” as he recognized that the team had worked hard to produce its analysis. NTR 983, 985-86; RE 82 at 4, 10. Mr. Czerwinski was concerned that the grant characteristics section would confuse readers and lead them to draw inferences that the data did not support. NTR 959, 985-86; RE 82 at 4, 10. Although previously he had told the team that the section should be no more than five pages, by early December he wanted it shortened to one or two pages. NTR 984-85. Because it was more than a month past the October 31 issuance date, Mr. Czerwinski wanted to “cut [the team’s] losses” and issue the report. *Id.* at 982, 985.

167. As soon as Mr. Czerwinski informed the team that the inability to project the grant characteristics findings to a larger universe was a major problem, Mr. James was prepared to “shift gears, cut our losses, write the report as pretty much the way it ended up.” STR 426-28. Mr. James recognized the need to respond to his supervisor’s concerns, despite his belief that the grant characteristics analysis had more utility than Mr. Czerwinski believed. *Id.* at 427; NTR 1541-42. Petitioner disagreed with both Messrs. James and Czerwinski, advocating for more rather than less information in the report. NTR 984-85, 988, 1540-41. As a result, Petitioner did not address Messrs. Czerwinski’s and James’s concerns about the draft and argued against further reducing it. *Id.* at 1540-44. Ms. Mak agreed with Messrs. James and Czerwinski that “the evidence was just not there to support some of the more far-reaching conclusions [Petitioner] wanted to make.” STR 543. In her view, Petitioner’s section of the report was a “data dump” which “overwhelme[d] the reader,” because Petitioner attempted to include everything the analysis showed, regardless of its importance to the message. *Id.* at 545-46. Ms. Mak testified that Petitioner “felt very strongly that [there] were reportable findings that should

be included in the report. There was disagreement as to whether or not those findings were supported” by sufficient evidence. STR 539.

168. Mr. James considered Petitioner’s failure to respond timely to his and Mr. Czerwinski’s concerns when evaluating her performance. NTR 1544-45. Mr. James testified that Petitioner’s resistance to her supervisors’ direction delayed the issuance of the report and demonstrated poor judgment. *Id.* at 1543, 1545. As Mr. Czerwinski testified, “there’s a time to let things go, to stop digging in your heels and to get the product moving, and I thought we’d passed that time.” NTR 990. In the view of Mr. James, Petitioner thus failed to recognize that although she had worked hard on it, the costs of producing a lengthier grant characteristics section far outweighed its potential value. STR 221-23. Mr. James testified that the team needed to follow the guidance of Mr. Czerwinski—who had to sign the report—and who found the grant characteristics section of little value, saw that the report would not be able to produce “a recommendation about certain types of grants,” and concluded that, therefore, an expanded grant characteristics analysis was not necessary to the report’s recommendation. *Id.* at 221-25.

169. Ms. Ortiz sent an email to ARM colleagues on December 5, 2007, expressing continued concerns about the GBE:

We’ve literally spent months arguing about how the data could/could not be used, and only just after Thanksgiving did we come to an agreement of how to report the results. It’s now due to go to agency mid-January [for their comments] (though there is no good reason it couldn’t have been issued in October as planned). . . . I have the discomfoting feeling that the report has been subject to willful and malicious delays.

The difficulty now is that we’re getting some rumblings that the data are now obsolete and that to really know what’s going on we’d need the 2007 data. Much as I’d like to take that at face value, it feels like another potential excuse to delay issuing the report . . .

[Adding the 2007 data] risks postponing the report another several months with no real improvement on the analysis or conclusions. And just wastes many more of ARM's resources, not to mention other folks [sic].

I'm not convinced we're at the point of an "abuse of GAO resources" just yet, but it's getting close. And if I thought conceding to additional analysis would get the report out the door more quickly I'd do it in a second. But it doesn't seem like that. . . .

PE 124.

170. On December 5, 2007, Mr. James met with Petitioner to provide feedback on her 2007 appraisal. JE 31 at 154. He "walked through each competency, making repeated references to the Band IIB standards and the differences between 'meets' and 'role model' performance. When [he] was finished, [Ms. Donahue] said she disagreed with [Mr. Czerwinski's and Mr. James's] assessment of her work." *Id.*

J. The filing of the second amended Charge on December 7, 2007 and subsequent events

171. On December 7, Petitioner filed a second amended Charge with the PAB/OGC, alleging, among other things, that her 2007 appraisal was "given in retaliation for [her] engaging in protected activity." JE 25 at 3, 9.

172. On December 10, 2007, Ms. Donahue told Ms. Ortiz that the SI Budget group had reviewed the December 5th draft, and had stated that "the totals and ranges of undistributed funding and authorizations listed in the report need[] to be reported in nominal dollars instead of real (inflation-adjusted) dollars." PE 128. Ms. Donahue asked Ms. Ortiz to "re-run the analysis for the authorizations and underactive balances, without the inflation adjustment." *Id.* Petitioner proposed a compromise solution after Ms. Ortiz raised an objection to the change. PE 133. Mr. Czerwinski responded that he doubted the Budget group would compromise. JE 31 at 167-68. Resolution of this issue took until January 8, 2008, when Mr. James instructed the team to re-run

the numbers using nominal dollars. PE 140 at 2; *see* PE 131; PE 134; PE 135; PE 136; PE 138; PE 139; RE 73.

173. On December 20, 2007, Ms. Mak emailed Mr. James and Ms. Donahue that she had completed a table reflecting all the 2007 Performance and Accountability Reports (PARs); she specifically referenced that “all three departments (DOJ, HHS, and EPA) continue to see grants management as a challenge or as a concern.” JE 31 at 178-79. Mr. James responded that “[s]ince the 2007 HHS information comes from the Financial Report rather than the PAR, that should probably be stated clearly in the table. . .” and advised her to add a footnote to the draft explaining why there was no HHS PAR. *Id.*

174. On January 4, 2008, Ms. Ortiz raised with Mr. James an additional issue regarding his proposed use of nominal dollar ranges in the GBE report. *Id.* at 186.

175. On January 8, 2008, Mr. James sent the GBE team a “to do” list to be tackled before the report could be sent to Mr. Czerwinski again. It included a draft footnote noting that HHS was participating in an OMB pilot which allowed agencies to file, in lieu of a PAR, a Financial Report by November 2007, and an Annual Performance and Highlights report by February 2008. *Id.* at 187.

176. On January 14, 2008, according to Mr. James, Congressional requesters asked that the GBE team “include any pertinent information from the soon-to-[be]-released HHS Performance and Accountability Report into [the] report on undistributed funds in expired grant accounts.” PE 142 at 1. Mr. James informed Mr. Mihm that “[t]he client . . . understood that doing so would move the issuance date of the report to late April 2008.” *Id.*; JE 31 at 207.

177. On January 23, 2008, Mr. James told Mr. Mihm that the HHS PAR would be released shortly, and asked Mr. Mihm's consent that “the committed issue date be moved to

4/30/08 to accommodate this [Congressional] request.” Mr. Mihm approved the request that day. JE 31 at 206-07.

178. On January 24, 2008, Petitioner provided Mr. James a statement of facts drafted by Ms. Hogan that was to be used for the team exit meetings with OMB and HHS at the end of January. NTR 1561-62; JE 31 at 209-10; *see* RE 3. The purpose was to provide a summary of the facts in the Grant Balances report for the agencies to review in advance of meetings the team would hold with officials from the two agencies. *See* NTR 1561. Mr. James found the fact statement was unacceptable for several reasons. *Id.* at 1562-64. First, the 35-page document was too long; what was needed should be “concise and to the point” for a meeting with “high level officials” within a few days. *Id.* at 1562. In Mr. James’s view, it was inappropriate to provide the officials with a lengthy, detailed statement of facts and expect them to confirm or refute each detail. *Id.* at 1562-63. Second, the fact statement was “basically the draft report at the time with paragraphs turned into bullets.” *Id.* at 1562. Mr. James saw this as another example of Petitioner’s “half attempt to do something quickly, hand it to me and then have me fix it,” without exercising the proper review first. *Id.* at 1564. Third, the statement of facts contained information that had not been cleared through GAO’s review process, and thus, was not ready for release to OMB and HHS. *Id.* at 1565. Mr. James expected Petitioner, as AIC, to understand what was appropriate for the statement of facts under the circumstances, and to correct Ms. Hogan’s draft accordingly. *Id.* at 1564-65. In Mr. James’s view, Petitioner “wasn’t listening to [his] position. She was rather trying to prove [him] wrong,” and thereby demonstrated a problem in the competencies related to critical thinking and collaboration. *Id.* at 1566-69.

179. Petitioner followed up on the draft Statement of Facts by forwarding to Mr. James various pieces of GAO guidance on the topic, with the notation, “Hope this helps.” JE 31 at 210. Mr. James forwarded this response to Mr. Czerwinski with the comment, “. . . ever helpful.” PE 144. Mr. Czerwinski responded, “God help you.” *Id.*

180. On January 29, 2008, Mr. James and Ms. Donahue attended the exit conference with HHS; Mr. James indicated to HHS that a copy of the GBE report would be sent to the agency for comment. PE 145 at 3. The team held an exit conference with OMB the same week. RE 89 at 1.

181. On January 31, 2008, Mr. Mihm received, for the first time, a full draft of the GBE report. RE 89 at 1; NTR at 135. Although his expectation was that drafts “be fairly close to street ready,” he found the GBE draft problematic in that the grant characteristics section began with an extensive discussion of methodology rather than leading with the “fundamental bottom line,” such that “if the client reads nothing else, this in the highlights is what we wanted them to read.” RE 89 at 6, 14; NTR 135-142. Contrary to his expectations for a GAO report, the draft was not written so that busy readers could quickly understand the importance of what they were reading. *See* NTR 139-41. Mr. Mihm noted that the importance of the findings was unclear because the draft did not provide “a clear sense about is there a problem, and if there’s a problem what should [the reader] be doing to correct it.” *Id.* at 140-41. Mr. Mihm also had issues regarding the discussion on the limitations of the grant characteristics findings. RE 89 at 14; NTR 141-42, 1575. Mr. Mihm testified that he reviews drafts produced by SI teams before Second Partner review, and expects a team to incorporate his comments before sending a draft forward. NTR 96.

182. On February 14, 2008, Mr. James sent Petitioner a revised Highlights section based on comments from Mr. Czerwinski. PE 147. Ms. Donahue emailed in response that she had not seen Mr. Czerwinski's comments, but that based upon Mr. Mihm's concerns, Mr. James's version "provides too much contextual information and does not emphasize the findings as much as it should." *Id.* Her email included a link to GAO guidance on writing Highlights. *Id.* Mr. James in turn forwarded the message from Ms. Donahue to Mr. Czerwinski with the note, "fyi, just another example of: You can say it; I can write it; but Pat disagrees with it. This is why it is probably going to be the middle of next week before I will be comfortable giving the draft back to you and Chris [Mihm]." *Id.* Mr. Czerwinski replied, "you get a [P]urple [H]eart." *Id.*

K. Second Partner review period

183. After working through Mr. Mihm's comments, the team submitted a revised draft GBE report to Mr. Mihm on February 25, 2008. JE 31 at 241. Mr. Mihm made additional comments and on March 4, 2008 a draft was sent to Kathy Allen, a Director in GAO's Quality and Continuous Improvement Office, who served as the Second Partner reviewer for the GBE. JE 31 at 231-39, 241, 251-52; NTR 1585-86; *see* JE 11.

184. Second Partner review is intended to evaluate whether the report meets GAO standards from the perspective of an objective, third party. STR 446-47; JE 33²⁴ at 82; *see* JE 10. The GBE report could not be sent out for agency comments or issued without Ms. Allen's approval. NTR 1585-86; STR 442.

185. Ms. Allen returned the draft GBE report on March 6 with comments and edits marked throughout. *Id.* at 1586; JE 11. She had significant concerns and did not authorize the

²⁴ Ms. Allen's deposition was admitted into the record in lieu of her testifying in person. For consistency of reference, the deposition will be cited as JE 33; *see* NTR 1616.

report to go forward. NTR 1587-89. Ms. Allen found that the “scope and methodology wasn’t set up” in the Highlights section. JE 33 at 59-60. She also found that the grant characteristics section lacked necessary context, in that the “findings for characteristics [were not] clear because [there was] no context of other characteristics in ea[ch] category.” JE 33 at 59-63; JE 11 at 1, 3, 7. She returned the draft with the requisite Second Partner Concurrence Tool marked “Needs Discussion” in three areas: Presentation, Highlights, and Recommendations/Matters. JE 10; NTR 1586-87; STR 441. The “Needs Discussion” mark connotes that the draft does not meet a GAO report standard and that there were “serious issues that have to be resolved.” NTR 991-92, 1587-89; JE 10.

186. Messrs. James and Czerwinski considered it a serious and significant problem that the report received the “Needs Discussion” checkmarks. STR 441-42; NTR 991-92, 1588-89. Neither Mr. James nor Mr. Czerwinski had previously overseen a report that received a “Needs Discussion” checkmark. NTR 992, 1589.

187. On March 10, 2008, Mr. James emailed a summary of Ms. Allen’s cover page comments on the draft to the team members. PE 152. Within the hour, Ms. Ortiz sent an email to ARM co-workers noting that

a lot of the problems that we discussed with the team along the way—particularly with respect to finding 2 – also stood out to QCI. Most importantly, the failure to control for other characteristics when describing results or to provide better context by analyzing characteristics of all grants in the system are both issues. We repeatedly offered and encouraged the team to do both analyses (the multivariate assessment and analysis of additional data) and Stan and Tom explicitly refused.

