



Office of Inspector General  
U.S. General Services Administration

**Investigation of  
Whistleblower Reprisal  
Complaint**

**June 21, 2017**

This Whistleblower Investigation Report addresses one of several complaints to the Office of Inspector General (OIG) for the General Services Administration (GSA or Agency) regarding GSA's 18F program and the Technology Transformation Service (TTS).

## I. INTRODUCTION

Thomas Sharpe, the Commissioner of GSA's Federal Acquisitions Service (FAS), is a career Senior Executive Service (SES) employee who reports to the Administrator of GSA. Sharpe is statutorily responsible for administering GSA's Acquisition Services Fund (ASF).<sup>1</sup> In his complaints to the OIG initiated on December 2 and 3, 2015, Sharpe complained that the creation of TTS and GSA's use of the ASF as a primary source for funding TTS violated the 2006 General Services Modernization Act and resulted in mismanagement, waste of funds, and abuse of authority.<sup>2</sup> Sharpe notified both the Administrator and Deputy Administrator that he had reported his concerns to the OIG. At that time, Denise T. Roth served as the Administrator and Adam Neufeld as the Deputy Administrator. Shortly after initiating his complaint, Sharpe claimed reprisal for voicing his concerns to his superiors and reporting his concerns to the Inspector General (IG).

The OIG investigated Sharpe's reprisal complaint and related disclosures under the independent authority provided by the Inspector General Act of 1978 (IG Act) for investigating "complaints or information from an employee of the establishment [GSA] concerning the possible existence of an activity constituting a violation of law, rules, or regulations, or mismanagement, gross waste of funds, abuse of authority or a substantial and specific danger to the public health and safety."<sup>3</sup>

Apart from this investigation, the OIG's Office of Inspections and Forensic Auditing (Office of Inspections) performed an evaluation of GSA's 18F program and issued three reports.<sup>4</sup> One report addressed 18F's financial business practices and the others addressed information security deficiencies.

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<sup>1</sup> 40 U.S.C. §§ 303(b), 321.

<sup>2</sup> Pub. Law No. 109-313, 120 Stat. 1734 (Oct. 6, 2006).

<sup>3</sup> 5 U.S.C. App. 3, § 7(a) (2017).

<sup>4</sup> The OIG's reports are available at <https://www.gsaig.gov/Inspection-and-Evaluation-Report>. The reports are: *Evaluation of 18F*, JE17-001 (Oct. 24, 2016); *Management Alert Report: GSA Data Breach*, JE16-004 (May 12, 2016); and *Evaluation of 18F's Information Technology Security Compliance*, JE17-002 (Feb. 21, 2017).

These reports, particularly *Evaluation of 18F*, confirmed many of the deficiencies in GSA's 18F program that Sharpe reported to the OIG.

In this report, we describe our findings that Sharpe engaged in protected activity, and that he was subjected to reprisal for engaging in protected activity.

## II. BACKGROUND

The changes in GSA's organizational structure from 2002 through the present provide the context for considering Sharpe's whistleblower disclosures. GSA is organized into "service" level major components, with headquarters and regional functions, and staff offices.<sup>5</sup> Prior to 2006, GSA had three services: the Public Building Service (PBS) and two acquisition services, the Federal Supply Service (FSS) and the Federal Technology Service (FTS).<sup>6</sup>

In April 2002, the House Subcommittee on Technology and Procurement Policy held a hearing on GSA's organizational structure entitled *Making Sense of Procurement's Alphabet Soup: How Purchasing Agencies Choose between FSS and FTS*.<sup>7</sup> This hearing reflected Congress's growing concern with GSA's bifurcation of acquisition services. Subsequent hearings led to a consensus that the "overlapping and redundant functions in both FTS and FSS caus[e] inefficiencies within GSA and confusion for customer agencies."<sup>8</sup> Industry testimony expressed concern that "overlap takes valuable time away from customer service and inevitably increases acquisition costs," and that "eliminating this overlap is key to GSA's future success."<sup>9</sup> The "product of an intensive hearing and oversight process that has spanned three Congresses," the 2006 General Services Modernization Act I (Modernization Act) addressed these concerns by consolidating the Federal Technology and Federal Supply Services (FSS and FTS) into a single, new service: the Federal Acquisition Service (FAS).<sup>10</sup>

In conformity with consolidation of the two services into one, the Modernization Act combined the funds of the two services, the FTS Technology

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<sup>5</sup> In addition to its service-level components, GSA also includes the OIG and Civilian Board of Contract Appeals, both of which are independent from GSA service-level administration and operations.

<sup>6</sup> H.R. Rep. 109-91, 2006 WL 3901782, at \*5.

<sup>7</sup> H.R. Rep. 109-91, 2006 WL 3901782, at \*7.

<sup>8</sup> H.R. Rep. 109-91, 2006 WL 3901782, at \*5; *accord* S. Rep. 109-257, 2006 WL 1524427, at \*2-3.

<sup>9</sup> H.R. Rep., 109-91, 2006 WL 3901782, at \*8.

<sup>10</sup> H.R. Rep. 109-91, 2006 WL 3901782, at \*6-7; *see* Pub. Law No. 109-313, 120 Stat. 1734 (Oct. 6, 2006).

Fund and the FSS General Supply Fund, into a unified, single new fund: the Acquisition Services Fund (ASF).<sup>11</sup> Like the PBS, FAS relies on fees that its government customers pay for the acquisition services FAS provides. The Modernization Act provides that the ASF “is available for use by or under the direction and control of the Administrator . . . .”<sup>12</sup>

The Modernization Act also created a statutory requirement that a Commissioner head FAS who “shall be responsible for carrying out functions related to the uses for which the Acquisition Services Fund is authorized . . . .”<sup>13</sup> As discussed below, the FAS Commissioner’s responsibilities included investments of ASF funds in projects with a cost recovery to recoup the investment, which included funds for what came to be known as 18F.

The 2006 House Committee observed: “Critical to the permanent resolution of GSA management challenges is ensuring that the structural reforms are memorialized in GSA’s organic legislation so that the remedies developed will endure.”<sup>14</sup> Ten years later, however, Administrator Roth created a new technology service, named the Technology Transformation Service or TTS, in order to “transform the way government builds, buys, and shares technology.”<sup>15</sup> An existing staff office, the Office of Citizen Services and Innovative Technology and 18F (OCSIT/18F), became the core of the new service. TTS is headed by a third headquarters Commissioner who reports directly to the Administrator.<sup>16</sup> As it is an addition to the prior two existing GSA services, PBS and FAS, TTS is often referred to as the third service.

The order creating the third service provided that TTS may use the ASF as well as various other funds.<sup>17</sup> The order made TTS the successor in interest to OCSIT/18F for its current Memoranda of Agreement (MOA) and Interagency Agreements (IAAs). This included a June 2, 2015 MOA for using ASF funding for OCSIT/18F until the MOA, by its terms, ends on June 12, 2018. The Administrator’s order creating the TTS provided that this and other agreements shall continue “until and unless modifications are approved.”<sup>18</sup>

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<sup>11</sup> Pub. Law No. 109-313, at §§ 2-3; *see* 40 U.S.C. § 321(b) and (c).

<sup>12</sup> 40 U.S.C. § 605(a).

<sup>13</sup> 40 U.S.C. § 303(a) and (b).

<sup>14</sup> H.R. Rep. 109-91, 2006 WL 3901782, at \*6.

<sup>15</sup> GSA Directive 5440.696 ADM (May 3, 2016), at § 2; *see also* GSA Directives 5440.700 ADM (July 7, 2016) and 5440.709 ADM (Oct. 11, 2016)(these subsequent directives delineated TTS’s organizational structure).

<sup>16</sup> GSA Directive 5440.696, at § 3(a).

<sup>17</sup> GSA Directive 5440.696, at § 4(a)(4).

<sup>18</sup> GSA Directive 5440.696, at § 4(a)(3).

### III. FINDINGS OF FACT

A. Origins of the Third Service: In early 2013, personnel from the White House, the Office of Management and Budget (OMB), and GSA began to discuss creating a team of information technology innovators drawn from the private sector to bring industry experience and innovation into the government. The project was staffed with Presidential Innovation Fellows (PIF), a program created as part of the President's May 2012 Digital Government Strategy.<sup>19</sup> The project was housed in GSA, and the PIF program was located within the project.

Then-Administrator Daniel Tangherlini began the project in FAS under the management and control of FAS Commissioner Sharpe, who initially approved using the ASF to fund the project.<sup>20</sup> Sharpe first agreed to invest ASF funds in the project because he saw an opportunity for FAS to develop products and services that could be offered to government customers. At the time, Sharpe felt he was agreeing to a "limited risk exposure investment" with the ASF.

The approval for using ASF funds for 18F was accomplished through the budget and Strategic Action Plan Initiatives (SAPI) processes. The FAS Commissioner annually recommended that the Administrator approve the Fiscal Year ASF Cost and Capital Plans, which identified the capital projects that would be funded and their project costs. Once the Administrator approved the Plans, the FAS Commissioner considered and approved 18F's requests for increasing the ASF investment through SAPI Adjustments.

Early on, tension arose from Sharpe's insistence on the application of standard business assessments to ensure that the ASF funds were being invested in prudent ventures. On one occasion, Sharpe asked his 18F staff for a performance plan with milestones and performance measures before he would approve a Fiscal Year (FY) budget for increasing 18F by 26 Full Time Equivalent (FTE) positions. On this occasion, Sharpe emailed then-Chief of Staff Neufeld to request that Neufeld work all FAS issues, including any issues

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<sup>19</sup> Mem. For the Heads of Exec. Dep'ts and Agencies, *Building a 21<sup>st</sup> Century Digital Gov't* (May 23, 2012) (<https://obamawhitehouse.archives.gov/the-press-office/2012/05/23/presidential-memorandum-building-21st-century-digital-government>).

<sup>20</sup> For convenience, "18F" is used to describe the component that in earlier stages was known as Project X, STORM, then United States Digital Service (USDS), and later still as GovX. STORM is the acronym GSA used for Systems Transformation and Operations Reform. USDS was used until GSA learned that this was the name OMB chose for its digital service component.

related to the ASF, directly through Sharpe. Neufeld responded that he wanted to start hiring the Monday after next, and the Administrator could approve funding without any “crazy, non-legally-required steps GSA has imposed on itself” that would delay hiring and obstruct the project’s goals. Sharpe advised that Neufeld was “confusing the process by directing FAS, ASF activity outside [his] authority, around me, and for which I am accountable, as is [Tangherlini].” Sharpe subsequently asked Administrator Tangherlini for his support of Sharpe’s management direction to ensure that increased hiring at 18F was justified. The Administrator responded by expressing his appreciation for Sharpe’s oversight and support as well as his efforts in getting the program going quickly and properly.