QCI also wasn’t thrilled with the recommendation, which was something ARM’s work on the data did not support (thought the team felt its other audit work was sufficient support.)

PE 152.

188. On March 19, 2008, Ms. Allen met with Mr. James, Mr. Czerwinski and Ms. Ortiz to discuss her concerns with the draft report. Ms. Allen characterized the grant characteristics section of the draft as “no context, no clue.”²⁵ JE 31 at 281; JE 33 at 51-52.

189. The lack of context led Ms. Allen, like Mr. Czerwinski, to question the overall utility of the findings in the grant characteristics section. JE 11 at 1, 7; *see* JE 33 at 60-63.

190. Mr. James testified that he and Mr. Czerwinski knew that the team could not provide the context Ms. Allen sought. NTR 1591-92. Because the team only had data from the PMS closeout reports and not for the entire universe of PMS grants, it could not state whether its findings with regard to the PMS closeout grants “represent a disproportionate share compared to all programs and all grants” in the PMS. *Id.* at 1592. No amount of detail or explanation of the PMS closeout data would resolve this fundamental limitation and address Ms. Allen’s concern. *Id.* at 1593-94, 1596.

191. On March 20, 2008, Rebecka Derr, the Staffing Specialist for SI, sent an email to all SI staff who were scheduled to be given a new assignment in April or May, including Ms. Donahue. PE 157. The email instructed the recipients to review an attached list of upcoming engagements and respond via email with their assignment preferences no later than March 26, 2008. *Id.* Mr. James, who also received a copy of the email, notified Ms. Derr that Petitioner would not be ready to start a new engagement on her scheduled release date of May 15 because the issuance date for the GBE report was being pushed back. *Id.* Mr. Czerwinski, who was also copied on the staffing email, emailed Ms. Derr and suggested that Petitioner remain on the April/May reassignment list and that her new engagement team be asked “to be a little flexible”

²⁵ Ms. Allen also raised issues with the tables in the grant characteristics section. JE 11 at 16-19; NTR 1591. Further, although the draft report explicitly discussed the limitations of the grant characteristics analysis, the nature of Ms. Allen’s questions indicated that readers would have difficulty understanding them. NTR 1592-93; JE 11 at 7.

with Petitioner's start date. *Id.* Ms. Derr agreed with Mr. Czerwinski's proposal and kept Petitioner on the staffing list. *Id.*

192. Petitioner was on leave from March 13 until she returned to work on March 25, the day before her staffing preferences were due. JE 31 at 286, 291. Petitioner testified that she did not read Ms. Derr's email on March 25 because she and Mr. James were attending meetings and addressing issues regarding the GBE report, and that she was out of the office the following day. NTR 830-32; *see also* STR 660-62.

193. On March 25, 2008, Mr. James sent Mr. Czerwinski an email captioned "thinking creatively (again)," explaining that he needed to ask Congressional requesters for an extension on the report issuance until May 2008, and asking if Mr. Czerwinski knew of any Congressional event that Mr. James could tie to a request for an extension. PE 158.

194. On March 31, 2008, Petitioner sent an email to Ms. Derr (with a copy to Mr. James) stating that she had been prematurely assigned to a new job, "did not review the available jobs or submit any preferences," and had "been out of the office (off & on) with a sick child . . . and was away on annual leave when this preference was due." JE 31 at 291.

195. Ms. Derr replied on April 1, 2008, noting that she "wasn't aware that [Petitioner was] out of the office until the day before preferences were due . . . (you didn't have any 'out of office' auto reply on your e-mail)." *Id.* On the same day, Petitioner came to Mr. James's office upset and angry and told Mr. James that he should have informed her that she was up for reassignment. JE 31 at 292. Mr. James told Petitioner that he had informed Ms. Derr about the need to delay Petitioner's reassignment until the Grant Balances Engagement was finished, and asked Petitioner to speak with Ms. Derr about the issue. *Id.*; NTR 1574-75. By the end of the

day, Petitioner had discussed the issue with “the SI Front Office” and it was determined that she could wait until the next cycle (June/July 2008) to be staffed. JE 31 at 292; NTR 842-44.

196. Concurrent with Second Partner review, the team also submitted the draft for review by stakeholders in the Office of the General Counsel and in the Financial Management and Assurance (FMA) team. NTR 1575-76. On April 2, while the GBE staff worked to address Ms. Allen’s comments, Petitioner and Mr. James received the combined comments of OGC and FMA. RE 83 at 1; NTR 1575-78. FMA commented that the grant characteristics section of the report was “meaningless and confusing” and that the data was “not really meaningful.” RE 83 at 2. OGC also was confused by the grant characteristics discussion and noted that the discussion seemed more appropriate for an Objectives, Scope and Methodology section, as Mr. James had pointed out months earlier. RE 83 at 16; NTR 1581-83.

197. On April 7, 2008, Mr. James sent an email to the Grant Balances Engagement team advising them that “all of our key reviewers—First Partner, [Managing Director], Second Partner, GC, and FMA—have expressed serious concerns that the findings in our ‘grant characteristics’ section have no real meaning because we do not know whether the amounts of undisbursed funds for each grouping of grants (*i.e.*, size, project/formula, grantee type, and contribution required) are disproportionate. They have also had questions and issues with the data in the four tables.” RE 74 at 1. Mr. James proposed that the team reduce the text of the grant characteristics section and remove the tables. *Id.* He also provided a draft illustrating his proposed revisions. Further, he recognized that the team would not be able to address the fundamental concern—raised by multiple reviewers—that “there was no connection between our analysis and what we wanted to say about grants management.” NTR 1594-96. The team’s attempts to explain the analysis and its limitations had confused reviewers and caused them to

question the extensive discussion of methodology. *Id.* at 136-142, 1578-83, 1596; RE 89 at 6, 14; RE 83 at 2, 6, 16.

198. Petitioner replied to Mr. James's email the same morning and again resisted his views. RE 75 at 1. She did not "think it [was] necessary to further reduce the grant characteristics section," because the reviewers had raised issues about other sections of the draft report, and the team had been able to successfully respond to those other concerns. *Id.*; NTR 1596.

199. On April 8, Mr. James met with Petitioner to discuss his proposed revisions in response to the reviewers' concerns, and informed her that Mr. Czerwinski agreed with his suggested changes. JE 31 at 298; NTR 1596-97. According to Mr. James's notes, Petitioner "refused to accept this solution and asked me to not talk but just listen to her point of view. . . . At one point, [Petitioner] prefaced a comment with the phrase 'goddamn it, Tom!'" JE 31 at 298; NTR 1596-98. Petitioner also stated that she "was not impressed" with the fact that Mr. Czerwinski had to sign off on the report and that she was willing to meet directly with Mr. Mihm, Ms. Allen, or anyone else who had issues with the report in order to convince them she was right. JE 31 at 298; NTR 1597-98. Mr. James testified that "this particular exchange was pretty heated." NTR 1598. He viewed Petitioner's statements as "anathema" to "role model" performance in the competency of Collaborating with Others and considered her response to have been inappropriate; "it certainly wasn't above a meets expectations." *Id.* at 1598-99. Mr. James considered this exchange when he evaluated Petitioner's performance for the 2008 appraisal cycle. *Id.*

200. Following his April 8, 2008 discussion with Petitioner, Mr. James asked Ms. Ortiz to call regarding reporting issues. She responded with an email, which also went to team

members and supervisors in ARM. In that email, Ms. Ortiz advised Mr. James that ARM disagreed with his proposed statement that “Analysis of Expired Grants with Certain Characteristics is not Conclusive.” She stated that if he chose to exclude certain analysis, that statement should also be excluded; and further, ARM wanted its name removed from the report and would sign the Form 124²⁶ noting its disagreement. JE 31 at 299.

201. On April 9, 2008, Ms. Ortiz proposed alternatives and repeated that if Mr. James insisted on his proposed changes, ARM would sign the Form 124 noting its disagreement. RE 76. Mr. James sent a modified proposal the following day “that hopefully addresses some concerns.” JE 31 at 299-300; RE 77.

202. On April 23, 2008, Mr. James met with Petitioner to provide mid-point performance feedback. He advised that she was at the “meets expectations” level in all eight competencies. JE 31 at 318. She replied that she “wholeheartedly disagreed” with the interim assessment. *Id.* at 319.

203. On April 25, 2008, Mr. James sent a revised draft GBE report to Ms. Allen for Second Partner review. NTR 1601-02; JE 12. The grant characteristics section had been reduced from four pages in the previous draft to one page in the April 25 draft. JE 11 at 14-18; JE 12 at 15-16.

204. Ms. Allen notified Mr. Czerwinski on April 25 that because her comments on the Highlights page had not been incorporated in the new draft, she would not continue reading the latest revision. JE 31 at 322. Mr. James checked and found that “the most recent version of the Highlights page . . . did not include any of the changes I had asked Pat [Donahue] to review in

²⁶ Form 124 is a form signed by each of the stakeholders of an engagement, stating that “the report accurately represents the analyses and treats them in accordance with professional standards.” NTR 419; *see id.* at 299, 648, 1292.

my email of 3/20/08.” *Id.* Ms. Donahue responded that “[p]erhaps [he] did not save the changes” in the document management system. PE 165. Mr. James forwarded that response to Mr. Czerwinski with the comment, “unlike some of us, Pat [Donahue] accepts none of the blame”; Mr. Czerwinski replied, “thanks for sharing this, Tom.” *Id.*

205. Ms. Allen provided her comments on April 30 but did not approve the draft, noting that the GBE team had not resolved her concerns from the previous draft. JE 33 at 71-77; NTR 1601-02, 1604. As to the grant characteristics section, Ms. Allen stated that the team had not successfully addressed whether it was meaningful to state that the largest balances of undisbursed funding among expired grants were awarded on a project basis or to states. JE 12 at 7; JE 33 at 73-74. She also noted that the draft included essentially the same paragraph in the Highlights page and in the results in brief, or “RIB,” that appeared in the body of the report, whereas GAO reports typically provide a longer elaboration in the body than in the Highlights page and RIB. JE 33 at 75-76; JE 12 at 16. Recognizing that it was the team’s prerogative to abbreviate the grant characteristics section, Ms. Allen believed that the body needed at least some additional elaboration compared to the earlier paragraphs. JE 33 at 76-77. She met with the team on May 8 to discuss her concerns. JE 31 at 331.

206. On May 15, 2008, Ms. Donahue sent Ms. Derr and Mr. James an e-mail noting that her release date for reassignment was July 21 (JE 31 at 338) and asking when she should submit her staffing preferences for her new assignment. Ms. Derr replied the next morning that she “should submit [her] preferences for this staffing round.” PE 167. Mr. James forwarded the email to Mr. Czerwinski, who responded: “Proof of advance notice.” *Id.* Mr. Czerwinski then commented to Mr. Derr, “This one is never easy, huh, Becky? Thanks for your patience here.” *Id.*

L. The filing of the third amended Charge and subsequent events

207. On May 21, 2008, Petitioner filed a third amended Charge alleging that her midpoint feedback “discounted [her] accomplishments and achievements and was given in retaliation” for protected activity. She also claimed that it was part of “ongoing, retaliatory hostile work environment which stretches back to December 2006 when [she] filed [her] first charge against these three managers.” JE 26.

208. On May 22, 2008, Ms. Donahue emailed Ms. Ortiz the latest version of the draft report for her review and suggestions prior to the next round of Second Partner and General Counsel review. PE 170. Mr. James forwarded the communication to Mr. Czerwinski, who responded: “such a help.” PE 170.

209. Messrs. James and Czerwinski determined that the best way to respond to Ms. Allen’s comments was to collapse the grant characteristics section into the first section of the report rather than devoting a separate section to the analysis. NTR 1604-05. The team submitted a revised draft to Ms. Allen on May 23, 2008, which contained a short, two-paragraph discussion of grant characteristics collapsed into the first section of the report. JE 13 at 14-15. Ms. Allen returned the draft on May 28 with minor comments and the signed Concurrence Tool. JE 13 at 2; JE 10 at 2; NTR at 1604.

210. The Second Partner review process normally takes approximately one week to complete, but on the GBE it took nearly three months. NTR 1595, 1605. Mr. James found the time spent on Second Partner review “incredibly long. I’ve never seen that happen before and I probably will never see it again.” NTR 1605. He believed that Petitioner’s performance contributed to the long length of time. *Id.* at 1606-07. In his view, if Petitioner had not resisted

Mr. Czerwinski's suggested approach to the grant characteristics section, Second Partner review would have been significantly shorter. *Id.*

211. On June 3, 2008, Mr. James asked Petitioner to forward copies of the draft report to certain officials at HHS. Petitioner asked one of the officials if he believed it was necessary to send the draft to the Deputy Secretary for Grants, in accordance with Mr. James's assurance at the exit conference in January 2008. Mr. James forwarded this exchange to Mr. Czerwinski with the note, "I think we are ok [with] HHS but will continue to monitor any discussions Pat has with them." Mr. Czerwinski responded, "I agree, Tom. [B]ears close watching, as this is another case of Pat potentially making a problem where none currently exists. At least you know about this. The ones we don't know about really bite us. Thanks for your diligence." PE 176.

212. On June 9, 2008, Mr. James was advised by GAO's Office of the General Counsel that Petitioner had filed an amended Charge based upon her mid-point feedback in April 2008. Mr. James notified his supervisors, Mr. Czerwinski and Mr. Mihm, that he had been asked to provide the basis for the feedback. JE 31 at 355-56.