Shortly afterwards, Tangherlini decided to move the 18F project to OCSIT, which, in his view, had an “innovation culture” that was more in line with 18F. In the course of discussions about the transition from FAS, the GSA’s Office of General Counsel (OGC) addressed Sharpe’s authority for the ASF in an email to Neufeld and others:

[The s]tatutory requirements relating to the use of the ASF including those in 40 USC 303(b) [] make the Commissioner of FAS responsible for carrying out functions related to the authorized uses of the ASF. Unfortunately, the statutory language does not allow the Commissioner of FAS to relinquish responsibility for those functions to another organization or grant a block of money to OCSIT from the ASF.

Sharpe took this responsibility seriously. One witness described him as “a very ‘rule and law’ type of person.” After 18F’s transition from FAS to OCSIT, 18F sought a \$2 million increase in funding through the SAPI Adjustment process, which led to further tension between Sharpe and Neufeld. Sharpe tried to resolve specific details with the Chief Financial Officer (CFO), the General Counsel, and the 18F Director about how the funding would be executed. One of Sharpe’s concerns arose with OGC’s legal opinion that 18F’s efforts require “a tie to FAS activities or offerings if they are going to be funded from the ASF.” Sharpe wanted to lock down who “makes this call” before finalizing additional funding for new 18F projects. In Sharpe’s view, counsel had been clear that the FAS Commissioner (and not the Administrator’s Chief of Staff) was accountable for the ASF. In raising the issue, Sharpe felt he was just “trying to get the [18F] initiative met within proper controls” by defining up front “[w]ho will decide, track and be accountable.” For his part, Neufeld felt Sharpe’s

questions had been resolved and informed Sharpe that his continuing objections were obstructionist, stating in an email to Sharpe that:

You consistently put in place ever-new restrictions well beyond what the law requires or that are standard in this organization; ask to re-litigate questions that have previously been signed on by yourself and others; and take every opportunity to limit the impact of the past decisions he [Tangherlini] has made . . . .”

In Neufeld’s view, the ASF was directed and controlled by the Administrator, and Sharpe only had an “administrative role.”

Sharpe approved MOAs in 2013, 2014, and 2015, providing his authorization as the Commissioner of FAS to continue investing ASF funds in 18F. The first MOA with OCSIT for 18F (then known as United Digital Service [USDS]), dated Nov. 21, 2013, specifically addressed the FAS Commissioner’s responsibility. As outlined in the MOA, Sharpe was responsible “for determining whether funding for USDS projects and activities can be provided by the ASF.” Further, funding would be requested through GSA’s SAPI process, and Sharpe was responsible for determining “how any approved SAPI [would] be fulfilled through approving SAPI Execution Reports.” Sharpe also was responsible “for reviewing the ongoing performance of the funds provided by the ASF to determine whether additional funding is appropriate, under the ultimate direction and control of the Administrator.” Additionally, based on 18F’s quarterly SAPI Executive Reports of expenditures, the MOA reserved Sharpe’s “right to remove funding or deny any future funding.” The same language was used in 2014 and the first 2015 MOA.

With the transfer of 18F under GSA’s OCSIT component, Sharpe continued to approve ASF funding for 18F through the budget process and the SAPI processes. By 2015, however, projects that exceeded \$100,000 in cost also had to be reviewed by a project review board that included a representative from the Administrator’s Office (the A-Suite). An FAS executive chaired this particular review process. The project review board held periodic 18F investment review meetings to discuss 18F business lines and planned projects. The OIG found an example of how this process worked in practice. After the business case for four 18F investment proposals were presented at a board meeting, FAS Deputy Commissioner Kevin Youel Page met with OCSIT Associate Commissioner Phaedra Chrousos and reached agreement on which of the four proposals would receive ASF funding. Youel Page then signed the

Investment Review Board (IRB) Decision Memorandum reflecting the agreement.

In February 2015, Tangherlini resigned as Administrator of GSA. Denise Turner Roth became Acting Administrator and Adam Neufeld became Acting Deputy Administrator.

On June 2, 2015, a new MOA was executed to provide ASF funding for 18F through June 12, 2018. Unlike the earlier MOAs, the Administrator and Deputy Administrator were signatories. The MOA reaffirmed the Commissioner's responsibility for carrying out functions related to the uses of the ASF, and that the Commissioner still had the authority "subject to the direction and control of the Acting Administrator" to "provide additional funding or reduce funding levels." The June 2 MOA removed the language that specified the FAS Commissioner's responsibilities for determining which 18F projects can be funded by the ASF.

Later in the summer of 2015, Roth began to float her ideas for creating the third service (Technology Transformation Service or TTS) to address a perceived need for more nimble, creative, and sophisticated information technology solutions. Initially, Roth envisioned that TTS would be funded by transferring part of the FAS budget and procurement authority. Specifically, one-third of the FAS Office of Integrated Technology Services (ITS) budget would be transferred to the new service, which would also be given the FAS Multiple Award Schedule 70 information technology portfolio.<sup>21</sup> Roth understood that Schedule 70 generates significant revenue through charges to its government customers that use GSA schedule contracts, and this revenue would give TTS an independent source of funding. Sharpe opposed relinquishing any FAS procurement authority to TTS.

Following her August 5, 2015 confirmation as Administrator, in October 2015, Roth began in earnest the process of informing GSA leadership of her intent to create the new service. After initial discussions, Roth designated a GSA Office of Government-wide Policy representative, Giancarlo Brizzi, to assist with TTS negotiations that included Sharpe and his deputy. Sharpe continued to voice objections to the third service based on OCSIT/18F's poor financial performance when operating under the MOAs that permitted use of the ASF. As OCSIT/18F continued to increase staffing, Sharpe became concerned that losses had grown far beyond what had been projected initially, and that the

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<sup>21</sup> The ITS now is the Information Technology Category (ITC).

business case for ASF's investment to justify the growth had not been made. Since at least May 2015, the CFO, Gerard Badorrek, had advised Sharpe to impose a pause in hiring in view of 18F's large loss position. Sharpe told us that he had made repeated recommendations to pause hiring in 18F in order to bring costs more into alignment with revenue, but that on each occasion (most recently in January 2016) Roth overruled his recommendations. From his conversation with the Administrator, Sharpe understood that this was a White House project and he could not stop a presidential program.

B. Sharpe's Objection to the Draft Order Creating TTS: In October 2015 Roth formally restarted the effort to create a third service with a series of meetings with her top leaders. On November 30, 2015, Roth circulated a new draft order for the third service that required the principals to register their concurrence or non-concurrence within five days.

Under the draft order, FAS retained its Schedule 70 procurement authority as well as all of the FAS Technology Services funding. The third service, however, received procurement authority independent from FAS ". . . to provide and make solutions available to best serve its customers." In addition to using other funding sources, the new service also was permitted to rely on the ASF for activities with an acquisition nexus, as a primary source for funding. The draft order was circulated by GSA's correspondence tracking center for concurrence or non-concurrence. At the time, Roth knew that FAS leadership (*i.e.*, Sharpe and Youel Page), remained concerned with using the ASF to fund the new service.

Roth and Neufeld met with Sharpe on December 2, 2015, the day before he had to record his concurrence or non-concurrence with the Administrator's proposal. During this meeting, the discussion included statements that Sharpe was "not playing ball" and comments about transferring SES personnel. Sharpe viewed the statements as threatening.

Sharpe contacted the OIG the same evening and again on December 3, 2015. Sharpe relayed his concerns and fear of retaliation if he fulfilled what he perceived to be his statutory responsibilities for the ASF and non-concurred in the proposed order. He provided the language that specified his concerns for non-concurring, and advised these comments would be entered in GSA's Controlled Document Tracker (CDT) system:

The FAS Commissioner has been forced into the position where he has no choice but to respectfully non-concur with the order. He is joined in this non-concurrence by the FAS Deputy Commissioner.

The FAS Commissioner is made responsible in legislation for the ASF and its functions, subordinate to the Administrator. He is determined to fulfill this responsibility while striving to be the very best subordinate he can be to the Administrator.

This clearance action is marked as a high-priority item requested by the Administrator & Deputy Administrator and as such, this is not following normal timing and procedures for Org Change orders.

As to this rushed process, I note there is no supporting business case, market analysis, stakeholder analysis, analysis of negative impact to FAS mission, nor an assessment of the continued viability of the current 18F business model. Through October, 18F losses have deepened to 2 x plan and utilization is at a very low 38% prompting FAS review of its investment.

To the Order:

1. The Order appears to provide for a third GSA service, the scope of which is duplicative not only with FAS, but possibly the entire agency, and appears to possibly allow moving FAS ITS to the new service, undoing the legislation that created FAS.
2. Moreover, the Order gives the third service the right of first refusal on customers of GSA within that scope.
3. Such duplication related to acquisition and the ASF will conflict with and not benefit FAS, and may result in the waste associated with duplicating FAS's acquisition oversight functions, overhead support and trading platforms.
4. Giving the third service right of first refusal would seem to contravene the legislated purpose in creating FAS, which was to provide GSA customers one place for end to end solutions, including all [Information Technology] IT, and will lead to customer confusion and internal GSA conflict.
5. Execution of the Order would appear to obviate the intent of the [Memorandum of Understanding] MOU underpinning the FAS investment in OCSIT/18F; the MOU was based on OGC counsel that any use of the ASF must benefit FAS. I am concerned that I may need to withdraw my support for the MOU.

6. in an increasingly politically charged and multi stakeholder environment, FAS has struggled to properly oversee its investment in 18F. The creation of the third service and granting it autonomy from FAS combined with outright use of the ASF would make it impossible for FAS Commissioner to fulfill the responsibility for the ASF and its functions.

7. The creation of a third service, partially funded by the ASF, will set up a competition between the third service Commissioner, who has no authority or accountability for use of the ASF, with the FAS Commissioner, who has authority for the use of the ASF and cannot remove himself from accountability for proper management of the ASF. The competition can only be resolved by the Administrator, thereby negating the FAS Commissioner's authorities, and putting at risk FAS investments and critical government operations it supports.

After sending his email to OIG, on December 3, 2015, Sharpe non-concurred in GSA's CDT system, providing comments critical of the proposed order. Sharpe then informed Roth that he non-concurred with the creation of the TTS and the use of ASF funds. Sharpe also informed Roth that he had reported his concerns about creating TTS and using ASF funds to the OIG.

In response, Roth informed Sharpe of her displeasure with his failure to concur and for not sharing his concerns with her directly rather than going to the OIG. The next day, on December 4, 2015, Roth emailed Sharpe to again express her dismay that Sharpe felt he could not share his concerns with her directly. Roth also advised that she would put the project on hold for a short time to find a path forward. On December 4, 2015, Neufeld expressed his surprise to Youel Page, Sharpe's deputy, that they had issues with the new service. Neufeld also acknowledged, though, that both FAS executives had expressed displeasure with the proposal in the small group meetings conducted by the Office of Government-wide Policy.

Sharpe's December 3, 2015 non-concurrence raised immediate concerns among those responsible for the 18F project. The Administrator's senior advisor for 18F issues, Andrew McMahon, spoke with Neufeld about the ASF and then assured Chrousos and the 18F Director that there still was support for using the ASF to fund the TTS. On December 7, 2015, Chrousos emailed Neufeld and asked: "Is she really not going to fire him for the way in which he delivered his non-concurrence? He put her at very unnecessary risk." Neufeld

called Chrousos and told her that it does not work that way in government. Later that same day, Neufeld emailed several of the key supporters of the third service that Roth “wants to make sure that internal substantive concerns are all allayed to the maximum extent possible, and an additional week or two will allow further discussion of the relevant issues and ensure we get this right.” FAS, OCFO, and OGC were not included in the email.

On December 8, 2015, Neufeld sent an email to OCFO requesting an OCFO investigation into ASF-funded operations that he suspected were “perpetually money-losing business lines” within FAS. Neufeld sought answers about how each project was doing and “what limitations on hiring/new contracts may be justified.” He remarked that “we” may not be proper stewards of the taxpayer funds for these projects. Neufeld also sent his email to Sharpe and his deputy, the executives responsible for FAS, as well as the FAS Chief of Staff and others.

While Neufeld’s December 8 request to OCFO for a review of FAS projects did not include 18F, by December 21, the OCFO was also reviewing 18F’s financials and was concerned that “the program’s prospects for achieving cost recovery [we]re slim at best.” Because 18F had a low utilization rate for reimbursable work, OCFO staff concluded that “[i]f the program continues to hire without generating offsetting revenue, the situation will only get worse” and recommended a hiring pause until cost recovery was achieved. OCFO staff also recommended revising the June 2, 2015 MOA to provide clear operating guidelines and management controls, ideally including monthly reporting requirements on billable staff utilization and hiring adjustments.

On December 17, 2015, Roth rated Sharpe’s annual performance for FY 2015 at Level 4, which reflected her judgment that:

The executive demonstrates a very high level of performance beyond that required for successful performance in the executive’s position and scope of responsibilities. The executive is a proven, highly effective leader who builds trust and instills confidence in agency leadership, peers, and employees. The executive consistently exceeds established performance expectations, timelines, or targets, as applicable.

Although Sharpe hoped for a Level 5, Level 4 was the highest rating Roth awarded anyone in the SES that year. Sharpe also received a performance bonus for the year.

In early January 2016, however, within weeks of rating Sharpe at Level 4, Roth contacted the GSA Chief People Officer (CPO), Antonia Harris, for guidance on performance improvement options for members of the SES. At the time, Roth already was familiar with the rules for SES transfers and had issued reassignments as recently as December 1, 2015, the day before her meeting with Sharpe. Harris understood Roth was speaking about Sharpe because the two had been going back and forth concerning Sharpe's annual FY 2015 performance review. Over the next few months, Roth continued to have discussions with Harris and GSA General Counsel, Kris Durmer, about options for dealing with poor performance in the SES. Harris recalled advising Roth during their January 2016 discussion that SES members should be given an opportunity to improve their performance and issues should be documented ". . . before a transfer could be initiated."

On January 7, 2016, Roth sent a message from her personal email account to her GSA email address documenting an earlier meeting with Sharpe and his deputy. According to her email to herself, Roth told Sharpe and Youel Page that they effectively left the table and stopped engaging when they formally recorded their objection to the third service. Roth expressed her desire to find common ground for everyone, and her concern that Sharpe would terminate funding as soon as the MOA with OCSIT/18F expired. She recorded that Sharpe felt marginalized and was not being heard. Roth noted that Sharpe believed that the new service was going forward regardless, and he was getting "rolled." Roth also noted that "[Sharpe] ultimately informed me he was so concerned he went to the ig. I told him, I don't know what to say. He had the opp to come talk w me and he didn't" [sic]. According to her account, Sharpe acknowledged he should have come to Roth, and Roth asserted that she was committed to finding a better process.

Also on January 7, 2016, Neufeld followed up on his December 8, 2015 request for OCFO review of ASF-funded business operations under FAS oversight. Neufeld stated to the CFO that Roth "has been looking for someone to take an objective look at 18F financials, and has been frustrated at the clear witch-hunt mentality Tom [Sharpe] has been taking." Neufeld stated that Roth wanted to ensure 18F was being treated the same as other FAS programs funded by the ASF. In his email, Neufeld asked the CFO to provide only the facts he had found so far when he briefed Roth and Neufeld the next day on January 8, 2016. Afterwards, the CFO could "get deeper on all the ASF programs." Neufeld also commented: "Sounds like you have seen this already given that [Sharpe] came by to try to bully you into recommending an 18F

hiring freeze to Denise!” The OIG investigation did not reveal an employee other than Neufeld on this one occasion who characterized Sharpe’s behavior as bullying. Instead, as noted above, the CFO’s own staff had raised concerns with 18F’s hiring in late December 2015 in view of 18F’s weak financials.

Roth’s and Neufeld’s January 7 emails occurred while Sharpe and Youel Page were raising several objections to the OMB’s apparent direction that GSA use \$49.5 million in ASF funding for a project that may not recover the investment. The project, login.gov, would build on GSA’s experience with a pilot, Connect.gov, for providing citizens secure access to personal information with government agencies. While Sharpe approved the business case for ASF funding for the Connect.gov pilot on the assumption that the OMB would require the agencies to use the service and the agency fees for the service would recover the ASF investment, the OMB did not move forward with such a requirement because OMB personnel believed that this type of operational approach was flawed and was a reason that prior, similar efforts failed to gain widespread agency approval. Neufeld and Roth both cautioned the GSA leadership who were heavily invested in login.gov against overreacting and expressed their confidence that the language in the draft could be corrected once OMB understood FAS’s concerns. Both Roth and Neufeld believed the project provided a good opportunity for GSA.

On Sunday, January 10, 2016, Roth notified Sharpe that she had evaluated his suggestion to pause hiring in 18F and had decided not to do so. She also expressed her surprise that there were many systemic underperforming ASF-funded programs that did not have reasonable breakeven plans. Roth notified Sharpe that meetings would be scheduled for each ASF portfolio to go over the financials and plans. The next day, Sharpe responded to Roth noting that in past years FAS “inherited or had forced upon it” programs without recovery models, and that since becoming the FAS Commissioner, he had insisted that FAS operate programs with the intent and plans to recover costs. Sharpe also provided Roth with the analysis of each FAS portfolio as prepared by the OCFO.

On January 20, 2016, Roth emailed Neufeld and the CFO stating that she wanted to engage in a “deep dive” into the FAS portfolios and noted that a “deeper dive” in a third round may be needed as well. Roth also wanted to know whether Sharpe was correct when he claimed that he freezes underperforming ASF programs in FAS. Neufeld responded by stating that from his discussions with the OCFO, “ASF programs do often perform below

plans; that performing below plan does not generally lead to hiring freezes or anything extreme like that; and that plans are often changed.”

On January 20, 2016, Roth paused discussion of the issue of creating a third service using ASF funding in order to focus instead on the potential for OCSIT/18F to have internal procurement authority for their IT products. After Roth floated this proposal, Sharpe responded the next day and raised concerns. Sharpe’s initial concern was that adding procurement authority to 18F, an entity that was already experiencing deep losses, would only add to those losses. Sharpe also expressed concern that bifurcation of FAS management responsibility from procurement authority “almost always leads to poor business controls and pressure for misuse.” Sharpe, however, expressed his willingness to assist Roth by having FAS take on the Internal Acquisition Division (IAD) from the Office of Administrative Services. Shortly afterwards, Roth replied that by giving the new service some internal acquisition authority, it would lead to the creation of needed expertise without duplicating FAS.

By this time, the CFO had raised and discussed his concerns regarding 18F’s hiring with OCSIT’s Associate Administrator, Chrousos. After her discussions with the CFO, Chrousos alerted McMahon that a hiring freeze was a “done deal” and that she was only able to back the CFO off of requiring 18F to take back pending offers. While Chrousos was concerned that Roth would announce a hiring freeze at their next meeting, that did not happen. On February 25, 2016, at Roth’s request, Sharpe contacted OGC for guidance on whether every ASF funded program must recover costs.

During February and March 2016, the deep dive meetings Roth initiated for FAS programs were conducted, with each meeting focusing on one ASF-funded program. Strategic plans, controls, and financials were considered. A witness reported that, unlike the other portfolio reviews, the deep dive for 18F looked only at financials without considering 18F’s future plans and hiring patterns. This level of scrutiny of FAS by the Administrator and Deputy Administrator appeared to have been unprecedented. One witness to these meetings saw that Neufeld seemed “more on the attack,” and commented that this had been his attitude since Neufeld had been in GSA.

On March 3-4, 2016, Roth and Neufeld also raised concerns about Sharpe’s inability to finalize a new firearms disposal policy before a congressional hearing on the deficiencies in GSA’s Surplus Firearm Donation

Program revealed in a June 2015 OIG Office of Inspections report.<sup>22</sup> Roth asked her chief of staff to evaluate the situation after Sharpe was unable to provide specifics on what his staff was doing to comply with the OIG report. On March 4, 2016, Roth notified Sharpe that she was taking the pause off and planned to sign an order creating the new service under a Commissioner.

C. Sharpe's Objection to the Final Order Creating TTS: On March 11, 2016, Roth circulated the draft order for the new service and announced that "The focus would be on building a procurement environment for the agency[s] internal use that specializes in emerging technology." In a meeting that day, Youel Page pointed out that nothing differentiated the new service from FAS's ITS.

When Roth announced the new proposal, she met with the interested leaders, including FAS Deputy Commissioner Youel Page. On March 16, 2016, Roth, Neufeld, Sharpe, and Youel Page met to discuss the scope for the new service, and Roth directed Sharpe to find a way to make the third service work for FAS, which Sharpe found threatening. On March 18, 2016, Roth asked Sharpe to contact General Counsel Durmer regarding Sharpe's continued concern with meeting his obligations for the ASF as the FAS Commissioner. Roth expressed her understanding from OGC that the proposed order did not violate the Modernization Act, and her concerns about building up conflicts that could be resolved by addressing the hurdles to TTS implementation up front before everyone concurs/nonconcur.