213. On June 17, 2008, HHS advised the GBE team that they had "[n]o substantive comments." PE 178 at 1.

214. On July 3, 2008, OMB notified Mr. James by email that it would contact Ms. Donahue by July 18 with comments on the report, "if any." PE 183 at 1. Based on this message, Petitioner emailed Mr. James as follows: "The phrase 'if any' in the message below suggests that OMB might not have any comments. I was wondering if you had the chance to talk to [the OMB representative] and if he gave you this impression?" Mr. James forwarded this email to Mr. Czerwinski with the notation "... still bringing the pain. . . ." *Id.*

215. On July 18, 2008, Mr. Czerwinski emailed Mr. James that Petitioner’s supervisor on her upcoming assignment—Bill Doherty—had asked when she would be available and that Mr. Czerwinski had said that “he needed to get specifics from you [Mr. James], but from my point of view, the sooner the better.” RE 61 at 2.

216. On July 21, 2008, GAO’s Office of the General Counsel informed Mr. James that a Petition had been filed with the Personnel Appeals Board on behalf of Ms. Donahue. JE 31 at 369.

217. On July 23, 2008, Mr. James, Mr. Czerwinski and Ms. Donahue conducted a telephone conference with OMB officials regarding that agency’s preliminary oral comments on the GBE.²⁷ Ms. Donahue took detailed notes of the conference and drafted a Record of Interview, which she provided to Messrs. James and Czerwinski. NTR 807-08; *see* PE 191. She also drafted suggested rebuttals to the comments, which she sent to Mr. James. NTR 808-09; *see* PE 189; PE 193. Mr. James forwarded these drafts to Mr. Czerwinski, who replied: “Well we sure got quantity from her, now let’s see about the quality.” Mr. James responded that he had done “some heavy editing of the summary list.” PE 193 at 1.

218. Mr. James forwarded his email exchange with OMB about the timing of comments, which referenced that agency’s clearance process, to Mr. Czerwinski on August 7, 2008, to which Mr. Czerwinski replied: “water torture.” PE 198A.

219. Later that day, OMB submitted formal comments to Mr. James and Ms. Donahue. JE 31 at 392. Mr. James sent the comments to Ms. Ortiz, Mr. Czerwinski, and Neill Martin-Rolsky (an attorney in GAO’s OGC), and began preparing a response. *Id.*

²⁷ OMB had initially indicated to Ms. Donahue that it would adopt GAO’s recommendations in their entirety, but later changed its mind. NTR 806-07.

220. At 9 a.m. on August 8, Mr. James left a voice message for Mr. Czerwinski and Ms. Donahue saying that he would start drafting the team response to the OMB letter. *Id.* At 9:31 a.m., Mr. James forwarded his draft response and asked for comments from Mr. Czerwinski, Ms. Donahue, and Elizabeth Curda (the SI employee responsible for performance and accountability reporting). JE 31 at 393; NTR 820-21. He then forwarded the draft to Mr. Martin-Rolsky. JE 31 at 393.

221. At 10:50 a.m., Mr. Czerwinski sent Mr. James his revisions to the draft OMB response. *Id.* At 10:59 a.m., Ms. Donahue sent Messrs. James and Czerwinski her “initial observations on OMB’s comments.” JE 31 at 394-97. Because of an erroneous email address, Mr. James did not receive the message until 12:01 p.m. NTR 818; *see* PE 198D.

222. Ms. Donahue’s initial observations stated that “OMB makes no explicit commitment to address” the grants management problem; she included a multi-page chart listing OMB comments and her observations on those comments. PE 198E; JE 31 at 394. Mr. James remarked by email to Mr. Czerwinski on these observations: “here’s the full treatment—Classic Pat.” PE 198D (12:29 p.m.). The supervisors then drafted language that noted OMB should have discretion to choose how to handle the problem of undisbursed grant balances, which Mr. James forwarded to Petitioner at 12:57 with the note: “I read through your comments and talked to [Mr. Czerwinski]. Here is the version we want to go with.” PE 198B. Mr. Martin-Rolsky (OGC) weighed in at 1:01 p.m. with the comment that language responsive to Petitioner’s concern about OMB’s lack of commitment should be added; he suggested specific language to incorporate that concern, and he also noted that OGC needed to sign off on the response. PE 198C.

223. At 2:10 p.m., Petitioner emailed Messrs. James and Czerwinski that OMB “only states that the reporting include the amount of undisbursed grant funding. OMB does not explicitly state that the reporting it would consider would include the last three reporting elements that GAO recommends. Could this mean that OMB does not concur with the other reporting elements GAO recommends?” PE 198F. Mr. James forwarded this message to Mr. Czerwinski with the comment: “more hand wringing;” the latter replied: “Good thing you are patient.” *Id.*

224. The team accepted the draft language supplied by Mr. Martin-Rolsky, with some editing, that responded to Petitioner’s concern about OMB’s lack of commitment to implement the GBE report recommendations. PE 198C; PE 198I. Mr. James thanked Mr. Martin-Rolsky for his quick input and told him that his comments “added value and clarity to [the team’s] response.” PE 198H; *see* NTR 823.

225. The team issued the Grant Balances Engagement report on August 29, 2008, approximately 10 months after the originally planned issuance date of October 31, 2007. NTR 1609-10; JE 31 at 433; *see* JE 30.

226. Once the report was issued, Petitioner began work on a new engagement under the supervision of a new supervisor. NTR at 1610. However, because Mr. James served as her DPM for the vast majority of the 2008 appraisal period, he was responsible for preparing Petitioner’s 2008 rating. *Id.* at 1611-12.

227. Mr. James made the final entry in his performance log for Petitioner on September 16, 2008, concerning the ending paperwork for the Grant Balances Engagement. JE 31 at 436.

M. FY 2008 appraisal and related Charge

228. In preparing Petitioner's 2008 appraisal (covering from October 15, 2007 to October 14, 2008), Mr. James considered her self-assessment, his notes on Petitioner's performance, and information on Petitioner's performance as an adjunct instructor provided to him by GAO's Learning Center. NTR at 1611. He also discussed Petitioner's performance with Bill Doherty, the Assistant Director on her new assignment. *Id.* at 1611-12. After reviewing the Band IIB performance standards, Mr. James prepared a proposed rating which he then discussed with Mr. Czerwinski. *Id.* at 1611. Mr. James rated Petitioner as "meets expectations" in all eight competencies. JE 16 at 1.

229. In accordance with SI policy, Mr. James also discussed the rating before an SES panel comprised of Managing Director Mihm and the Directors in SI. NTR 1613. Petitioner's ratings did not change as a result of the SES review process. *Id.* at 1000-01 (Testimony of Mr. Czerwinski).

230. Petitioner received her performance appraisal for FY 2008 on December 6, 2008. JE 27 at 2; *see* JE 16.

231. On December 11, 2008, Petitioner filed a Charge with the PAB/OGC alleging that her 2008 appraisal "undervalued and minimized [her] work and was measured using improper standards." JE 27 at 1, 6. She also alleged that it was given in retaliation for engaging in protected activity and part of a continuing hostile work environment. *Id.* at 6. She specifically identified Messrs. James, Czerwinski, and Mihm as responsible officials on this Charge. *Id.*

232. On December 17, 2008, Mr. James met with Petitioner to discuss her performance. PE 230 at 34-37. Petitioner informed Mr. James that she "obviously disagreed" with her rating and that he "had drastically undervalued the performance she gave to the engagement." *Id.* at 37.

III. ANALYSIS

Petitioner alleges that GAO, through Messrs. James, Czerwinski, and Mihm, violated 5 U.S.C. §2302(b)(9) by lowering her fiscal year (FY) 2007 and 2008 performance appraisals in retaliation for engaging in protected activity.²⁸

Section 2302(b)(9) provides:

[a]ny employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority . . . take or fail to take, or threaten to take or fail to take, any personnel action against any employee . . . because of . . . the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation[.]

In order to establish a claim of retaliation under section 2302(b)(9), a petitioner must prove, by a preponderance of the evidence,²⁹ that: (1) the petitioner engaged in protected activity; (2) the petitioner was subsequently treated adversely; (3) the allegedly responsible individual knew of the protected activity; and (4) a genuine nexus exists between the protected activity and the personnel action. *Pernell v. GAO*, PAB Docket No. 01-03 at 12 (3/13/03). In order to establish a genuine nexus, a petitioner must establish that “the protected activity was a ‘significant factor’ in the personnel decision about which the employee is complaining.” *Davis v. GAO*, PAB Docket Nos. 00-05, 00-08 at 26 (7/26/02), *aff’d* (7/11/03); *see Riley v. U.S. Postal Serv.*, 34 Fed. Appx. 777, 781 (Fed. Cir. 2002). Where the employer offers legitimate, nondiscriminatory reasons for its actions, it is necessary to examine whether the employee has discredited the proffered reasons and shown them to be pretextual. *Baloch v. Kempthorne*, 550 F.3d 1191, 1200 (D.C. Cir. 2008); *Adeyemi v. District of Columbia*, 525 F.3d 1222, 1226-27

²⁸ As noted above, Petitioner requested in her Post-hearing Brief that her other claims be dismissed. *See* n.1.

²⁹ The Board's rules define "preponderance of the evidence" as that degree of relevant evidence which a reasonable person, considering the record as a whole, would accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not. 4 C.F.R. §28.61(d).

(D.C. Cir. 2008). In determining whether the personnel decision "is causally connected to the alleged retaliatory motive, it is necessary to balance the intensity of the motive to retaliate against the legitimate basis for the agency's action." *Holtgrewe v. FDIC*, No. 98-3068, 1998 U.S. App. LEXIS 5291 at 9 (citing *Warren v. Dep't of Army*, 804 F.2d 654, 658 (Fed. Cir. 1986)). Finally, if an agency "honestly believes in the reasons it offers" for its personnel decision, no finding of retaliation is warranted even if the agency is mistaken in its reasoning. *Beyah v. Dodaro*, 666 F. Supp. 2d 24, 33 (D.D.C. 2009).

The parties agree that the first three elements of a retaliation claim have been established in this case. GAO Brief at 41; Pet. Brief at 39. Specifically, as to the first element, the filing of a Charge with the PAB Office of General Counsel is protected activity within the meaning of 5 U.S.C. §2302(b)(9). *See Davis v. GAO*, at 26 (7/26/02). Ms. Donahue filed Charges and amended Charges against GAO and/or her supervisors on February 2, 2006; December 6, 2006; May 10, 2007; December 7, 2007; May 21, 2008; and December 11, 2008. RE 1; JE 23-27. As to the second element, Petitioner was treated adversely after she filed Charges³⁰ because the alleged lowering of her performance appraisals from the levels that she believed were proper reduced the amount of performance pay that she would otherwise have received with higher appraisals. *See Malphurs v. GAO*, at 3-4 (*en banc*) (7/8/92). As to the third element, Messrs. James, Czerwinski, and Mihm were aware that Petitioner had filed Charges prior to the issuance of the appraisals. NTR 603-05; STR 688-89; JE 31 at 29, 166, 355-56.

The parties disagree as to the fourth element: whether Petitioner has demonstrated by a preponderance of the evidence that a genuine nexus exists between her protected activity and her 2007 and 2008 appraisals.

³⁰ Unless otherwise indicated, the term "Charges" in this Decision includes amended Charges as well.

With respect to the allegation against Mr. Mihm, I find that Petitioner has not demonstrated by a preponderance of the evidence that Mr. Mihm had any input in preparing, determining, revising, or otherwise affecting Petitioner's FY 2007 and 2008 performance appraisals. Mr. James and Mr. Czerwinski were the individuals responsible, respectively, for preparing and reviewing Petitioner's FY 2007 and 2008 appraisals. *Supra*, ¶¶10, 15-16, 31, 141. The only role that Mr. Mihm had in the appraisal process was to facilitate the SES review of all SI appraisals. *Supra*, ¶¶142, 229. Petitioner's ratings did not change as a result of this process, and there is no evidence that Mr. Mihm recommended that Mr. Czerwinski or Mr. James lower Petitioner's ratings or directed them to do so. *See id.* Accordingly, with respect to Mr. Mihm, Petitioner has not demonstrated by a preponderance of the evidence that a genuine nexus exists between her protected activity and her 2007 and 2008 appraisals because Petitioner has not shown that Mr. Mihm took a personnel action against her.³¹

With respect to Mr. James and Mr. Czerwinski, a more detailed analysis is necessary. The first question to be resolved is what Charge allegedly led to retaliation. Petitioner first filed a Charge with the PAB Office of General Counsel in February 2006.³² That Charge involved a GAO-wide policy decision and challenged the Petitioner's (and 11 other individuals') placement

³¹ It is, therefore, unnecessary to resolve whether, as Ms. Donahue testified, Mr. Mihm stated "it's always personal" after she told him that she had filed a Charge and that it was nothing personal. NTR 605. Mr. Mihm testified that he did not recall making such a statement. NTR 117-18; *see* ¶44, *supra*. Even assuming, without deciding, that Mr. Mihm made the alleged remark, there is no evidence that he had any role in lowering Petitioner's ratings or directing or suggesting to anyone else that they do so.

³² Petitioner does not allege that she experienced any retaliation as a result of filing the February 2006 Charge. Nonetheless, consideration of this Charge is pertinent with respect to analysis of Petitioner's December 2006 Charge.

in Band IIA during the Band II restructuring. In that Charge, Petitioner specifically named four high-ranking GAO officials as allegedly responsible parties.³³ RE 1 at 4.