Later that day on March 18, Sharpe met with the General Counsel and Deputy General Counsel, who provided their legal views on the third service, and Durmer then stated to Sharpe that any executive who cannot execute an order in good faith can resign. Afterwards, Sharpe emailed Roth that he understood the General Counsel's legal position. Sharpe did not suggest that OGC resolved his concerns, but advised that he was continuing to think through his concerns to form a position when he received the final order. Sharpe assured Roth that he would faithfully execute whatever decision she made. That same afternoon on March 18, 2016, Roth circulated the draft of a final order to establish the TTS and placed an initial response deadline of March 25.

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<sup>22</sup> GSA OIG Office of Inspections and Forensic Auditing, JE15-004 (June 12, 2015), *Limited Evaluation of GSA Surplus Firearm Donation Program: Inadequate Controls May Leave Firearms Vulnerable to Theft, Loss, and Unauthorized Use*.

On March 21, 2016, Sharpe contacted the OIG regarding his concerns with Roth's final order and her plan to establish TTS. During this contact Sharpe also expressed concern about retaliation, specifically with keeping his job after he registered his non-concurrence. Sharpe elaborated in language that reflected the thrust of his planned non-concur:

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The legislation establishing FAS and the ASF makes me as the commissioner accountable for all activities undertaken under the ASF, which is granted to you in legislation. This requirement is currently supported by MOU. The MOU was designed to allow the ASF activities to be managed for a limited time period by the Associate Administrator of OCSIT, who would be accountable for the sound management of those activities, including internal controls and financial performance.

The MOU is legally sufficient, but temporary, and represents a major business risk borne by me as the FAS Commissioner.

I initially agreed to undertake this risk under the MOU given: 1) The judgments by then Administrator and now you that the 18F needed to be led and incubated outside FAS in order for it to thrive and I could understand that position; 2) the MOU was temporary; (3) the MOU was limited in size and scope; and 4) there was agreement that the ASF investment would be designed and managed to benefit FAS and 5) the undocumented understanding that 18F would eventually come back to FAS to be managed within a business line.

There was significant pressure on me to assume these risks from each Administrator and I agreed to be so direct despite my recognition of the business risks I was pressured to agree to assume.

Both myself and the Deputy Commissioner, consistent with the desires of the Administrator, have therefore taken a very limited role in attempting to manage or oversee 18F, in order to meet the goal of providing as much de facto autonomy as possible, the only logical reason that 18F would not simply be led and managed from FAS instead of OCSIT.

Since signing the MOU:

1) 18F has not been managed to recover costs and has been allowed to continue hiring despite mounting financial losses (for FY16, 18F's outlook is to lose up to \$22m on \$44 m of expense). Moreover, OCFO reports that 18F poor business controls are allowing for work to be performed for customers without having [Interagency Agreements] IAAs in place, a violation of the MOU.

2) 18F staffing has grown enormously, as has the scope of 18F efforts. What started as coding and consulting has evolved into desire to launch hiring programs, acquisition programs, services to grantees and state governments, shared services development and delivery, etc.

3) The benefits to FAS have yet to be fully studied or even addressed.

5) [sic] Attempts made by me to exercise minimal oversight to ensure sound financial management decisions, i.e., a temporary hiring pause to bring costs better into alignment with revenue, have been denied.

Accordingly, the conditions that led me to agree to the MOU have changed dramatically and I have adjusted my assessment that the business risks now far outweigh the benefits, that I no longer am capable or willing to bear the accountability for functions that are not and likely to be permanently out of my control.

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Sharpe also specified his objections to the language of the final order for establishing a third service:

1. The Order appears to provide for a third service, the scope of which may be duplicative not only with FAS, but possibly other parts of the agency, and possibly allow in the future moving parts of FAS ITS to the new service, ignoring the exhaustive analysis, review and legislation that created FAS to be the one place for end to end solutions, including all IT.

2. Such duplication related to acquisition and the ASF will lead to customer confusion and internal GSA conflict, and will not benefit

FAS, and may result in the waste associated with duplicating FAS's acquisition customers and oversight functions, overhead support and trading platforms. I as the FAS Commissioner disapprove of the possibly duplicative and wasteful use of the ASF by the third service.

3. Execution of the Order would appear to obviate the intent of the MOU underpinning the FAS investment in OCSIT/18F: the MOU was based on OGC counsel that any use of the ASF must benefit FAS. I am concerned that as the FAS Commissioner that I may need to withdraw my support for the MOU.

4. In an increasingly politically charged and multi-stakeholder environment, FAS has struggled to properly oversee its investment in 18F. The creation of the third service and granting it autonomy from FAS combined with outright use of the ASF would make impossible for me as the FAS Commissioner to fulfill my responsibility for the ASF and its functions. A situation that as the FAS Commissioner I cannot approve of.

5. The creation of the third service, partially funded by the ASF, will set up a competition between the third service commissioner, who has no authority or accountability for use of the ASF, with the FAS Commissioner, who has authority for the use of the ASF and cannot remove himself from accountability for proper management of the ASF. The competition can only be resolved by the Administrator, thereby negating the FAS Commissioner's authorities, and putting at risk FAS investments and critical governmental operations it supports. A position that I as the FAS Commissioner cannot approve of.

Shortly after contacting the OIG on March 21, 2016, Sharpe sent an email to General Counsel Durmer acknowledging OGC's opinion that the Administrator did not need Sharpe's approval for the new service. In this email, Sharpe requested a change in the Order creating TTS so that Sharpe's continued approval for the June 2, 2015 agreement would not be required. Sharpe explained that the MOA required him to undertake a major business risk, and that since the MOA was signed 18F had failed to recover costs, had continued hiring despite mounting losses, and had been found by the OCFO to have poor business controls. Sharpe also pointed out that his efforts to exercise minimal oversight through hiring pauses were denied. Sharpe stated

that in these changed circumstances, he did not see how he could or should bear the accountability for functions that were outside his control.

The next day, March 22, 2016, General Counsel Durmer emailed Sharpe. Without addressing the specific deficiencies Sharpe raised with 18F's practices, Durmer advised that the issues were in the nature of business management and policy concerns and that Sharpe's "oversight responsibilities over the ASF remain in effect." That statutory relationship under the Modernization Act, Durmer stated, was not changed, nor can it be. Durmer assured Sharpe: "You will maintain the same level of oversight and management of the fund as you have had."

On the afternoon of March 24, 2016, Sharpe informed Roth of his intent to non-concur to the Order to create TTS and the proposed use of the ASF to fund TTS. On the evening of March 24 (just before the March 25 deadline for TTS concurrence), Roth and Neufeld met with Sharpe. Roth asked Sharpe whether he intended to close the MOA and terminate ASF funding of TTS. In response, Sharpe assured Roth that while he disagreed with her proposal, he would not walk away from the June 2015 agreement. The discussion of transferring other executives whom Roth believed were underperforming also arose again, which Sharpe took as a veiled threat that he would be removed from his position as FAS Commissioner unless he supported the Administrator's proposal. On the morning of March 25, 2016, Sharpe formally submitted his non-concurrence in the CDT system. Only FAS non-concurred.

At noon on March 25, 2016, Sharpe reported to the OIG that during Roth's and Neufeld's March 24 meeting with him, Roth listed examples of executives on probation who could be reassigned punitively and told him that she needed Sharpe to make the TTS work. At the time, Sharpe viewed Roth's statement as a veiled threat. When asked about this meeting, Roth stated that she had never threatened Sharpe with transfer to another position within GSA or discussed the transfer of other personnel, and had not been present during or a participant in such a conversation.

Roth signed the order establishing TTS as the third service on April 29, 2016, effective that day.<sup>23</sup>

D. Consideration of Transferring Sharpe: As noted earlier, after Sharpe's December 3, 2015 non-concurrence regarding the order creating TTS and the proposed use of ASF funds, Roth began discussing options for transferring or

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<sup>23</sup> GSA Order 5440.696 ADM.

reassigning under-performing SES members with both CPO Harris and General Counsel Durmer. In January 2016, Roth initially met with CPO Harris to discuss performance improvement options for members of the SES. Transfer of SES members was the option of interest to Roth during this meeting. While Sharpe's name was not stated during the meeting, it was clear to CPO Harris that Sharpe was the subject of the conversation. In this meeting, CPO Harris advised Roth that before she could initiate Sharpe's transfer (or that of any SES member), Roth would first have to work with Sharpe to improve his performance and formally document issues. After Roth was familiar with the rules governing personnel transfers, she met privately with General Counsel Durmer to discuss the process for transferring SES members. During this meeting, Durmer advised Roth that transfers of SES members were indeed possible, and that transfers to positions within the local commuting area could be effected as quickly as within 15 days.

From February through April 2016, Roth (and occasionally Neufeld) continued meeting with Harris and Durmer, specifically discussing performance concerns with Sharpe and the option of transfer. On March 22, 2016, Roth sent herself two emails documenting what she described as (1) her attempts to counsel Sharpe to correct his unsatisfactory performance and (2) Sharpe's continued poor performance. In the first email sent that day at 2:17:18, Roth identified the results of the deep dives, alleged general performance issues with Sharpe (*e.g.*, firearms disposal, etc.), Sharpe's "not providing rigorous Mgmt/oversight," and her inability to feel confident in relying on the information Sharpe provided to her. In the second email sent that day at 2:18:09, Roth admitted that "the only reason [she continued] diving deeper [was Sharpe] insisting that 18F [wa]s prob[lematic] if not mtg plan."

Roth forwarded her first March 22 email to Neufeld to use in drafting formal documentation of what Roth asserted were Sharpe's performance deficiencies.

On Friday, March 25, 2016, Sharpe formally non-concurred in the CDT system against the creation of the TTS and its use of the ASF. FAS was the only entity that non-concurred.

On Monday, March 28, 2016, Neufeld sent Roth his revised, edited, "fleshed out" version of the memorandum for issuance to Sharpe. In the revised memorandum, Roth stated that despite her repeated efforts to work with Sharpe to correct Sharpe's alleged performance deficiencies, Sharpe simply had not made any real progress or effort to do so.

On Tuesday, March 29, 2016, Roth sent to Sharpe via email the memorandum, advising Sharpe that she had become concerned “over the recent past two months” with deficiencies in FAS leadership. On March 30, 2016, Sharpe contacted the OIG, forwarded a copy of Roth’s memorandum, and noted that he considered the memorandum to be “retaliation.”

In early April 2016, without waiting for Sharpe’s response to the memorandum, Roth and Neufeld held a discussion with CPO Harris about Sharpe, poor performance, and transfer. During this discussion, the issue of transferring Sharpe was raised, to which Harris responded by stating that Sharpe would first need to be provided an opportunity to improve his performance. Harris continued that in the event that Sharpe’s performance did not improve, then Roth could consider reassignment/transfer to another position where Sharpe could be successful. Roth and Neufeld listened to Harris’s guidance and then Roth requested a skeleton document for such a transfer.

In response to Roth’s request, CPO Harris prepared a document template to transfer Sharpe to either a Senior Advisor or SAM.Gov Project Manager position (Notice of Transfer). On or shortly after April 14, 2016, Harris hand-delivered Sharpe’s Notice of Transfer template to Roth. While Roth and Neufeld recalled that the Notice of Transfer template was for Youel Page, they acknowledged that they planned to transfer both Sharpe and Youel Page simultaneously to other SES positions with less responsibility and authority.

On or about May 16, 2016, Roth and Neufeld met with General Counsel Durmer, several OGC attorneys, and CPO Harris to discuss removing Sharpe and Youel Page from FAS. The discussion included the Administrator’s legal authorities with respect to SES members and the laws that protect federal employees from retaliation. The General Counsel advised that removing these executives would likely be overturned because of Sharpe’s complaint to the OIG. Both Roth and Neufeld acknowledge that they did not transfer Sharpe and Youel Page in light of the General Counsel’s legal advice, and their view that a reversal of that transfer would be completely disruptive for FAS.

E. Sharpe’s Continuing Concerns: Sharpe continued to report to the OIG the concerns he expressed to the Administrator, Deputy Administrator, and the OGC regarding changes in ASF governance that, in Sharpe’s judgment, marginalized the authority of the FAS Commissioner for the ASF, and politicized the ASF.

Roth altered Sharpe's authority over TTS/18F related investments after Counsel's advice led her to abandon plans to remove FAS's leadership. While Sharpe did not know about the transfer proposal, he was aware that Roth was considering a new governance structure for the ASF now that she had decided to create another service funded through the ASF. In view of the uncertainty over how Roth wanted to handle ASF investment proposals, Sharpe contacted Roth on July 18 to inquire whether she wished to approve the investments in TTS until she established the governance model.

In his email, Sharpe advised that he already had acted on several proposed investments sent to him for review, but that the Executive Business Case (EBC) for login.gov concerned him. Sharpe explained that OCFO found the investment controversial because the project relied on a business case for repaying the ASF investment that attempted "to succeed where we have failed before." Neufeld already had approved the login.gov investment as chair of the Investment Review Board (IRB) which oversees investments in GSA's portfolio. Sharpe still had the authority under the MOA to approve and sign or reject the login.gov EBC as the FAS Commissioner, subject to Roth's control and direction as Administrator, but he inquired whether Roth might want to act herself. Nonetheless, he assured Roth that if she wished he would "of course sign [the EBC] and execute it as you see fit to the best of my abilities." Roth responded two days later, July 20, and advised she had selected Neufeld to oversee investment activity on the Administrator's behalf, which Roth felt complemented his role as the IRB chair.

Roth did not tell Sharpe she was relinquishing her responsibilities for the ASF under the Modernization Act, and consequently the nature of Neufeld's oversight responsibility remained vague. When Sharpe later received a September 1, 2016 IRB agenda that included approval of the ASF budget and a TTS investment, he became concerned that the "IRB [wa]s replacing FAS Commissioner in view of ASF as review and approval for budget and EBCs." Sharpe reported to the OIG that this would not serve as a "meaningful FAS Commissioner role to fulfill the role's statutory responsibility to oversee the ASF." Over the next several weeks, Sharpe learned that Roth had delegated to Neufeld her full authority as Administrator to use the ASF for TTS, and that he would exercise this authority with or without Sharpe's input.

On September 6, Roth in an email to GSA's Chief Information Officer advised that OGC had provided guidance that the ASF may be used to fund a product or service when the product or service may potentially be resold to other agencies by FAS. She designated Neufeld as the decision maker for

applying OGC's guidance when there are questions on the application of the guidance in a particular case. Roth also approved TTS's use of ASF funding for a wide variety of TTS activities, including acquisition services, instructional activities, custom partner solutions, transformation, discovery sprints, and products and platforms.

After GSA received the OIG's draft report on 18F/TTS business deficiencies for comment, Sharpe again raised concerns with his inability to protect the ASF. In a September 25, 2016 email to Roth, Sharpe claimed that the report demonstrated that the June 2, 2015 MOA governing TTS use of the ASF was being "willfully ignored," and recommended TTS's orderly transition back to FAS. Sharpe assured Roth that he would take these actions "fully subordinate to you and with full sensitivity to 18F staff and their culture and to our customers." He proposed "to immediately put in place ASF accountability and governance, set a more proper management tone, establish controls, and provide needed leadership to pursue growth to recovery and drive real customer results." Roth responded the next day, September 26, that she was "disappointed" with Sharpe and told him that he needed to become a "constructive partner," which he viewed as retaliatory.

Questions about the new governance from Sharpe and others led to several back-and-forth emails with OGC. On October 7, General Counsel Durmer emailed Sharpe stating that the FAS Commissioner has the responsibility to "actively participate in the review process" for business cases for TTS's use of ASF and subsequent re-sale by FAS, but Sharpe did not need to approve or disapprove the business cases. Durmer notified Sharpe that Roth or her designee, now Neufeld, had the final determinative authority "either way," whether Sharpe approved the EBC or not. Durmer went on to caution: "Any intentional failure" by Sharpe to carry out his functions as FAS Commissioner "could be considered a statutory violation[]."

OGC provided more extensive guidance on October 11. Although the guidance stated that the decision to approve or disapprove an EBC "is to be made jointly by FAS and TTS" with the Administrator or her designee (Neufeld) having the final authority, OGC reiterated that the FAS Commissioner is only required to participate in reviewing proposals. Sharpe had the "discretion to either approve or not approve the business case," but that Neufeld, as the Administrator's designee, had "final determinative authority either way."

How Roth's new governance worked in practice was apparent by fall. Sharpe alerted Roth on September 25 that TTS wanted him to sign an inter-

agency agreement (IAA) in order that \$2.2 million of ASF funding in a FAS project could be used for a TTS project that was in arrears. Sharpe advised that he had not yet signed because he had learned that the payment was for services that had not been ordered, and he needed to understand the matter better. Four days later, September 29, Sharpe learned from another component head that Sharpe had to sign two ASF business cases that already were being performed without his approval, and then learned from Neufeld that Neufeld would sign if Sharpe did not. Sharpe later learned that on September 30, Neufeld had signed the \$2.2 million IAA mentioned above while Sharpe was still investigating it.

Sharpe viewed the governance change as further retaliation by Roth “by negating my authority to oversee the use of ASF as called for in statute and GSA delegations of authority.” Sharpe also felt that the “ASF has been abusively politicized” and that he could not stop that.

Roth’s new governance model gave the FAS and TTS Commissioners shared approval authority for using the ASF to fund TTS projects, although as General Counsel Durmer had earlier cautioned and Sharpe understood, only the FAS Commissioner is accountable for the ASF under the Modernization Act. Sharpe could only exercise control over ASF investments in TTS projects when the TTS Commissioner agreed. In Sharpe’s view: “This le[ft] the ASF in Adam’s hands on behalf of the Administrator, I [was] placed in a wink and nod do as I am directed process.” Moreover, TTS could use the ASF to develop products and services, without having any “ability, or therefore interest, to recover its costs against ASF,” because Sharpe was left responsible for reselling those products and services to repay the ASF even though FAS questioned their viability.

As a consequence of his diminished authority, while Sharpe disapproved the use of the ASF for Cloud.gov and login.gov, after being overruled, and fearing retaliation, Sharpe signed the memorandum of understanding between TTS and FAS for ASF funding.

Administrator Roth resigned her position effective January 20, 2017, and Timothy Horne was appointed as Acting Administrator.

Sharpe subsequently informed the OIG that in a meeting with the Acting Administrator, the Acting Administrator stated to Sharpe that the TTS had White House support and repeated what Roth had said: that Sharpe must make TTS work for FAS. The Acting Deputy Administrator was present at the meeting as well. Sharpe reported to the OIG that he feared retaliation. Sharpe

said he had heard that his position would be converted to a political position, which he believed would be retaliatory.

On May 16, 2017, the OIG interviewed Acting Administrator Horne, who stated that shortly after Horne became Acting Administrator, Sharpe told him he was a whistleblower and that a report from the Office of Special Counsel would be issued in the near future. Horne also said that since he became Acting Administrator, Sharpe had expressed concerns to Horne on several occasions about the use of FAS's Acquisition Services Fund to fund TTS. He said that he recalled receiving a February 2017 letter from OSC, that he had read and agreed with the OIG's audit report concerning TTS, and that he had assigned Acting Deputy Administrator Tony Costa with the effort to respond to OSC and resolve the issues in TTS.

Acting Administrator Horne said he did not believe he had restricted Sharpe's duties or authorities in any way since becoming Acting Administrator. With respect to whether the FAS Commissioner position would be converted to political, he stated that the Administration was reviewing all Senior Executive positions at GSA to determine which should be converted from career to political and vice versa. He said that the decision whether to convert the FAS Commissioner position from career to political would be made by the Administration, not by him or anyone at the GSA. He also stated that he had not spoken with anyone concerning the potential reassignment of Sharpe and that reassignment was not being considered at that time.

On June 6, 2016, Horne notified Sharpe that he is being replaced by a political appointee, effective June 23, 2017, and transferred to a lower level Assistant Commissioner position in the Public Building Services.<sup>24</sup> Horne also announced publicly that he was changing the service level status of TTS, and moving the component under FAS.

#### IV. ANALYSIS

Sharpe disclosed information to the OIG and GSA which he believed shows violations of law, mismanagement, waste, and abuse of authority. He also complained of reprisal in his reports to the OIG and the Agency.

Enacted contemporaneously, the IG Act and the Civil Service Reform Act (CSRA) together enforce merit systems principles and whistleblower

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<sup>24</sup> This report does not address the Administration's decision to make the position of FAS Commissioner a political position.

protections.<sup>25</sup> Because these acts provide parallel statutory schemes for resolving whistleblower complaints brought to the attention of the Office of Special Counsel (OSC), the Merit Systems Protection Board (MSPB), and to an agency's OIG, it is useful to identify the relevant provisions of law that apply to OIG reprisal investigations.