Both parties agree that for several months starting in March 2006 (when Mr. James and Mr. Czerwinski became Petitioner's supervisors), Mr. James and Mr. Czerwinski treated Petitioner well. STR 159 (Testimony of Mr. James); STR 690-96 (Testimony of Mr. Czerwinski); Pet. Brief at 22-25; Pet. Reply at 1; GAO Brief at 43-44. For example, in May 2006, Petitioner applied for competitive placement in Band IIB. NTR 1098. As part of Petitioner's application process, Mr. James prepared and Mr. Czerwinski approved the mid-cycle appraisal, in which they "bumped up" the rating proposed by her Learning Center supervisor from five "exceeds expectations" ratings so that she received this rating in all seven competencies. NTR 558-59; *see* JE 1. In addition, Mr. Czerwinski assisted Ms. Donahue in preparing for her interview with Mr. Mihm, the selecting official.³⁴ NTR 559. *See also* NTR 649-50 (Mr. James and Mr. Czerwinski praised Ms. Donahue for a GBE slide presentation in June 2006); PE 6 (Mr. Mihm noted in July 2006 "very thoughtful engagement and design"); NTR 561-63 (referencing PE 223) (Mr. Czerwinski congratulated Ms. Donahue in July 2006 upon her placement in Band IIB and complimented her early leadership of the GBE); PE 10 (in July 2006 Ms. Donahue prepared financial benefit language at Mr. James's request, and he characterized it as "perfect"); NTR 662, 665 (in September 2006 Mr. James and Mr. Czerwinski complimented Ms. Donahue on another slide presentation she had prepared); and PE 31 (in

³³ Messrs. Mihm, Czerwinski, and James were not among the four named individuals. Petitioner told Mr. Czerwinski in the Spring of 2006 that she had filed the Charge. STR 683-84. Mr. Czerwinski then relayed this information to Mr. Mihm. STR 690-91. Mr. Czerwinski testified that when he learned of Petitioner's Charges, he "would have conversations with [his] boss and [his] direct report, . . . Chris Mihm and Tom James." STR 691-92.

³⁴ Mr. Mihm, who was also aware of Petitioner's February 2006 Charge, selected Petitioner for placement in Band IIB in July 2006. *See* STR 690-91; NTR 10.

November 2006, Mr. Czerwinski elected not to continue participating in a telephonic entrance conference Ms. Donahue was conducting, telling her she had the conference “well-in-hand”).

Petitioner filed another Charge with the PAB Office of General Counsel on December 6, 2006. JE 23. Petitioner asserts that her supervisors treated her differently after she filed this Charge; specifically, she alleges in her Post-hearing Brief that after she filed her December 2006 Charge, her supervisors were no longer laudatory and supportive, and instead became hostile and retaliated against her.³⁵ Pet. Brief 39-40; *see* NTR at 605-06. GAO argues that the filing of the December 2006 Charge would not have provided a reason for the supervisors to retaliate because, like the February 2006 Charge, the December 2006 Charge did not name any of Petitioner's supervisors and instead challenged a GAO-wide policy (this time, regarding the timeframe for performance appraisals following an individual's placement in Band IIB). GAO Brief at 42; *see* JE 23 at 4; NTR 603. In this regard, GAO notes that Petitioner told Mr. James and Mr. Czerwinski not to take her December 2006 Charge personally, and both supervisors testified that they did not view this Charge as accusing them of any wrongdoing. GAO Brief at 42; *see* NTR 928-30; STR 157-58.

I find that the December 2006 Charge did not provide motivation for Mr. James and Mr. Czerwinski to retaliate against Petitioner. Like the February 2006 Charge, the December 2006 Charge challenged a GAO-wide policy. However, unlike the February 2006 Charge, the December 2006 Charge did not name any specific individuals as alleged responsible officials.

³⁵ In this proceeding, Petitioner has identified three different starting dates for the alleged retaliation. In the hearing, Petitioner testified that she noticed a change in her supervisors' treatment of her beginning in January 2007. NTR 606-07, 629. During closing arguments, counsel for Petitioner argued that the retaliation began after Petitioner filed her May 2007 Charge. *See id.* at 1786. In Petitioner's Brief, she claims that the retaliation began in December 2006. *See* Pet. Brief at 40. Consistent with Petitioner's Brief, I construe Petitioner's claim as an assertion that the alleged retaliation began in December 2006 after she filed her Charge that month.

Despite the fact that the Charge did not identify any individuals in the relevant section on the Charge form for such information, Petitioner contends both that: (1) it was "self-evident" that the Charge was against those who supervised her during the time at issue (NTR 603-04); and (2) the statement in the Charge that "I believe that my rating as a Band IIB for the period 10/05 to 10/06 was improper and determined in violation of law and GAO Orders[]" demonstrates that the "December 2006 Charge did accuse her supervisors of wrongdoing." Pet. Reply at 4 & n.3 (emphasis in original). *See* JE 23.³⁶

I disagree. Petitioner clearly knew how to identify individuals whom she alleged had committed wrongdoing, as evidenced by the fact that she did so both before her December 2006 Charge (as shown in her February 2006 Charge naming four high-ranking GAO officials) and after her December 2006 Charge (as shown by her subsequent filings in May 2007, December 2007, May 2008, and December 2008 naming Messrs. Mihm, Czerwinski, and James). RE 1; JE 24-27. Moreover, the substance of the December 2006 Charge challenged a GAO-wide policy, a policy that her supervisors were required to follow. If anything was "self-evident" from such a Charge, it was that this Charge, like the earlier Charge of February 2006 that also challenged a GAO-wide policy, challenged the actions of the GAO officials who were responsible for the formulation of that policy—not the actions of three supervisors who had no input in its development and no discretion in its implementation. This conclusion is strengthened by the allegation in the Charge claiming that Petitioner's appraisal "was improper and determined in violation of law and GAO Orders." JE 23. This allegation constitutes a challenge to the policy;

³⁶ I reject GAO's assertion that "Petitioner admits [that] her December 2006 Charge did not accuse Messrs. James and Czerwinski of any wrongdoing. *See* JE 23 at 4; NTR 603." *See* GAO Brief at 42 (underscoring and citations in original). To the contrary, Petitioner is asserting that the December 2006 Charge did accuse Mr. Czerwinski and Mr. James of wrongdoing, despite the fact that they were not specifically identified by name in the Charge.

it is not an assertion that her supervisors misapplied a GAO policy.³⁷ Indeed, as Ms. Donahue testified, shortly after she filed the December 2006 Charge, she told her supervisors not to take the Charge personally because it was directed not at them, but at the GAO policy they followed. NTR 604-05. Consistent with what Petitioner told them, Mr. James and Mr. Czerwinski testified credibly that they did not take the filing of this Charge personally. STR 157-58; NTR 928-30. Finally, they also testified credibly that they did not take it into account in appraising Petitioner's performance. NTR 1013, 1210.

Accordingly, based on the record, I find that Mr. James and Mr. Czerwinski had no reason to be, and were not, motivated by retaliatory animus as a result of the December 2006 Charge, and that this Charge cannot serve as the basis for a retaliation claim. *See Riley*, 34 Fed. Appx. at 780-81 (finding no retaliation where there was no evidence of retaliatory motive); *Simien v. U.S. Postal Serv.*, 99 M.S.P.R. 237, 251 (2005) (finding no causal connection where agency officials did not have “a significant motive to retaliate”).

However, even if I had found that the December 2006 Charge did provide motivation for Mr. James and/or Mr. Czerwinski to retaliate against Ms. Donahue, I find for the reasons discussed below that Petitioner has not established that a genuine nexus exists between the protected activity of filing the December 2006 Charge and the FY 2007 and 2008 performance appraisals.

³⁷ In this regard, Petitioner asserts that Mr. James and Mr. Czerwinski "did not like to be embarrassed," and implies that they were embarrassed by the filing of the December 2006 Charge and, therefore, had motivation to retaliate. Pet. Reply at 6. I find that this assertion is without merit. The two supervisors had no reason to be embarrassed by the filing of a Charge in which they were not named and which alleged, in essence, that their actions were consistent with a GAO-wide policy. Indeed, their actions were, in fact, consistent with a GAO-wide policy. *See* NTR 928-29, 1102 (GAO officials assured Mr. James and Mr. Czerwinski that they had correctly based Petitioner's 2006 appraisal only on her Band IIB performance). *See Donahue v. GAO*, PAB Docket No. 08-05 (8/11/09).

Petitioner properly acknowledges that there is no direct evidence of retaliation, but asserts that circumstantial evidence supports her allegations.³⁸ Pet. Brief at 56. The lengthy record in this case makes it abundantly clear that the Grant Balances Engagement was a difficult, complex, and frustrating work project, spanning an unusually long period of well over 2 years (from March 2006 to August 2008). NTR 564-65; NTR 1609-10. However, Petitioner asserts that it was not work-related judgments that determined her performance appraisals for her work on the engagement; rather, she contends that as a result of her Charges, her supervisors treated her with hostility and disrespect, incorrectly held her responsible for delays and difficulties on the engagement, failed to sufficiently credit her for work she performed, and consequently lowered her performance appraisals. Pet. Brief at 56.

The circumstantial evidence addressed by Petitioner and GAO will be considered next.³⁹

1. Performance appraisals

GAO asserts that Petitioner's performance appraisals themselves refute any claim of retaliation because her ratings over the three appraisal periods were relatively consistent. GAO Brief at 44. Petitioner's 2006 appraisal was the first appraisal she received that addressed solely her work as the AIC on the GBE (July through October 2006). That appraisal, which Mr. James

³⁸ As noted by Petitioner, the lack of direct evidence in a retaliation case "is unsurprising, given that there is almost never direct evidence of a prohibited personnel practice. *Chen v. GAO*, Docket No. 50-209-GC-84" (9/30/87). Pet. Brief at 56. In this regard, Petitioner admits that Messrs. James and Czerwinski did not make any statements to her regarding her claims at the PAB, *see* NTR 865-66, and there is no record evidence showing that they made any statements to each other or anyone else regarding her PAB claims.

³⁹ GAO correctly points out that Petitioner offered no evidence of any similarly situated individual (*i.e.*, an AIC supervised by Mr. James and Mr. Czerwinski who had not engaged in protected conduct and encountered comparable challenges on an engagement) receiving higher performance appraisals than she received. *Webster v. Dep't of Army*, 911 F.2d 679, 689-90 (Fed. Cir. 1990) (affirming finding of no nexus in section 2302(b)(9) case where employee failed to present evidence that similarly situated employees received more lenient sanctions for comparable conduct). However, while such evidence is one factor that could help to establish retaliation, its absence in this case is not fatal to Petitioner's claim.

gave to Petitioner before he learned of her December 2006 Charge (STR 156), contained two “exceeds expectations” and six “meets expectations.”⁴⁰ JE 2. That was the same distribution of ratings as her 2007 appraisal as a Band IIB covering the period from October 2006 to October 2007, which is the first performance appraisal she received following the December 2006 Charge.⁴¹ JE 6. Further, Petitioner’s 2008 performance appraisal as a Band IIB for the period from October 2007 to October 2008 (in which all eight competencies were rated as “meets expectations”), also prepared by Mr. James and Mr. Czerwinski, contained the same ratings in six of the eight competencies that she received in her 2007 appraisal. JE 16. Accordingly, Petitioner's overall appraisal for 2008 did not differ significantly from her supervisors' appraisals of her work on the Grant Balances Engagement in 2006 and 2007 as a Band IIB.

There is ample documentary and testimonial evidence in the extensive record to accept the Agency's stated bases for these ratings. In these circumstances, I find that the relative consistency of ratings by the same supervisors on the same work engagement tends to support a conclusion that the 2007 and 2008 appraisals were not retaliation for Petitioner's protected activity. *See Crist v. Dep't of Navy*, 50 M.S.P.R. 35, 39-40 (1991) (finding no retaliation where employee’s performance appraisals prior to protected activity were consistent with appraisals received after protected activity).⁴²

⁴⁰ Mr. Czerwinski testified, without contradiction, that "meets expectations" is the "most common" rating at GAO. NTR 938.

⁴¹ Under the GAO performance pay system, performance-based compensation is based on the number of ratings at a particular level, without regard to which competencies the particular rating applies to. *Pay Administration in the Analyst Performance-Based Compensation System*, GAO Order 2540.3, ch. 6, ¶4 (June 12, 2006) (PE 1); NTR 533-34 (Testimony of Margaret Braley). Thus, the fact that one of the “exceeds expectations” ratings was in a different competency from the 2006 appraisal had no effect on her performance-based compensation.

⁴² However, I reject GAO's argument that the lapse of time between the filing of Petitioner’s Charges and the issuance of her appraisals shows a lack of retaliatory motive. *See* GAO Brief at 46-47. While it

2. Emails

Petitioner asserts that numerous emails entered into evidence demonstrate that beginning in December 2006, Mr. Czerwinski and Mr. James retaliated against her for engaging in protected activity. Broadly speaking, Ms. Donahue's assertions regarding the emails fall into two categories: (1) claims that the emails show that, as a result of the Charges that she filed, her supervisors demonstrated hostility towards her and treated her performance more harshly than was warranted; and (2) claims that emails between Mr. Czerwinski and Mr. James demonstrate antagonism and disrespect towards Ms. Donahue as a result of the Charges that she filed.

As to the first category, I find that the evidence does not support Petitioner's contention. As an initial matter, I reject the contention that the emails demonstrate hostility towards Ms. Donahue. For example, Petitioner contends that immediately after she filed the December 2006 Charge, Mr. Czerwinski "began to inject himself forcefully" into the engagement, and cites to several emails from December and subsequent months as support for this "hostility," including a December 15, 2006 email from Mr. James to Ms. Donahue in which Mr. James states: "Need to keep [Mr. Czerwinski] in the loop from now on so he can help us find our way through the data to the message."⁴³ Pet. Brief at 40, 44; *see* PE 37.

The referenced emails do not demonstrate hostility; rather, they constitute typical and commonplace communications from a supervisor to an employee regarding aspects of a work

is true that GAO issued the 2007 appraisal almost a year after Petitioner's December 2006 Charge, and the 2008 appraisal almost two years after that Charge, appraisals for GAO employees are generally issued annually on a set schedule. NTR 527-30; JE 28. The timing of their issuance in this case is simply a function of that schedule and is no indication of retaliation or lack thereof.

⁴³ Other examples cited by Petitioner include a claim that Mr. Czerwinski exhibited hostility in December 2006 by insisting that the team conduct a case study (PE 36, 45), Mr. Czerwinski's response to a January 2007 email from Ms. Donahue to Mr. Mihm's administrative assistant asking whether Mr. Mihm would be available for the Design Summit on a particular date (PE 44), and a January 2007 email from Mr. James to Ms. Donahue regarding responsibility for various assignments on the engagement (PE 48).

project.⁴⁴ The emails address substantive matters relating to Petitioner's management of the engagement. They reflect concerns of Mr. James and Mr. Czerwinski with the progress of the engagement in the period leading up to the Design Summit because, in their supervisory view, Petitioner's attention was overly focused on data analysis instead of on her broader responsibility to manage the engagement.⁴⁵ See ¶¶51-56.

Moreover, even if some of the emails could be construed as being negative towards Ms. Donahue's performance and her management of the project, the evidence supports the conclusion that the emails reflected the professional judgment of the supervisors that the engagement was not proceeding in the manner that they had expected as a result of Ms. Donahue's performance. As Petitioner appropriately acknowledges (Pet. Brief at 57), whether that determination was right or wrong is immaterial to the claim before me as long as it was based on the supervisors' professional judgment. What is material is that the evidence does not demonstrate that the supervisors' view resulted from the Charge that Ms. Donahue filed in December 2006 or from her subsequent protected activity. *Baloch*, 550 F.3d at 1200.

⁴⁴ Petitioner ignores evidence in the record of continued favorable interactions with Mr. Czerwinski. *See, e.g.*, RE 25 (April 2007 email from Mr. Czerwinski thanking Petitioner for her work and advising her that GBE was discussed at the ERM [Engagement Review Meeting] without raising questions from the Acting Comptroller General); RE 26 (April 2007 email from Mr. Czerwinski thanking Petitioner for providing an update on help the team was getting from individuals outside SI).

⁴⁵ Petitioner acknowledges that she was not the only recipient of emails from Mr. James questioning the judgment of individuals who worked on the engagement. Petitioner testified that Mr. James and Ms. Ortiz had "heated email exchanges" (NTR 873) and that Mr. James questioned Ms. Ortiz's judgment (NTR 875) as well as that of a GAO OGC attorney (NTR 879); she also indicated that there "might have been one or two" "fairly tense" meetings where comments were directed at another ARM employee (NTR 878, 168-69).

As to the second category of emails, Petitioner contends that Mr. James's and Mr. Czerwinski's retaliatory animus is apparent from several emails they sent to one another in which they allegedly "demeaned or ridiculed" Petitioner. *See* Pet. Brief at 47-48, 57.⁴⁶

In my view, these emails clearly demonstrate two supervisors sharing their exasperation and frustration with having to deal with Petitioner's performance over the course of a complicated and lengthy work project;⁴⁷ they do not provide evidence of retaliatory animus for engaging in protected activity. The earliest email in this category cited by Petitioner was written in January 2008. *See* PE 144. In that example, after Mr. James had received information from Ms. Donahue in response to a question he had posed about the engagement, he emailed Mr. Czerwinski "ever helpful," to which Mr. Czerwinski replied "God help you." PE 144. These comments, while undeniably sarcastic in tone, focused on the work of the engagement and in no way implicated protected activity. At that time, the engagement was already considerably behind its original timeline and had encountered numerous problems; that time was also well over a year after Petitioner filed her December 2006 Charge.

While Petitioner had filed amended Charges in May and December 2007, the evidence that the GBE was taking unusually long and that continued disputes about the draft were causing further delay in early 2008 provides the backdrop for these emails. The timing of this first cited email is much more likely a reflection of the difficulties that were continuing on the progress of the engagement. Petitioner's repeated protected activity alone does not establish nexus for purposes of retaliation based solely on the temporal proximity of these emails (or other

⁴⁶ The parties disagree on the precise number of such emails. Pet. Brief at 44 ("at least ten"); GAO Response at 25 (stating that Petitioner only cites to nine emails, one of which does not refer to Petitioner). A review of the record reveals eleven emails in this category: PE 144, 147 and 198F each contain two emails referencing Petitioner; PE 176, 183, 193, 198D and RE 61 each contain one such email.

⁴⁷ Mr. James testified that in his 23 years at GAO, he had only participated in an engagement that lasted 18 to 22 months once or twice, and that he had never been on one as long as the GBE. NTR 1610.

managerial actions) to the Charge filing. It is not sufficient to establish pretext when the Agency has offered legitimate reasons for the challenged actions. *See, e.g., Woodruff v. Peters*, 482 F.3d 521, 530 (D.C. Cir. 2007); *Butler v. D.C. Housing Fin. Agency*, 583 F. Supp. 2d 61, 66 n.13 (D.D.C. 2009).

Similarly, the February 2008 email from Mr. Czerwinski to Mr. James (PE 147) does not show retaliatory intent. In that email, Mr. Czerwinski was replying to an email from Mr. James, in which Mr. James stated that Petitioner continued to disagree with their views on the grant characteristics section. *See id.* In his reply, Mr. Czerwinski told Mr. James, “you get a [P]urple [H]eart.” That statement expressed sympathy for Mr. James for the difficulties that he was having with Petitioner on the progress of the engagement. Nothing in that email, or any other email in the record, refers directly or indirectly towards any protected activity engaged in by Petitioner.

Further evidence that these emails did not demonstrate retaliatory intent is the fact that both supervisors sent similar emails to each other regarding another employee (Ms. Ortiz) who was involved in the engagement and who did not engage in protected activity.⁴⁸ *See, e.g.,* PE 119A (October 30, 2007 email from Mr. James to Mr. Czerwinski describing Ms. Ortiz’s email as her “latest shot across the bow” and stating “Don’t know why she didn’t [copy] you [on the email] since she sent it to everyone in ARM (again)”; PE 116 (October 24, 2007 email from Mr. James to Mr. Czerwinski expressing frustration with Petitioner and Ms. Ortiz).⁴⁹ Indeed, as noted in Petitioner’s Brief (49-50) and evidenced throughout the record, Mr. James and Mr.

⁴⁸ Petitioner testified that she “would not know” whether Ms. Ortiz had filed charges against Mr. James or Mr. Czerwinski. NTR 877. There is no evidence that she did so.

⁴⁹ Moreover, the emails regarding Petitioner and Ms. Ortiz are consistent with Mr. Czerwinski’s use of a sarcastic tone in other emails, as illustrated in PE 198A where he refers to OMB’s clearance process as “water torture.” *See* ¶218, *supra*.

Czerwinski disagreed with Ms. Ortiz regarding substantive aspects of the engagement,⁵⁰ just as they disagreed with Petitioner about substantive aspects of the engagement. The record reflects that these disagreements—both with Petitioner and with Ms. Ortiz—stemmed from the supervisors' perceptions of how work was proceeding on the engagement, and not from protected activity.⁵¹ As noted earlier, whether those perceptions were right or wrong is irrelevant; what matters is that they were based on the supervisors' judgment as to the work, not as a response to the protected activity of filing Charges.

3. Notes

Petitioner alleges that Mr. James's practice of keeping notes on her performance during part of the engagement (JE 31) is evidence of his retaliatory animus. According to Petitioner, the notes are not complete because they omit several emails between Mr. Czerwinski and Mr. James "that demeaned or ridiculed" her, and the absence of these emails, along with the fact that Mr. James was aware of Ms. Donahue's Charge filing, suggests that the accuracy of the notes is suspect. *See* Pet. Brief at 44, 57. In addition, Petitioner asserts that the fact that Mr. James kept notes only on her (NTR 1621-22), even though he supervised other AICs at the time, demonstrates his animus towards her. Pet. Brief at 44.

I do not find Petitioner's argument persuasive. First, the timing of the initiation of the note-taking process does not suggest that it was in response to Ms. Donahue's protected activity. Mr. James began keeping his notes on April 11, 2007 (STR 160), immediately after his April 2007 mid-point feedback session with Petitioner—about four months after she filed her

⁵⁰ In testifying about the issue discussed by Ms. Ortiz relating to real vs. nominal dollars, Mr. Czerwinski stated that it "[g]ives me a headache just remembering it." STR 782-83.

⁵¹ For example, as the team worked through comments on a draft report in April 2008, Mr. James emailed Mr. Czerwinski that he was "not sure what I can get [Petitioner] and [Ms. Ortiz] to agree to at this point." PE 160.

December 2006 Charge and one month before she filed her May 2007 Charge. Thus, nothing about the initiation of the note-taking process shows a close temporal connection that would suggest a reaction to the filing of a Charge.

Second, as Mr. James credibly testified, he began keeping these notes because during the April 2007 mid-point feedback session, Petitioner expressed views about her performance that differed greatly from his own, and she requested highly detailed and specific feedback from him about his expectations and her performance. Mr. James wanted to ensure that he had an accurate recollection of her performance when discussing that performance with her. STR 160-61. The fact that he began keeping these notes immediately after that mid-point feedback session supports Mr. James's testimony.⁵²

Third, the uncontested fact that the notes did not include several emails between Mr. James and Mr. Czerwinski that were disparaging of Petitioner does not discredit Mr. James's testimony or the accuracy of the documents contained in the notes. Mr. James did not testify that his notes included every email that mentioned Ms. Donahue; he testified that the documents and emails he copied into his notes were true and accurate copies of those particular documents:

Q: And you said you copied and pasted was it text from emails and other documents, is that correct?

A: Yes.

Q: And then, in copying and pasting the text, did you alter it in any way after pasting it in your notes?

A: No, I did not.

Q: Did you alter it in any way before pasting it in your notes?

A: No, I did not.

Q: So any copies of text from emails of documents in your notes are true and accurate copies?

A: Correct. Yes.

⁵² Nothing in the record establishes that any other AIC or employee supervised by Mr. James requested such detailed feedback or expectations.

NTR 1116. Moreover, Petitioner has not demonstrated that any specific emails or notes that are contained in Mr. James's note-taking were inaccurate or altered in any way.

Accordingly, I reject Petitioner's contention that the note-taking by Mr. James demonstrates animus towards her based on her protected activity.

4. Telework

GAO asserts, and I agree, that evidence of lack of retaliatory action by Mr. Czerwinski and Mr. James is seen in their treatment of Ms. Donahue's requests to telework. GAO Brief at 45; GAO Response at 4-5. Petitioner, who worked on a part-time schedule throughout the GBE (STR 147), was permitted to telework often.⁵³ NTR 867-69; STR 148. Under GAO policy, Mr. James could have required Ms. Donahue to seek advance approval or disapproved Petitioner's requests to telework, but he did not. Rather, he permitted her simply to inform him whether she would be in the office. *See* RE 61 at 1. As Petitioner acknowledged during the hearing, Mr. James always permitted her to telework through the entire course of the Grant Balances Engagement, including after she filed her December 2006 Charge and subsequent Charges.⁵⁴ *See* NTR 869-70.

If Mr. James were motivated by retaliatory animus, it is unlikely that he would have consistently and uniformly accommodated Petitioner in her desire to telework. *See Simien*, 99

⁵³ Mr. James testified that his appraisal of Petitioner's performance was not affected either by her part-time schedule or her use of telework. STR 148.

⁵⁴ Agency counsel quoted from Petitioner's deposition during the hearing:

“Q: Question: did Tom James always approve your request for telework?
Answer: I—we always discussed it and he always said fine....”

Petitioner then agreed: “A: ...I think the testimony I have given today is in keeping with what I gave at the deposition.” NTR 869-70. *See also, e.g.*, JE 31 at 31, 48-49, 83, 84, 105-106, 286-87, 291, 331; RE 61.

M.S.P.R. at 251-52 (agency's accommodation of employee's desire to return to prior postal route indicative of no retaliatory animus); *Brown*, 28 M.S.P.R. at 139-40 (employer's attempt to accommodate employee's preferences regarding travel and duty location "inconsistent with a retaliatory motive"). In addition, Mr. Czerwinski was aware that Mr. James permitted Ms. Donahue to telework, and nothing in the record indicates that he expressed displeasure with this practice or sought to curtail it.⁵⁵ Indeed, even Petitioner acknowledges in her Brief that "allowing [her] to telework may have some limited probative value regarding the issue of her supervisors' retaliatory animus[.]" Pet. Reply at 13.

In these circumstances, I find that Mr. James's actions regarding telework (and the absence of any action by Mr. Czerwinski directing or suggesting any curtailment in Petitioner's liberal use of telework) support a conclusion that they lacked retaliatory animus towards Petitioner.

5. Expectations setting

Petitioner challenges GAO's assertion that Mr. James's actions in setting expectations for her in May and June 2007 evidences a lack of retaliatory animus. Rather, Petitioner contends both that "Mr. James engaging in the expectation-setting process with [her] was simply consistent with GAO policy" and that "contrary to GAO's assertion that Mr. James's role in setting expectations evidences a lack of retaliatory animus, the evidence shows just the

⁵⁵ When Mr. Czerwinski questioned Mr. James in a July 2008 email about the fact that Petitioner did not make advanced requests to telework as is typically required, Mr. James assured Mr. Czerwinski that he did not view this as a problem and that he had been permitting Petitioner simply to inform him when she would telework in order to assist her in dealing with personal issues. RE 61 at 1. Nothing in the record indicates that Mr. Czerwinski had any disagreement with Mr. James's approach in this regard.

contrary."⁵⁶ Pet. Reply at 9.