Section 7(a) of the IG Act authorizes IGs to investigate violations of law, rules, or regulations; mismanagement; gross waste of funds; abuses of authority; and substantial and specific dangers to the public health and safety.<sup>26</sup> As discussed in the following section, four separate provisions of law make reprisal unlawful. Section 7(c) of the IG Act prohibits reprisal for making a complaint or disclosing information to the employee's OIG. The CSRA prohibits retaliation against an employee who makes 'protected disclosures' to her agency, the agency's OIG or the Special Counsel, and additionally prohibits retaliation for cooperating with or disclosing information to the IG or the Special Counsel.<sup>27</sup> Each of these provisions is addressed in the following sections.

Reprisal claims have four elements: (A) the employee engaged in a protected activity; (B) another employee who has authority to take, direct others to take (or approve) any personnel action took (or approved) or threatened to take such action; (C) the employee taking such action had actual or constructive knowledge of the protected activity; and (D) there is a causal connection between the protected activity and the personnel action.<sup>28</sup>

Reprisal investigations under the IG Act are not governed by the evidentiary burdens and procedures that govern the OSC and the adversarial adjudicatory proceedings before the MSPB.<sup>29</sup> Instead, OIG investigations consider the preponderance of the evidence to determine the validity of a whistleblower's claims.

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<sup>25</sup> IG Act, Pub. L. No. 95-452, 92 Stat. 1101 (Oct. 12, 1978); CSRA, Pub. Law No. 95-454, 92 Stat. 111 (Oct. 13, 1978). Significant amendments were added by the Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 102 Stat. 16 (Apr. 10, 1989), and the Whistleblower Protection Enhancement Act, Pub. L. No. 112-199, 126 Stat. 1465 (Nov. 17, 2012).

<sup>26</sup> 5 U.S.C. App. 3, at § 7(a).

<sup>27</sup> 5 U.S.C. §§ 2302(b)(8)(A), (b)(8)(A), and (9)(C).

<sup>28</sup> 5 U.S.C. § 1221(e)(1); 5 U.S.C. App. 3, § 7.

<sup>29</sup> See 5 U.S.C. § 1214(b)(4) (In contrast, the MSPB must order such corrective action as the Board considers appropriate if disclosure or protected activity was a contributing factor to a personnel action, unless the agency demonstrates by clear and convincing evidence that the same personnel action would have been taken in the absence of the disclosure).

A. PROTECTED ACTIVITY

An employee making a reprisal claim must demonstrate that he engaged in protected activity. Protected activity is defined differently for § 7(c) disclosures under the IG Act, for § 2302 (b)(9) under the CSRA, and for §§ 2302(b)(8)(A) & (B)(8)(B) under the CSRA.

The OIG finds by preponderant evidence that Sharpe engaged in protected activities that fall within each of the four reprisal provisions.

1. IG Act § 7(c) Protected Activity: The IG Act broadly protects an employee from reprisal for “making a complaint or disclosing information to an Inspector General, unless the complaint was made or the information disclosed with the knowledge that it was false or with willful disregard for its truth or falsity.” 5 U.S.C. App. 3, § 7(c).

Beginning December 2 and 3, 2015, Sharpe made several disclosures to the OIG of information related to 18F deficiencies, along with his concerns regarding the creation of the TTS, the diminution of his responsibilities over the ASF as FAS Commissioner if TTS was authorized, and reprisal. Sharpe provided information that supported the OIG’s evaluation of 18F, particularly regarding its business practices and deficiencies. The OIG investigation finds by preponderant evidence that Sharpe’s complaints and disclosures to the OIG are protected activities under § 7(c).

2. CSRA § 2302(b)(9) Protected Activity: Much like § 7(c) of the IG Act, the CSRA broadly protects an employee “for cooperating with or disclosing information” to an agency IG or to the Special Counsel. 5 U.S.C. § 2302(b)(9)(C).

Subsection (b) of the CSRA also requires, however, that the cooperating or disclosing employee be in a covered position. 5 U.S.C. § 2302(a)(2)(B). The term “covered position” includes “a career appointee position in the Senior Executive Service.” *Ibid.* Sharpe is a career member of the SES who occupies the position of FAS Commissioner within the SES. Sharpe satisfies this requisite.<sup>30</sup>

As stated above, Sharpe provided information to the OIG regarding (a) the TTS/18F business practices; (b) the creation of TTS; and (c) TTS’s impact on FAS and the FAS Commissioner’s statutory responsibilities. In addition,

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<sup>30</sup> See *Acting Special Counsel v. United States Customs Service*, 31 M.S.P.B. 342, 344-45 (2011); *O’Brien v. Office of Independent Counsel*, 74 M.S.P.B. 192, 202-07 (1997).

Sharpe cooperated with the OIG's evaluation. The OIG finds by preponderant evidence that Sharpe's disclosures to, and cooperation with, the OIG are protected activities under § 2302(b)(9)(C).

### 3. CSRA §§ 2302 (b)(8)(A) and (B)

Section 2302(b)(8)(A) protects covered persons who make "a[] disclosure of information" that (s)he reasonably believes evidences (i) any violation of law, rule, or regulation, or (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health and safety from discrimination by a person who has the "authority to take, direct others to take, recommend, or approve any personnel action" against the employee or applicant based on such disclosure. 5 U.S.C. § 2302(b)(8)(A) (disclosures to the agency); *accord* 5 U.S.C. § 2302(b)(8)(B) (disclosures to the OSC or the OIG). Section 2302(b)(8)(B) addresses disclosures to the Special Counsel and the Inspector General, using identical language (excepting, however, that disclosures under this provision cannot include an alleged violation of Section 2302 itself).<sup>31</sup>

"Disclosure" is defined as a "formal or informal communication or transmission." 5 U.S.C. § 2302(a)(2)(D). Whether the employee engaged in protected activities is determined by the reasonableness of his belief, "not whether he correctly labeled the category of wrongdoing; OSC can be expected to know which category of wrongdoing might be implicated by a particular set of factual allegations."<sup>32</sup> The reasonableness of an employee's belief is judged from the perspective of an informed, objective listener, by determining whether

a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee or applicant would reasonably conclude that the actions of the Government evidence such violations, mismanagement, waste, abuse or danger.

5 U.S.C. § 2302(b)(13).<sup>33</sup>

As discussed below, the OIG finds by preponderant evidence that Sharpe made protected disclosures of violations of law, gross mismanagement, gross waste of funds, and abuse of authority.

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<sup>31</sup> The exception noted in the text is not pertinent to this investigation. Sharpe's disclosures of possible violations of law do not include alleged violations of § 2302.

<sup>32</sup> *Pasley v. Dep't of Treasury*, 109 M.S.P.R. 105, 112 (2008).

<sup>33</sup> *See Pasley v. Dep't of Treasury*, 109 M.S.P.R. at 112.

*a. Violations of Law: 2006 Modernization Act*

Sharpe reported that the creation of the third service, TTS, violated the 2006 GSA Modernization Act in two ways: (1) by TTS overlapping and duplicating functions assigned to FAS; and (2) through the order approving TTS's use of ASF funds, while restricting the FAS Commissioner's statutorily required oversight of the ASF.

Sharpe is not an attorney. Accordingly, the reasonableness of his belief regarding violations of law is measured by a disinterested *lay* observer standard. As the FAS Commissioner, he is knowledgeable about the ASF, the functions performed by FAS and its components, and how investments are made and protected to achieve cost recovery. Sharpe has been involved with 18F since its predecessor project commenced in 2013, and he understands how the work of 18F relates to the work of FAS. Sharpe also understands the process he used when 18F was under FAS oversight and management; when 18F was moved to OCSIT; and now that 18F has evolved to become TTS, the third service.

In evaluating the objective reasonableness of Sharpe's beliefs that the Modernization Act was violated, the OIG considered that Roth and Neufeld received frequent legal advice from OGC, and that OGC provided legal advice to the Administrator and Deputy Administrator on numerous occasions in order to achieve Roth's vision for a third service. OGC considered Sharpe's concerns and advised him on several occasions that Roth had the authority (1) to create TTS and (2) to determine TTS's governance for using ASF funding. The OIG investigation recognized that attorneys may disagree on how the Modernization Act should be interpreted, and a final resolution is not necessary for this investigation.

While an employee reasonably may rely on advice of his agency's counsel, the OIG finds by preponderant evidence that Sharpe's belief that the third service violated the Modernization Act is objectively reasonable as to both issues he raised. Indeed, we found that similar concerns were raised by others, including OGC staff. In the weeks leading up to Sharpe's December 3, 2015 non-concurrence, the questions raised by OGC staff included:

“the creation of DTS as a technology-focused service alongside FAS looks like an administrative repeal of prior legislation and a stealth re-creation of a service Congress specifically abolished via the GSA Modernization Act”

“legal risks: open question as to whether the Act partially pre-empted the Administrator’s authority to create DTS”

“DTS fails to solve existing customer confusion between different technology-focused organizations with GSA”

“creates duplication with FAS in a subset of FAS’ territory (smaller deals)”

Undoing the Modernization Act: Administrator Roth saw value with two separate GSA services offering IT services to agency customers. She saw success when agencies decide to buy services from “a new venture like 18F rather than take advantage of existing FAS offerings.”

Sharpe, however, complained that the GSA Administrator did not have the authority to create a new service that duplicated or overlapped the GSA acquisition functions that the Modernization Act consolidated in FAS. As the Administrator’s comment above reflected, it is apparent that in practice, if not intent, FAS and TTS had overlapping missions.

The duplication also is apparent in the notice that the Administrator sent to Congress. Section 608 of the Consolidated Appropriations Act, 2016, Pub. Law No. 114-113, 129 Stat. 2242 (Dec. 18, 2015) (Section 608 or § 608), generally requires notice to the Committees on Appropriations of the House of Representatives and the Senate of a reprogramming of appropriated funds that, *inter alia*, creates or reorganizes offices, programs, or activities. Through her Section 608 notification to Congress, the Administrator made apparent that in practice, if not intent, FAS and TTS had overlapping missions:

GSA has a central role in transforming government technology, whether it’s assisting agencies in accessing and purchasing from innovative technology companies, informing and building out agency digital services, and building new government-wide platforms and products at a scale that would otherwise have been prohibitive.