The record shows that Mr. James engaged in extensive discussions with Petitioner in setting her expectations at the mid-point evaluation in 2007 and putting them in writing.⁵⁷ In my view, his efforts demonstrated his willingness to listen to and address Petitioner's concerns regarding "her confusion about her performance expectations and their role in her performance appraisal."⁵⁸ *Id.* at 7. In this regard, Petitioner asserts that "[c]onsistent with GAO policy, she was seeking clarification from her supervisor," and acknowledges that "consistent with that policy, he was engaged in a dialogue with her to provide that clarification." *Id.* Indeed, as noted earlier, Petitioner concedes that "Mr. James engaging in the expectation-setting process with [her] was simply consistent with GAO policy." *Id.* at 9.

Nonetheless, Petitioner contends that Mr. James's actions during the process of setting her expectations evidences retaliatory animus. The record does not support this contention. Mr. James drafted proposed expectations for Ms. Donahue on May 2, 2007. JE 31 at 7. On May 25, 2007, she responded by email with proposed revisions and grouped the expectations by competencies in the hope that "this facilitates communications." *Id.* at 31-33. Mr. James testified that by the time he received Petitioner's response, he was "fed up" with the process.

⁵⁶ It is possible to read Petitioner's contentions as a claim that by engaging in the expectation-setting process with Ms. Donahue, Mr. James simultaneously was acting in a manner consistent with GAO policy and was evidencing retaliatory animus. It is difficult to sustain a contention that acting in a manner consistent with GAO policy demonstrates animus. Rather, I construe the two contentions as a claim that although the fact that Mr. James engaged in the expectation-setting process was consistent with GAO policy, the details of how he did so demonstrated retaliatory animus towards Ms. Donahue.

⁵⁷ Petitioner acknowledges that "[w]hile it might be unusual for an employee to request written expectations at the mid-point evaluation, given the confusion over the proper role of her expectations in her performance appraisal, it is not unreasonable that she would request written detailed clarification of her performance expectations." Pet. Reply at 8-9.

⁵⁸ Petitioner alleges that her confusion resulted from "inaccurate and misleading statements made to [her] by Mr. James during her 2007 mid-point feedback session." Pet. Reply at 7.

NTR 1143. On the same date that he received her response, he sent Mr. Czerwinski the following email:

Here are updated expectations as revised by Pat. It reads like a contract with escape clauses for any hard deliverable deadlines and/or disputes over what was "mutually agreed-to." I anticipate it will take some time to work this out.

Two big issues. First, I can't live with the repeated references to "agreed-upon," which normally goes without saying but in this regard means if there is a dispute on what we "agreed upon," then all bets are off.

Second, I can't live with the sentence that says: "These expectations assume the timely cooperation with other GAO units and HHS and no unforeseen developments." On every job there are always unforeseen developments, so to put this sentence in just provides an all-purpose out for not delivering on time. This idea appears again later when she says that you and I need to understand that things can affect deliverable dates, including "management adjustments in the expected contents of the products."

JE 31 at 33-34 (emphasis in original).

On June 1, Mr. James sent Ms. Donahue a second draft of her proposed expectations (JE 31 at 37-40); they met to discuss the expectations on June 21 (*id.* at 61); Mr. James emailed revisions to her on June 25 (*id.* at 61-63); and Mr. James recorded June 21 as the date on which the expectation discussion took place. JE 9 at 2.

Petitioner contends that Mr. James demonstrated animus in retaliation for protected activity by characterizing her proposed changes as "nonsensical," "unproductive," "unnecessary," and "inappropriate" and by testifying that he was at this point "kind of fed up" when Ms. Donahue proposed revisions to his draft of the expectations. Pet. Reply at 10; *see* NTR 1143-44.

I disagree. Nothing in the record on this matter shows that Mr. James's actions and reactions were based on anything other than his supervisory judgment and experience—not as retaliation for Petitioner's having engaged in protected activity. Again, the issue is not whether

Ms. Donahue's proposed changes to the expectations were meritorious. Rather, the issue is the basis for Mr. James's responses. He testified credibly, and candidly, about what he perceived to be an unnecessarily lengthy, unproductive, and frustrating process that in his experience in SI, as a DPM for approximately 30 employees over at least a seven year period, was unusual.⁵⁹ His email to Mr. Czerwinski is consistent with his testimony and reflects his substantive disagreement with Petitioner's suggested changes. This evidence relating to the extended discussion of expectations demonstrates professional disagreement with Petitioner, no more and no less.

6. Substantive differences in views

The record amply demonstrates that the Grant Balances Engagement was a lengthy, complex and complicated work project that went through many revisions and iterations as it proceeded.⁶⁰ Beginning in early 2007 and continuing through much of 2008, the team had difficulty in precisely defining the scope of its work, the factual content that would be examined, the particular analyses that would be undertaken, and the objectives that it hoped to achieve. In many of these areas, substantial and substantive concerns and disagreements arose in numerous instances not just between Petitioner and her supervisors, but also between Ms. Ortiz and the supervisors, and even at the Second Partner Review stage. These included, among other things, such issues as whether to conduct a case study, the question of real versus nominal dollars, the issue of a multivariate analysis, confusion about the content of the grant characteristics analysis,

⁵⁹ Mr. Czerwinski testified that Mr. James became “weary” as a result of the expectation-setting process and that Mr. James “worried that he would never be able to reach closure.” STR 673.

⁶⁰ Petitioner testified that there were "over 2,000 emails" relating to the engagement in her mailbox (NTR 911) and that there were over 40 drafts of the engagement report (NTR 783). Mr. James also testified that there were over 40 drafts of the report (STR 161, 220), which was “a high number” of drafts (STR 397).

and the matter of how to respond to the concerns expressed during the Second Partner Review. Petitioner asserts that the evidence regarding all of these matters shows that her supervisors' actions towards her were based on retaliation, and that her view on the substance of these issues was the correct one. Conversely, GAO contends that the evidence shows that retaliation was not a basis for the supervisors' actions, and that their view on the substance of these issues was the correct one.

Both parties devote extensive argument and discussion in an effort to show which side was "correct" on the substance of these and other similar issues. However, the relevant factor is not which party was substantively correct on the issues; it is whether the supervisors' positions and actions on these issues as they related to Petitioner were motivated by retaliatory animus for her having engaged in protected activity. On that point, the record does not reflect that retaliatory motivation was the basis of the supervisors' positions or actions.

Rather, their positions or actions reflected numerous factors related to the complexity and length of the project and work-related conflicts, misunderstandings, and frustrations that they had with Petitioner (and that Petitioner had with them).⁶¹ The key is that these conflicts and misunderstandings, which grew as the engagement proceeded, were based on the substance of the work of the project—not on retaliation for protected activity. It is quite possible that the supervisors did not understand fully some of the substantive issues that Petitioner (as well as Ms. Ortiz) attempted to address, whether as a result of poor communications⁶² or other reasons.

⁶¹ These same factors applied as well to the supervisors' interaction with Ms. Ortiz, who did not engage in any protected activity. *Cf* pp. 86-87, *supra* (discussion regarding emails about Ms. Ortiz). Mr. James and Ms. Ortiz "had professional disagreements about many versions of the draft as it progressed." STR 391 (Testimony of Mr. James).

⁶² For example, Mr. Czerwinski testified that there was a breakdown in communications regarding the PMS (Payment Management System of HHS, ¶62, *supra*) universe between himself, Mr. James, and Petitioner, a "lapse" that he testified was attributable to Ms. Donahue, Mr. James, and "probably" himself

However, such a determination, especially as to whose responsibility it was to clarify substantive matters, is both speculative and irrelevant to the legal issue in this case. As Petitioner concedes, actions taken by the supervisors based on their honest professional judgment—even if wrong—cannot serve as a foundation for a finding of retaliation. Pet. Brief at 57. That is what the evidence in this case shows: professional judgments and misjudgments by several members of the team, as well as frustrations and tensions throughout an overly long and complex work project.⁶³ But the evidence does not demonstrate that retaliation was part of the motivation for the supervisors' appraisal of Petitioner's performance on the engagement.

too. NTR 1041-42. Mr. Czerwinski also testified that his judgments “were bad on the team’s dynamics and process.” NTR 997.

⁶³ *E.g.*, Mr. James (Jan. 2007), STR 317 (“I was frustrated and I felt like I needed to spell things out in lists and very specific terms”) (*see also* NTR 1130-31); Ms. Hosler (between Jul. 2006 and Apr. 2007), NTR 1729 (“it was an ongoing source of tension” that the job wasn’t moving fast enough), NTR 1732-33 (“there was a great deal of frustration on both sides in this situation . . . about being able to focus on the data and moving the job forward”), NTR 1730, 1734 (tension increased over time), NTR 1739 (“the engagement was a frustrating one and fairly dysfunctional”); Ms. Donahue (Jan.-Feb. 2007), NTR 659 (Ms. Hosler was frustrated with Mr. James concerning explanation of challenges of data collection); Mr. James (Aug. 2007-Mar. 2008), STR 220 (“when you give the first partner the draft in early August, and it’s not good enough to give the second partner until early March of the next year, that’s a long time and that’s an unusual amount of time”); Ms. Ortiz (Oct. 2007), NTR 313-14 (there was “increasing frustration on everyone’s part” and it was “becoming increasingly contentious about how to present the results”); Ms. Donahue (Dec. 2007), NTR 755 (“at that point we were all road weary. We had all been frustrated by the turn of events”); Mr. James (Dec. 2007), NTR 1223 (referencing JE 31 at 183) (“I felt like it was frustrating to get those kinds of responses. This is a month later and we’re going in the wrong direction again. We’re not closer to having expectations”); Carol Patey (an SI Assistant Director), NTR 484 (“I just knew that, for both parties, it was a report that was difficult, frustrating and it didn’t feel like it . . . was getting moved to where it needed to be”); Mr. Czerwinski (Feb. 2008), STR 836 (referencing PE 147) (“[t]his job is like getting a thousand cuts. So sure there is going to be frustration in that. There’s frustration with everybody. I’m sure Tom [James] has it, I have it. Pat [Donahue] had it. I’m sure everybody else had it”); Mr. James (Mar.-Apr. 2008), NTR 1598-99 (Petitioner was at “her wits end,” found it “really frustrating and felt like I wasn’t listening” during Second Partner Review; “everybody was frustrated”); Mr. Czerwinski (May 2008), STR 844 (“I was just tired of the whole thing by then” and “I was frustrated, period”).

7. IG search engine (IGSE)

Petitioner alleges that the “IGSE is a stark illustration of how quickly her supervisors turned against her after she filed the December 2006 Charge.” Pet. Brief at 42. Specifically, Petitioner alleges that she was “instrumental in developing the IGSE” and that prior to her filing the December 2006 Charge, her supervisors praised both her work and her presentations on the IGSE. In contrast, Petitioner alleges that after she filed her Charge, her supervisors criticized her role in the IGSE, with Mr. James calling it a “runaway train” (NTR 716), and Mr. Czerwinski blaming her for not telling him in advance that it was going to be demonstrated at the Knowledge Fair (STR 705). Pet. Brief at 42. Petitioner also claims she was no longer asked to present the IGSE at briefings. Pet. Brief at 43.

The Agency, however, contends that the December 2006 Charge did not cause “any change of behavior with respect to the IGSE.” GAO Response at 5.

I find that Mr. Czerwinski's view of Petitioner's work on the IGSE did change over time, but not as the result of her December 2006 Charge. Prior to November 2006, Mr. Czerwinski praised Ms. Donahue's work on the IGSE (*see* PE 32) and Mr. James promoted her role on the IG search tool (*see* PE 23, 24, 26, 28, 32). However, around Thanksgiving 2006, Ms. Donahue gave a presentation on the IGSE to an SI business meeting.⁶⁴ NTR 732; *see* STR 705; PE 28, 32; *see also* STR 266-68, 274. Mr. Czerwinski testified credibly that Ms. Donahue's presentation was “technically correct, [but] was not as good a presentation as I would have hoped.” STR 705. He was not impressed with Petitioner’s presentation as it was too “much in the weeds” and used

⁶⁴ Petitioner asserts in her Brief that the SI business meeting occurred after she filed her Charge in December 2006. Pet. Brief at 43. However, the record—including Petitioner’s own testimony—supports GAO’s assertion (GAO Response at 5-6) that this meeting occurred in November 2006. *See* NTR 732 (Petitioner testified that the IGSE presentation was in the “Thanksgiving time frame” and “then I filed my Charge.”); PE 32 (Petitioner asked Mr. Mihm on Wednesday, November 22, 2006 (the day before Thanksgiving) if the IG search tool could be demonstrated at “next week’s Business meeting”); NTR 932 (Mr. Czerwinski confirms that the demonstration took place around November 2006).

a “lecturing, pedantic tone” that detracted from the quality of the product. STR 705-06.

Moreover, KSO had started to roll out the search engine and Mr. Czerwinski was concerned that it would not be received as well if the SI team had rolled it out. *Id.* at 708. Thus, “[at] that point,”—the end of November 2006—Mr. Czerwinski had determined that “the risks of this project were outweighing the benefits,” that SI “shouldn’t be pushing it out,” and that they would “[j]ust let knowledge services put [it] out through their work.” *Id.* at 706.

Accordingly, the record shows that Mr. Czerwinski had determined that SI would no longer be “active sponsors” of the IGSE prior to Ms. Donahue's filing her December Charge. STR 707. As such, his determination could not have been based on retaliation, since Petitioner did not file her Charge until after Mr. Czerwinski had already determined that SI would no longer take an active role with the IGSE. Moreover, even if this conclusion about sponsoring the IGSE had been reached after learning of the December 2006 Charge, Mr. Czerwinski has offered a reasonable explanation for that conclusion and Petitioner has failed to show that it was pretext.

8. The April 2008 staffing cycle

Petitioner contends that her supervisors' actions in March 2008 regarding the upcoming staffing cycle support her claim of retaliation for engaging in protected activity. According to Petitioner, her supervisors failed to notify her of an immediate deadline for submitting her upcoming staffing preferences, despite being aware that she had been on vacation during most of the period for submitting that preference, and had also been absent in March because one of her children was seriously ill. Pet. Brief at 47; *see* PE 157; JE 31 at 291-92; NTR 832-33.

I reject Petitioner's claim that the supervisors' actions demonstrate retaliation. The chronology relating to this matter shows no evidence of retaliation.

On March 20, 2008, Rebecka Derr, Staffing Manager for SI, sent an email to all SI staff who were scheduled to be given a new assignment in April or May, including Ms. Donahue. PE 157. The email instructed the recipients to review an attached list of upcoming engagements and respond via email with their assignment preferences no later than March 26, 2008. *Id.* Mr. James, who also received a copy of the email, notified Ms. Derr that Petitioner would not be ready to start a new engagement on her scheduled release date of May 15 because the issuance date for the Grant Balances Engagement report was being pushed back.⁶⁵ *Id.* Mr. Czerwinski, who was also copied on the staffing email, emailed Ms. Derr and suggested that Petitioner remain on the April/May reassignment list and that her new engagement team be asked “to be a little flexible” with Petitioner’s start date. *Id.* Ms. Derr agreed with Mr. Czerwinski’s proposal and kept Petitioner on the staffing list. *Id.*

Petitioner was on annual leave from March 13 until she returned to the office on March 25, the day before her staffing preferences were due.⁶⁶ JE 31 at 286, 291. On March 31, Petitioner emailed Ms. Derr (with a copy to Mr. James) noting that she had been prematurely assigned to a new job, “did not review the available jobs or submit any preferences,” and had “been out of the office (off & on) with a sick child . . . and was away on annual leave when this preference was due.” JE 31 at 291. Ms. Derr replied on April 1, noting that she

wasn’t aware that [Petitioner was] out of the office until the day before preferences were due when Tom [James] let me know (you didn’t have any ‘out of office’ auto reply on your e-mail). At the time, [Mr. James] thought you were

⁶⁵ Mr. James added that if “the start of her next assignment can be flexible, I guess it’s ok to have her on for this cycle.” PE 157.

⁶⁶ Petitioner testified that she did not read Ms. Derr’s email on March 25 because she and Mr. James were attending meetings and addressing issues regarding the Grant Balances Engagement report, and that she was out of the office the following day. NTR 830-31. *See also* NTR 660-61. On March 25, Petitioner informed Mr. James that she needed to work from home the following day because of her child’s ongoing health problems. Mr. James noted to Ms. Derr that Petitioner had been back in the office on the 25th and 27th, and out of the office on the 26th and 28th. JE 31 at 291.

due back on the 26th, which would have given you time to provide preferences. Since I didn't hear back from you, I proceeded to put together a straw proposal for Chris [Mihm] and he approved it.

Id.

On the same day, Petitioner came to Mr. James's office upset and angry and told Mr. James that he should have informed her that she was up for reassignment. JE 31 at 292. Mr. James told Petitioner that he had informed Ms. Derr about the need to delay Petitioner's reassignment until the Grant Balances Engagement was finished and asked her to speak with Ms. Derr about the issue. *Id.*; NTR 1574-75. By the end of April 1, Petitioner had discussed the issue with "the SI Front Office" and it was determined that she could wait until the next cycle (June/July) to be staffed. JE 31 at 292; NTR 842 (Mr. Mihm helped her on the staffing cycle issue and Petitioner thanked him).

On May 15, 2008, Ms. Donahue sent Ms. Derr and Mr. James an email noting that her release date for reassignment was July 21 and asking when she should submit her staffing preferences for her new assignment. JE 31 at 338. Ms. Derr replied the next morning that she "should submit [her] preferences for this staffing round"; Mr. James immediately forwarded the email exchange to Mr. Czerwinski, who responded to Ms. Derr: "Proof of advance notice." PE 167. Ms. Derr replied "Absolutely!" and Mr. Czerwinski responded, "This one is never easy, huh, Becky? Thanks for your patience here." *Id.*⁶⁷

Nothing about these actions indicates retaliatory animus on the part of Messrs. James or Czerwinski. In fact, the record reflects that Petitioner's concern about her next staffing assignment was resolved within a day of her raising the issue on March 31. Mr. James

⁶⁷ I view Mr. Czerwinski's email as an expression of sympathy for Ms. Derr in light of the previous exchange with Petitioner over staffing, not as evidence of retaliation against Petitioner.

contributed to its resolution by informing Ms. Derr of the need to delay Petitioner's reassignment until after the completion of the Grant Balances Engagement⁶⁸ and by asking Petitioner to discuss the matter with Ms. Derr.

9. Credit for contributions to the Grant Balances Engagement

Petitioner contends that her supervisors did not properly credit her contributions to the Grant Balances Engagement when rating her performance. Namely, Petitioner asserts that she developed a methodology that located over \$1 billion in undisbursed funds remaining in expired grants, that she helped develop report recommendations designed to lead to financial accomplishments, and that this work positioned the Grant Balances Engagement report to be included on the GAO's 2009 Congressional and Presidential Transition website. *See* Pet. Brief at 54-55; PE 202 at 6.

Petitioner's arguments do not indicate retaliation. Mr. James credibly testified that in evaluating Ms. Donahue's performance, he took into account her efforts that led to the identification of the approximately \$1 billion in unspent grant funds in the PMS.⁶⁹ NTR 1195-99. However, he also considered the rest of Petitioner's performance over the course of the entire 2008 performance appraisal cycle regarding the substance and timeliness of project management, and in his view this body of work did not merit Petitioner receiving a higher

⁶⁸ Similarly, as noted above, Mr. Czerwinski requested Ms. Derr to ask that a new engagement team "be a little flexible" with Petitioner's start date. PE 157.

⁶⁹ Petitioner's appraisal for FY '08 contained no narrative explanation of the rating (JE 16); her self-assessment for the appraisal period did note that the GBE report "found over \$1 billion in undisbursed funds in expired grant accounts and made two recommendations to OMB." JE 15 at 1.

rating.⁷⁰ *Id.* This conclusion and the stated reasons underlying it are based on professional judgments as reflected in the record.⁷¹ There is no evidence to indicate that the rating that Petitioner received failed to take into account her contributions to the GBE report, and it is not the PAB's role to substitute its opinion on how much weight should be given to these contributions.⁷²

10. Other allegations concerning minimization of Ms. Donahue's contributions

Petitioner also contends that her other contributions to the GBE were minimized and that she was not credited sufficiently for her work on the project, thus further evidencing retaliation. Pet. Brief at 54. For example, Mr. James reported on a meeting with Capitol Hill staffers in February 2008 that they “were both very interested in understanding our methodology and in the potential impact of our findings.” JE 31 at 230. Petitioner objected that the memorandum reporting the meeting did not note that they were “very pleased” and thought the work looked “fantastic.” PE 230 at 28. Mr. James asked Mr. Czerwinski if he should add anything further, to which the latter replied: “Short and sweet, Tom, I would go with that, thanks.” JE 31 at 231. Petitioner objected that Mr. James—at the direction of Mr. Czerwinski—intentionally omitted

⁷⁰ Mr. James testified that the final report “was high quality,” despite “all the trouble it took to get there and how long it took to get there.” STR 489. He also testified that the Congressional requesters “were very happy in the end with what we gave them.” NTR 1536.

⁷¹ Once again, whether Petitioner or others may disagree with those professional judgments is not the issue. As long as those judgments are based on a supervisor's honest, professional view, such a judgment, even if mistaken, does not support a finding of retaliation. *Baloch*, 550 F.3d at 1200; *Adeyemi*, 525 F.3d at 1226-27.

⁷² In addition, record testimony established that the inclusion of the Grant Balances Engagement report on the GAO 2009 Congressional and Presidential Transition website reflected the significance of the subject matter, not the quality of any individual's work. NTR 145-49, 436-37. Again, the issue here is not whether Ms. Donahue's contributions were valued to the degree that she thought they should be (or, for that matter, whether I agree with the valuation). The issue is whether retaliation for protected activity was the basis for how her contributions to the report were taken into account. The record does not support the conclusion that it was.

the fact that Congressional staffers had praised the GBE. PE 230 at 28. Moreover, in August 2008, Ms. Donahue raised concerns that a draft GAO response to OMB's comments, prepared by Mr. Czerwinski and Mr. James, was not an accurate reflection of those comments. Petitioner drafted observations on OMB's comments. PE 198E. She claims that Mr. James and Mr. Czerwinski dismissed her concern as "classic Pat" (PE 198D); however, when Mr. Martin-Rolsky (from GAO OGC) raised the same concern, Mr. James and Mr. Czerwinski viewed his comments as "adding value." PE 198H.

Petitioner's example concerning the meeting write-up simply does not evidence hostility. Her suggested additions would have added unnecessary detail in the stated view of Mr. Czerwinski. Moreover, on review of the exchanges relating to the OMB comments, Petitioner's concern was stated in a general way. *See* PE 198F ("Could this mean that OMB does not concur with the other reporting elements GAO recommends?") and PE 198E ("OMB is concurring there is a problem, but not-concurring that they have a responsibility to address the problem..."). The GAO OGC comment, which noted that General Counsel concurrence was required, suggested as a solution to address the problem that the draft state that OMB comments "do not contain any specific steps or explicit commitment to implement our recommendations. We agree that OMB should have discretion to choose the best way...." PE 198H. The record does not show that Petitioner proposed a specific solution to address the issue. *See* STR 863.

11. AIC duties

Petitioner also contends that her supervisors punished her by "removing or diluting AIC duties." Pet. Brief at 1. In her view, in December 2006, Mr. Czerwinski "[b]ecame more directive, setting forth tasks to be accomplished, even though this was usually the function of an AIC." *Id.* at 40. She also points to his insistence on a case study, "even though it is normally the

role of the AIC to recommend the appropriate methodology for an engagement.” *Id.* Petitioner also takes issue with the specifics of Mr. James’s emails and task lists, claiming that he did not identify particular areas where she was deficient in project planning and management of the engagement. Pet. Reply at 17.

Petitioner’s concerns about Mr. Czerwinski were addressed, *supra*, in the context of emails that she believed evidenced hostility. As noted previously, Mr. Czerwinski’s concerns reflect typical supervisory communications regarding aspects of the work assignment. Moreover, Mr. James credibly testified that he began to take over some of the planning of the GBE because Petitioner was not doing so, as, for example, in late January 2007, when he could not foresee how the team would get the job done. STR 347, 316-20; *see, e.g.*, PE 48, 54A. At the same time, Mr. James tried to convey during team meetings that Petitioner was “responsible for everything the team does.” STR 347. He explicitly denied taking over project management: “I was offering my advice, looking for input and feedback. . . .But at no point in time did I assume responsibility for the entire project.” STR 318. By mid-point feedback in April 2007, Mr. James reminded Petitioner that “she needed to do more in terms of end-to-end project management.” NTR 1118-20; *see* JE 31 at 1.

The record of this case reveals that Mr. James assisted with or assumed some of Petitioner’s AIC duties in order to ensure that the engagement was progressing. This included, for example, working directly with Ms. Mak on her portion of the report (*see* ¶160, *supra*) and developing the task list in anticipation of the scheduled February 2007 Design Summit, which he testified, was “born out of frustration on my part that I felt like I needed to spell things out in order to get things done.” STR 316-17. In his judgment, at that stage Petitioner’s “focus was entirely on the analysis, with a total disregard for project management.” STR 320. Nothing in

the steps taken by Mr. James reveals retaliatory animus; rather, they were unsurprising efforts of a supervisor to keep the project on track and moving forward.

12. Testimony of Ms. Mak and Ms. Hosler

When rotating off the GBE, Ms. Hosler asked the SI staffing manager not to assign her or new PDP employees to work with Petitioner because Ms. Hosler had difficulties in working with her—*i.e.*, Ms. Hosler found it “a very frustrating experience,” and believed Petitioner’s management style to be “very difficult” and “kind of demoralizing.” *See* ¶70. Ms. Hosler testified that Petitioner “can be very condescending and over explain and not really hear you when you’re trying to express your ability to do something” and that, when Mr. James had a question, “there wouldn’t be a response that one might necessarily expect when your boss has that great of a concern.” NTR 1736-37.

Ms. Mak noted to Mr. James that she felt that Petitioner did not value her contributions and that she was having difficulty working with her (¶60, *supra*). Ms. Mak testified at the hearing that she telephoned Mr. James twice during the GBE to ask for help. STR 554-55. She requested “to work more clearly, directly for him, on a specific part” of the job, because Petitioner was trying to involve her in more aspects of the job than she wanted as a team member. *Id.* As a result, Ms. Mak worked with Mr. James on drafting the Inspector General reports section. *Id.* 556.