The new Service will apply modern methodologies and technologies to improve the public’s experience with government by helping agencies make their services more accessible, efficient, and effective, and by itself providing services that exemplify these values. Additionally, the new service will build an acquisition

bench that specializes in emerging technology, adding a skillset that currently is very rare within the civilian sector of the federal government. *This service will help fill the gaps in government offerings that other agencies have expressed interest in, and will complement established agency ITS' strong acquisition vehicles and other parts of GSA.*<sup>34</sup>

The potential for duplication and confusion also appears in the respective missions of the TTS and the FAS offices of Integrated Technology Services (now the Integrated Technology Category, ITC) and Assisted Acquisition Services (AAS). FAS ITS “leads initiatives to research emerging technologies,” while the TTS is responsible for “[i]dentifying and testing emerging technology products and services.”<sup>35</sup> FAS AAS and ITS provide customer agencies IT “acquisitions expertise, support and solutions,” while the TTS’s mission includes consulting with agencies on technology procurements and “incubating new contracting vehicles” for emerging technology products and services, in coordination with FAS.<sup>36</sup>

Moreover, Sharpe knew that Roth wanted the new service to have acquisition authority and that at some point FAS might lose components to the service. As early as October 15, 2015, Roth conveyed her interest in “providing procurement authority for individual contracts and government wide vehicles” within the focus of the new service. Neufeld acknowledged that transferring FAS’s ITS to the new service was proposed as late as March 2016, and remained an open issue for future consideration. In fact, as late as March 11, 2016, two weeks before Sharpe ultimately non-concurred, the order for creating a new service provided for transferring part of FAS/ITS.

The head of OCSIT, Phaedra Chrousos, who would become the TTS’s first Commissioner, understood from her discussion with McMahon that duplication of FAS functions was one reason that Administrator Roth wanted a new service. Shortly after Roth announced her commitment to create TTS, Chrousos advised Brizzi that the new TTS service “may one day include parts of

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<sup>34</sup> While GSA’s § 608 letter notified the Committees on Appropriations and on Financial Services and General Government that GSA planned to create a new service, the letter did not address any use of the ASF. The attached GSA Order references the use of ASF, but there is nothing in the letter or attachment that suggested the FAS Commissioner would share authority over the ASF with the TTS Commissioner.

<sup>35</sup> *Assisted Acquisitions Services: Innovation, Service, Value* (July 2015); ITS Organization ¶¶ 3, 8 (Last Reviewed 4.4.16); ADM 5440.696 ¶ 2(d).

<sup>36</sup> *Assisted Acquisitions Services: Innovation, Service, Value* (July 2015); ITS Organization ¶¶ 3, 8 (Last Reviewed 4.4.16); ADM 5440.696 ¶ 2(g).

FAS ITS,” and that “we need to create a mission statement that is indeed a little vague when it comes to the line between FAS and the new Service,” a mission statement with “enough flexibility in its boundaries to expand later.” The OIG found that 18F also saw that overlap within GSA was good, because from their perspective, it fostered competition. Months later, on March 16, Chrousos recommended that Neufeld have a “hard talk” with Sharpe and his staff to explain: “[T]his is what we are, indeed, trying to do. I.e. ‘duplication’ is purposeful b/c ‘duplication’ really = transfer of responsibility.”

Sharpe’s concerns with duplication reflected his view that FAS was established by the Modernization Act to resolve the previous problems GSA’s customers experienced from GSA having two separate services, each with overlapping missions and functions. Sharpe’s understanding in this regard accurately reflected the legislative history of the Modernization Act. Through the Modernization Act, Congress consolidated GSA’s technology (FTS) and supply (FSS) services in order to address the “overlapping and redundant functions in both FTS and FSS [which caused] inefficiencies and confusion for customer agencies,” as well as to decrease the government’s acquisition costs associated with purchasing goods and services.<sup>37</sup> The OIG found that Sharpe and his staff were not the only ones concerned that the new service might violate the Modernization Act.

GSA’s General Counsel informed Sharpe that the Administrator had broad authority to reorganize GSA as she deemed appropriate, and that this had been done many times in the past. As the General Counsel stated, Administrator Roth did have *general* authority to delegate authority to another officer in GSA, transfer or reassign functions from one component to another, and establish components.<sup>38</sup> The GSA OGC’s position regarding the Administrator’s general authority was based on the assumption that the Modernization Act did not impair such general authority, which is found in 40 U.S.C. § 121(e).

Sharpe approached the issue differently. In contrast to GSA OGC’s position, Sharpe thought a law would have to be enacted to change what the Modernization Act created. His point has some validity. The House Report to the Modernization Act expressed a legislative intent to “ensur[e] that the structural reforms [of the Act] are memorialized in GSA’s organic legislation so

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<sup>37</sup> H.R. Rep., 109-91, 2006 WL 3901782, at \*5, \*7-8; accord S. Rep. 109-257, 2006 WL 1524427, at \*2.

<sup>38</sup> 40 U.S.C. § 121 (d)(1), (e)((1)).

that the remedies developed will endure.”<sup>39</sup> The Modernization Act consolidated GSA’s acquisition functions. If the order creating the TTS also created overlapping acquisition functions within FAS, then Sharpe may have been correct in his belief that a legislative change was required to undo the consolidation of acquisition services legislated through the Modernization Act.<sup>40</sup> Moreover, as the following section discusses, general delegation statutes such as 40 U.S.C. § 121(e) typically do not override more specific statutes such as contained in the Modernization Act, which imposes a restriction on those agency officers who can exercise the functions of the FAS under the Act. In a situation analogous to GSA’s, the Supreme Court held that the Attorney General’s broad delegation authority does not override the federal wiretap statute’s provision that applications to federal judges for wiretaps may only be delegated to specified officials.<sup>41</sup>

We found that Sharpe made protected disclosures to the Administrator and Deputy Administrator, the General Counsel, and others within GSA, as well as to the OIG. Sharpe expressed an objectively reasonable concern, one shared by others and one consistent with the purpose of the Modernization Act: that the creation of a third service conflicts with the intent of the Congress as set forth in the Act. The OIG finds by preponderant evidence that a disinterested lay person in the same position as Sharpe, with the knowledge of the essential facts he would know in that position, reasonably would believe that the disclosure evidenced a violation of law.

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<sup>39</sup> H.R. Rep., 109-91, 2006 WL 3901782, at \*6.

<sup>40</sup> Compliance with Section 608 does not operate as an implied repeal of a provision of statutory law, such as the Modernization Act. *Robertson v. Seattle Audubon Soc.*, 503 U.S. 429, 440 (1992)(“repeals by implication are especially disfavored in the appropriations context” and amendments to substantive law in an appropriations statute must be done so “clearly”). A repeal must be effected through legislation. *INS v. Chadhra*, 462 U.S. 919 (1983) (holding held a two-house veto provision without bicameralism and presentment unconstitutional).

<sup>41</sup> *United States v. Giordano*, 416 U.S. 505, 512-523 (1974); *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S.Ct. 2065, 639, 2071 (2012)(“It is an old and familiar rule that, where there is, in the same statute, a particular enactment, and also a general one, which, in its most comprehensive sense, would include what is embraced in the former, the particular enactment must be operative, and the general enactment must be taken to affect only such cases within its general language as are not within the provisions of the particular enactment. This rule applies wherever an act contains general provisions and also special ones upon a subject, which, standing alone, the general provisions would include.”(internal citations omitted)).

## Two Commissioners Managing ASF Disbursements

Sharpe also believed that the creation of the new service interfered with his ability to carry out his functions under the Modernization Act, which provided that:

Subject to the direction and control of the Administrator of General Services, the Commissioner for the Federal Acquisition Service *shall be* responsible for carrying out functions related to the uses for which the Acquisition Services Fund is authorized under section 321 of this title, including any functions that were carried out by the entities known as the Federal Supply Service and the Federal Technology Service and such other related functions as the Administrator considers appropriate.<sup>42</sup>

40 U.S.C. § 303(b)(emphasis added).

Under the earlier MOA with OCSIT, Sharpe directly, or through his deputy, reviewed the ongoing performance of ASF funds provided to 18F, approved the executive business cases and ASF funding for many 18F projects, and held periodic project reviews. Sharpe reported to the OIG that the creation of a third service effectively meant that the responsibility for ASF's investment in 18F was shared by two Commissioners, thereby diminishing his authority and responsibility as set forth in the Modernization Act.

Sharpe believed that the Modernization Act assigned the functions relating to the ASF to a career Commissioner, and that this was done in order to protect the fund from political influence. He predicted that sharing responsibility would politicize the ASF by

set[ting] up a competition between the third service Commissioner, who has no authority or accountability for the use of the ASF, with the FAS Commissioner, who has authority for the use of the ASF and cannot remove himself from accountability for proper management of the ASF. The competition can only be resolved by the Administrator, thereby negating the FAS Commissioner's authorities, and putting at risk FAS investments and critical government operations it supports.

After approving the TTS, Roth established a new governance model that delegated her authority to Neufeld, and Sharpe's prediction of competition

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<sup>42</sup> 40 U.S.C. § 303(b).

between two Commissioners came to being. Sharpe pointed out that while the OGC opined that Sharpe remained accountable for the ASF, and that the FAS Commissioner’s accountability cannot be changed under the law, Sharpe’s authority to control ASF-funded investments had significantly diminished. As a result, Sharpe asserted that it was difficult (if not practically impossible) for him to control the ASF funding even though “[a]ccountability remains with the FAS Commissioner.”

As to the first point Sharpe raised, we note that the Modernization Act provides that the FAS Commissioner exercises authority over the ASF “[s]ubject to the direction and control of the Administrator,” a political officer.<sup>43</sup> Moreover, although Sharpe was and remains a career SES, GSA designated his FAS Commissioner position as a “general” SES position, which means that the position may also be filled by a noncareer appointee.<sup>44</sup> This does not mean, however, that Sharpe’s broader concern with sharing the management and oversight of the ASF with another Commissioner is unreasonable.

While the Administrator may exercise direction and control over the Commissioner, that does not mean that the Modernization Act grants the Administrator unlimited authority to delegate or transfer ASF managerial or oversight functions outside FAS as part of her “direction and control” responsibility. Rather, the Act permits the Administrator to delegate this authority – but only by “appoint[ing] Regional Executives *in the Federal Acquisition Service*, to carry out such functions with the Federal Acquisition Services as the Administrator considers appropriate.”<sup>45</sup> That is different from delegating all or part of the FAS Commissioner’s responsibilities *outside* of the FAS.

In analogous circumstances, the Supreme Court held that where “the matter of delegation is expressly addressed” by another statute “specifically limiting” the agency head’s *general* delegation authority, the more specific statute controls the general one.<sup>46</sup>

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<sup>43</sup> 40 U.S.C. § 303(b).

<sup>44</sup> 81 Fed. Register 32936-01, 2016 WL 2958742, at 160-61 (“SES Positions That Were Career Reserved During CY 2015,” not listing FAS Commissioner and Deputy Commissioner as career reserved positions; 5 C.F.R. § 214.401; *see also* 5 U.S.C. §§ 3132(a)9), (b)(1) (the latter section providing that positions are designated career reserved “only if the filling of the position by a career appointee is necessary to ensure impartiality, or the public’s confidence in the impartiality, of the Government.”).

<sup>45</sup> 40 U.S.C. § 303(c) (emphasis added).