The statements and testimony of Ms. Hosler and Ms. Mak are fully consistent with the supervisors’ conclusion that Petitioner did not rate above “meets expectations” in either Developing People or Leading Others. There is no corroborating support for Petitioner’s view that she should have been rated higher on this competency. The views expressed by Ms. Hosler

and Ms. Mak also support the supervisors' conclusion that Petitioner's management style contributed to the length of time the GBE took.

Petitioner contends that the testimony of Ms. Hosler and Ms. Mak should not be given much weight because their involvement on the GBE and with Petitioner was limited. For example, Petitioner asserts that Ms. Hosler was on the engagement for only approximately eight months,⁷³ and that Ms. Mak was stationed in California, came to Washington, D.C. infrequently, had little personal interaction with the GBE team, and asked to be excluded from many team meetings. Pet. Reply at 18. However, Ms. Donahue does not dispute their testimony about their involvement and interactions with her, and I find that they were credible witnesses whose testimony is relevant to the issues at hand. I also find that their testimony supports that of Mr. James and Mr. Czerwinski regarding Ms. Donahue's actions and demeanor during the engagement.⁷⁴

13. Delays during the Grant Balances Engagement

Petitioner argues that she was blamed for delays for which she was not responsible, and that such blame evidences hostility based upon her protected activity. For example, she points out that according to Mr. James, the report was not timely because at the Design Commitment gate the team committed to issuing the report in October 2007, and the report was not issued

⁷³ Petitioner acknowledged that during the period Ms. Hosler was on the engagement, she interacted with Ms. Hosler "pretty frequently." NTR 657.

⁷⁴ Ms. Mak's testimony also contains an example demonstrating lack of retaliatory animus by Mr. Czerwinski. According to Ms. Mak, during an early 2007 meeting on to discuss the project plan in advance of the Design Summit, Mr. Czerwinski repeatedly asked Petitioner to make sure that she had built in enough time so that she could meet deadlines and complete the work without the team having to work nights and weekends. ¶60 (STR 550-51). Petitioner does not dispute that the discussion took place. Pet. Reply at 18. It is unlikely that a supervisor who was allegedly retaliating against an employee for engaging in protected activity would repeatedly try to make sure that the employee had enough time to perform her work.

until August 2008; and he ascribed the delays primarily to Ms. Donahue. Pet. Brief at 52 (citing STR 212-16 and STR 207-08).⁷⁵ However, Petitioner argues that the Design Commitment date is an estimate that is often adjusted as a result of changed circumstances. Pet. Brief at 52. The Agency does not disagree that a design commitment date is often adjusted. See GAO Response at 19-22; STR 714. Nevertheless, Mr. Czerwinski as Director believed that the team “didn’t do the [GBE] job very quickly or efficiently,” although like all SI jobs, it was timely in terms of meeting the date “ultimately agreed upon with the requester many adjustments later.” STR 713. Petitioner’s argument does not overcome the cumulative testimony that the GBE experienced an unusual amount of deadline slippage as well as unusual delay and difficulty at the Second Partner review stage, among others.

Petitioner contends that the various delays were not because of her performance as AIC, but resulted from events beyond her control, such as the almost six months before the GBE team received complete and reliable data from HHS and Treasury (citing *e.g.*, PE 40; PE 47; PE 56; PE 76; PE 101; PE 209; PE 216); the time added by collecting and analyzing data for case studies, which were not conducted (citing PE 47; PE 55; PE 56; PE 230); the six months spent resolving various issues with ARM relating to Mr. Czerwinski's insistence on developing a targeting tool without authorizing the necessary data analysis to make such a tool accurate and reliable (citing PE 96; PE 100; PE 106; PE 110; PE 114, PE 115; PE 119A; PE 124; PE 128; PE 132; PE 197; PE 230 at 18; RE 78; JE 31 at 86, 105-07, 113, 131, 137, 188); and the three months to obtain Second Partner concurrence (citing JE 31 at 252, 255-64, 281, 345-47). Pet. Brief at 53. The record reflects that the cited delays were due to numerous factors, including

⁷⁵ Mr. James also said that since the requesters’ Congressional staff was not unhappy with the actual issuance date, the report was not late in their eyes, and that GAO didn’t “really have a due date.” STR 207.

misunderstandings, miscommunications, and misjudgments not just by Petitioner, but by the supervisors and others on the team as well.⁷⁶ In my view, Petitioner's dispute with her appraisals in this regard does not demonstrate supervisory retaliation, but rather constitutes work-related disagreement about the appropriate amount of responsibility assigned by her supervisors to her for the delays in the engagement process.⁷⁷

Of particular note is the lengthy time that it took to obtain Second Partner concurrence—the independent review by Ms. Allen, an SES level Director in QCI who was not involved in any earlier part of the engagement. This stage of the engagement exemplified the work-related difficulties that plagued the engagement. A process that usually takes “a week or two” (NTR 1585) (Testimony of Mr. James) took almost three months on this engagement (from March 4, 2008 until May 28, 2008) (NTR 1605; STR 445; NTR 1226).⁷⁸ On Ms. Allen's first review of the draft report, she concluded in essence that it contained significant problems and that the report needed substantial revision on several major points, as reflected in her "needs discussion" checkmarks.⁷⁹ Such a conclusion by a Second Partner Reviewer was highly unusual in GAO

⁷⁶ For example, Mr. Czerwinski testified that the responsibility for the decision on the case studies, which added to the length of time that the engagement took, “ultimately rests with me.” STR 725.

⁷⁷ Mr. Czerwinski also testified that he, Mr. James, and Petitioner were all responsible for the fact that it took twice as long as usual to issue the report. NTR 999.

⁷⁸ Testifying about the almost three-month period to obtain Second Partner concurrence, Mr. James stated: "That is really quite amazing." STR 445.

⁷⁹ Only 7% of all GAO reports in FY 08 that underwent Second Partner Review received even a single “needs discussion” checkmark. STR 87 (testimony of Mr. Backhus); JE 33 at 65 (deposition of Ms. Allen). Mr. Czerwinski had never received any “needs discussion” checkmarks from a Second Partner Reviewer in 5 years, let alone multiple such checkmarks received from Ms. Allen on this engagement. NTR 992. He described the “needs discussion” checkmarks as “a really bad thing.” *Id.*

practice.⁸⁰ The team's efforts to respond to Ms. Allen's comments resulted not only in attempts to assess responsibility for the areas in the report that required revision, but also in substantive differences of opinion among team members. *See, e.g.*, NTR 1594-1607 (Testimony of Mr. James); NTR 993-97 (Testimony of Mr. Czerwinski); 386-92 (Testimony of Ms. Ortiz). This further supports the conclusion that team members on the engagement had many professional disagreements on important aspects of the report, some of which were not resolved even as late in the process as Second Partner review.⁸¹ Indeed, upon reviewing the draft a second time, Ms. Allen returned it for further revision by the team. *See* JE 12. Eventually, after Ms. Allen reviewed a third version of the report, a report was issued that satisfied Ms. Allen's concerns and contained significant findings.

Petitioner further contends that, even as her supervisors were faulting her for the slipped issuance dates, Mr. James was seeking to persuade the Congressional requesters and Mr. Mihm to extend the issuance dates. *Pet. Brief* at 53. However, Petitioner has failed to connect the supervisors' efforts to meet and/or get formal extensions on deadlines to reprisal for her Charge-filing activity. Their actions in seeking formal extensions were consistent with the goal of GAO's timely delivery of a report pursuant to a Congressional request. *See* STR 712-13; NTR 1218-19.

⁸⁰ Mr. Czerwinski testified that responsibility for the fact that it took three reviews before Ms. Allen, the Second Partner Reviewer, approved the report was attributable to Ms. Donahue, Mr. James, and himself—"three major people." STR 838.

⁸¹ Mr. Czerwinski testified that he sent the draft forward for Second Partner Review with reservations about its readiness, because he had "just been worn down." NTR 993. Mr. James explained: "Well, we felt it was as good as we could make it, given the circumstances. We had spent the months of September, October, November, December, January, February, March to get it as good as we possibly could make it. We were exhausted. We knew we had to get it out of the building. We needed somebody in an objective, authoritative position to help us work through the issues, and that's what second partner does. . . . I think in most cases the team responds to the first partner and listens to the advice and the wisdom of that person and doesn't fight it; rather, it is more a collaborative effort and you get better results." STR 446-47.

14. Petitioner's remaining arguments

Petitioner contends that Mr. James and Mr. Czerwinski demonstrated retaliatory animus when they rejected her request in September 2007 that Ms. Mak and Ms. Hogan reschedule certain matters so the report could be issued on time—*i.e.*, in October 2007. *See* Pet. Brief at 46, 57. However, Ms. Donahue had been told by Mr. James on August 23, 2007, that it was completely unrealistic (it would take a “miraculous” and “Herculean” effort (JE 31 at 79) to think that the report could be issued in October 2007). JE 31 at 79-80. Accordingly, the supervisors' rejection of Ms. Donahue's request was consistent with what Mr. James had already told her in terms of a date for the issuance of the report, and does not indicate retaliation. *See also* JE 31 at 85 (9/10/07 email from Mr. James to Petitioner explaining that issuance on October 31 unlikely because the team could not “short circuit the review” of the Director, Managing Director, and Second Partner).

Petitioner also contends that her supervisors' retaliation is evidenced by their lowering her appraisals because they considered the report late, while at the same time ensuring that their own performance appraisals did not reflect the report as late. Pet. Brief at 52. This contention lacks merit. In the first place, the supervisors' appraisals with respect to timeliness were based on their results on multiple engagements, not just the Grant Balances Engagement.⁸² Therefore, their appraisals cannot be compared directly to that of Petitioner, which was based entirely on her work on the GBE. Moreover, Mr. James acknowledged in his testimony that he was responsible in part for problems in issuing the GBE Report (STR 526-28), and indeed his rating

⁸² In this regard, Mr. Mihm testified that Mr. Czerwinski's performance was evaluated on a wide range of responsibilities, including oversight of 7-10 engagements. NTR 129. Similarly, Mr. James was responsible for supervision of numerous engagements, as evidenced by the fact that he supervised three or four other AICs during the time of the GBE. NTR 1621. Mr. James was evaluated on all his engagements during the relevant time periods, not just the GBE. STR 526-27; NTR 1621.

for FY '08 was lower in the competency of Achieving Results than it was in FY '07 (it fell from a “role model” rating in that competency to an “exceeds expectations” rating).⁸³ See PE 233, 234. Finally, Mr. Czerwinski credibly testified that in judging the timeliness of the report, he did not appraise Mr. James on whether the report was technically on time; rather, he judged both Mr. James and Petitioner on “how the whole process went.” NTR 978. Accordingly, I reject the contention that this matter evidences retaliation based on protected activity.⁸⁴

⁸³ Mr. James described his own performance on the GBE for both FY 07 and FY 08 as “mixed.” STR 527-28. Further, he testified that “separating this assignment singled out from everything else and just getting rated on this might have resulted in a lower rating[.]” STR 527.

⁸⁴ Petitioner also asserts that the “bulk of GAO’s case rests on the self-serving testimony of Mr. James and Mr. Czerwinski, and it is no exaggeration to say that this case hinges on a determination of their credibility compared to Ms. Donahue.” Pet. Reply at 14. I disagree. First, it should be noted that their testimony is no more or less self-serving than that of Petitioner. Moreover, many of the differences in testimony between the supervisors and Petitioner concern characterizations of record evidence (*e.g.*, Petitioner’s characterization of emails as hostile, as opposed to GAO’s characterization of them as supervisory concern over work performance). The emails and the abundance of other exhibits entered into the record speak for themselves and do not require credibility determinations. Finally, Mr. James’s and Mr. Czerwinski’s testimony was supported in pertinent part by that of Ms. Mak and Ms. Hosler, while Ms. Ortiz’s testimony sometimes supported Petitioner and sometimes supported Mr. James and Mr. Czerwinski.

CONCLUSION

Petitioner has presented numerous examples in an effort to support her claim of retaliation.⁸⁵ However, the mosaic that emerges from a review of the nine days of testimony and extensive number of documents is not one of retaliation, but rather one of a difficult, complex and protracted engagement on which "tension definitely developed over the course of the job." NTR 1729 (Testimony of Ms. Hosler); *see also*, NTR 1182-84 (Testimony Mr. James). Perhaps no better indication of the difficulties and concerns that grew in scope and degree as the engagement progressed was the independent assessment done by Ms. Allen in her role as Second Partner Reviewer.

Petitioner was not the only member of the team responsible for the problems on the engagement. Moreover, there may be reasonable differences of professional, work-related opinion on particular judgments and decisions that were made during the protracted course of the engagement. It is not the role of the PAB to determine who was right or wrong on those work-related determinations and judgments.⁸⁶

The extensive evidence does not lead to a conclusion that retaliation was the basis for the supervisors' determinations in Petitioner's performance appraisals for FY '07 and FY '08. None of Petitioner's actions in filing or amending Charges resulted in a lowering of her appraisals. In sum, Petitioner has not demonstrated by a preponderance of the evidence that

⁸⁵ The conclusion herein is based on a thorough review of the submissions of the parties in briefs, documents in evidence, and hearing testimony. All of Petitioner's arguments and evidence have been considered, and any remaining items cited by Petitioner that have not been specifically addressed in this Decision do not affect the disposition of this proceeding.

⁸⁶ Despite the difficulties encountered by the GBE team, there is no dispute that Petitioner contributed to the development of the GBE report and that the report was recognized as one of "high quality" that pleased the Congressional requesters and highlighted the financial benefit that might be attained through closer monitoring of federal grants. *See* nn. 69, 70, *supra*.