<sup>46</sup> *Giordano v. United States*, 416 U.S. at 514 (1974); *accord Touby v. United States*, 500 U.S. 160, 169 (1991); *Morton v. Mancari*, 417 U.S. 535, 550-551 (1974)(The enactment of Title VII in

We found that Sharpe made protected disclosures to the Administrator and Deputy Administrator, the General Counsel, and others, as well as to the OIG. At the least, Sharpe objectively had a reasonable belief that the Administrator’s adoption of the governance model for ASF-funded TTS projects violated the Modernization Act by sharing responsibilities for the ASF’s investment between two Commissioners. The OIG finds by preponderant evidence that a disinterested lay person in the same position as Sharpe, with the knowledge of the essential facts he would know in that position, reasonably would believe that the disclosure evidenced a violation of law.

*b. Violations of Law: Other Violations*

Sharpe also reported possible 18F violations regarding the Competition in Contracting Act (CICA) and the Anti-Deficiency Act.<sup>47</sup>

(1) Competition in Contracting Act:

On December 3, 2015, Sharpe reported to the OIG that 18F was violating the CICA by reselling Amazon web services, procured exclusively for GSA’s use, to other agencies. In a February 4, 2016 meeting with Roth, Sharpe expressed his concern that granting 18F procurement authority could “subject[] proper procurement to [the] pressure of [a] financially struggling start up [e.g., the Amazon Web Services -] CICA issue.” The OIG found that in late October 2015, GSA Senior Procurement Executive (SPE) Jeffrey Koses became concerned that 18F did not understand the line between making a contract solution available to another agency and using a contract in support of performing work for that agency. After working with OGC, on November 17, 2015, SPE Koses provided formal guidance to OCSIT/18F on the CICA, with a copy to Sharpe.

Other than his initial disclosure to the OIG regarding the Amazon contract, Sharpe did not provide information on CICA violations continuing

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1972, a general statute prohibiting discrimination in federal employment, is not an implied repeal of a 1934 Act that specifically provided an employment preference for qualified Indians in the Bureau of Indian Affairs. The Court held as a general rule: “Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.” This applies to delegation to the TTS Commissioner as well as to the Deputy Administrator. Although the Deputy Administrator “perform[s] functions designated by the Administrator,” the Court has cautioned that the general/specific canon is particularly apt when “Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions,” such as the 2006 Modernization Act accomplished when creating FAS). *Radlax Gateway Hotel, LLC v. Amalgamated Bank*, 132 S.Ct. at 2071 (citation omitted).

<sup>47</sup> See 41 U.S.C. § 3301 (CICA); 31 U.S.C. § 1341 (Anti-Deficiency Act).

after the SPE's intervention. The OIG finds by preponderant evidence that a disinterested lay person in the same position as Sharpe, with the knowledge of the essential facts he would know in that position, reasonably would believe that the disclosure evidenced a violation of law.

(2) Anti-Deficiency Act:

Sharpe reported his concerns with 18F's management of IAAs to General Counsel Durmer, as well as to the OIG. He reported to the OIG that 18F personnel were backdating IAAs in violation of the Anti-Deficiency Act. Sharpe subsequently reported that the ASF was being used by 18F to subsidize the budgets of other agencies. Sharpe elaborated by stating that 18F does not set its rates high enough to recover costs in order to get work from other agencies. By setting its rates too low, 18F's ability to achieve full recovery was negatively affected, while the budgets of agencies that use 18F services were effectively augmented. Sharpe told both the OIG and Durmer that 18F was doing projects for other agencies without IAAs in place. Sharpe also raised his concerns with Roth about the potential for augmentation with the login.gov project.

Sharpe's complaints about IAAs were investigated by the OIG's Office of Inspections, which found that in 101 of 18F's 202 project agreements the period of performance predated execution of the IAA.<sup>48</sup> For 50 of these projects, billable work was performed before execution of the IAA, jeopardizing 18F's ability to collect payment for at least 21,789.42 hours of work hours performed.<sup>49</sup> Billable work was performed in 14 projects outside the period of performance.<sup>50</sup> The report concluded that 18F failed to comply with requirements for Economy Act agreements.<sup>51</sup>

We found that Sharpe made protected disclosures to Roth and Durmer as well as to the OIG. Although Sharpe thought his disclosure showed Anti-Deficiency Act - rather than Economy Act - violations, that does not diminish the reasonableness of his disclosure.<sup>52</sup> The OIG finds by preponderant evidence that a disinterested lay person in the same position as Sharpe, with

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<sup>48</sup> *Evaluation of 18F*, JE17-001 (Oct. 24, 2016) at 16.

<sup>49</sup> *Evaluation of 18F*, JE17-001 (Oct. 24, 2016) at 16.

<sup>50</sup> *Evaluation of 18F*, JE17-001 (Oct. 24, 2016) at 16.

<sup>51</sup> 31 U.S.C. § 1535.

<sup>52</sup> *Pasley v. Dep't of Treasury*, 109 M.S.P.R. at 112 ("The key to determining whether . . . the exhaustion requirement [has been satisfied] . . . is whether [the whistleblower] provided . . . a sufficient basis to pursue an investigation, not whether he correctly labeled the category of wrongdoing; [the Office of Special Counsel] can be expected to know which category of wrongdoing might be implicated by a particular set of factual allegations.").

the knowledge of the essential facts he would know in that position, reasonably would believe that the disclosure evidenced violation of law.

*c. Gross Mismanagement*

“Gross mismanagement means a management action or inaction that creates a substantial risk of significant adverse impact on the agency’s ability to accomplish its mission.”<sup>53</sup> To constitute gross mismanagement, there must be “an element of blatancy” and “more than de minimis wrongdoing or negligence” (as opposed to decisions which are “merely debatable”).<sup>54</sup> Sharpe reported several such examples of gross mismanagement occurring before and after the decision to create the TTS.

In his initial report on December 3, 2015, Sharpe alerted the OIG that the new service was proposed without an assessment of the continued viability of the 18F model and without any supporting executive business case, market analysis, or stakeholder analysis, or any analysis of the negative impact that a new service might have to the FAS mission. Sharpe further reported that 18F was not being managed to recover costs and, instead, was allowed to continue hiring despite mounting financial losses and an absence of managerial controls to assist in protecting the ASF investment in 18F. After his initial report, Sharpe continued to report to the OIG about 18F’s inability to recover its costs and its continued hiring despite its mounting financial losses.

The OIG investigated these and other reports and confirmed Sharpe’s concerns. The OIG’s Office of Inspections found that 18F had a \$31.66 million cumulative net loss from its launch in March 2014 through the third quarter of FY 2016.<sup>55</sup> The report attributed this to unrealistic revenue projections, bloated staffing levels (which increased from 33 to 201 over these 31 months), and a low utilization rate for billable hours (more than half of the staff time was spent on nonbillable activities).<sup>56</sup> For example, although 18F projected over \$84 million in revenue for FY 2016, by the third quarter the actual revenue was less than \$28 million.<sup>57</sup> The OIG found that less than half of the 18F staff’s time was spent on projects that would recover FAS’s ASF investment in 18F

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<sup>53</sup> *Embree v. Dep’t of the Treasury*, 70 M.S.P.R. 79, 85 (1996).

<sup>54</sup> *Embree v. Dep’t of the Treasury*, 70 M.S.P.R. at 85; see also *Pulcini v. Social Sec. Admin.*, 83 M.S.P.R. 687, 690 (1999)(citation omitted), *aff’d No. 00-3099, 2000 WL 772728* (Fed. Cir. June 13, 2000), *per curiam*.

<sup>55</sup> *Evaluation of 18F*, JE17-001 (Oct. 14, 2016) at 8.

<sup>56</sup> *Evaluation of 18F* at 9-14.

<sup>57</sup> *Evaluation of 18F* at 9.

and that more than half of the time was spent on nonbillable activities.<sup>58</sup> The evaluation also found comments from senior agency and 18F leaders that raised doubt about 18F's intent to break even.<sup>59</sup>

The report of OIG's Office of Inspections addressed the numerous instances where IAAs and MOUs did not comply with GSA OGC's guidance in direct contravention of the express terms of the Department of Treasury's standard IAA (which 18F used as their IAA template) and the Economy Act.<sup>60</sup> Among other deficiencies, the OIG found that the period of performance predated the execution of an IAA or MOU in 50% of 18F's 202 intra or inter agency projects, risking 18F's ability to collect payments with a potential loss of \$1.4 to \$4.4 million.<sup>61</sup> The OIG evaluation found a pattern of 18F disregarding the advice of GSA's OGC, OCFO, and FAS, which in total advised 18F on at least 37 occasions that work should not be performed without a fully executed project agreement.<sup>62</sup>

We found that Sharpe made protected disclosures of gross mismanagement to Roth, Neufeld, General Counsel Durmer, and others, as well as to the OIG. As stated previously with regard to Sharpe's disclosures of possible violations of law, Sharpe had been involved with 18F since the predecessor project commenced in 2013. Sharpe's knowledge of 18F's business activities came from his engagement with TTS/18F leaders, discussions with the OCFO, and discussions within and without FAS regarding 18F activities. Sharpe was in a position to reasonably believe his disclosures.<sup>63</sup> The OIG found that the OCFO also shared Sharpe's view that in order to establish internal controls and align staffing with revenue, 18F needed to pause hiring, which had increased more than 500% in less than three years.<sup>64</sup>

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<sup>58</sup> *Evaluation of 18F* at 12-14.

<sup>59</sup> *Evaluation of 18F* at 10.

<sup>60</sup> *Evaluation of 18F* at 15-17.

<sup>61</sup> *Evaluation of 18F* at 16-17.

<sup>62</sup> *Evaluation of 18F* at 16-17.

<sup>63</sup> *Schnell v. Dep't of the Army*, 114 M.S.P.R. 83, 92 (2010) ("A reasonable belief exists if a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the appellant could reasonably conclude that the actions of the government evidence one of the categories in section 2302(b)(8)(A)). . . . To establish that the appellant had a reasonable belief that a disclosure met the criteria of 5 U.S.C. § 2302 (b)(8), he need not prove that the condition disclosed actually established a regulatory violation or any of the other situations detailed under 5 U.S.C. § 2302 (b)(8)(A)(ii); rather, the appellant must show that the matter disclosed was one which a reasonable person in his position would believe evidenced any of the situations specified in 5 U.S.C. § 2302 (b)(8)(internal citations omitted).

<sup>64</sup> *Evaluation of 18F* at 10-11.

Sharpe disclosed pervasive management deficiencies that not only threatened the success of 18F but the FAS's investment of ASF funds in TTS/18F.<sup>65</sup> Notably, GSA did not challenge the report's findings and accepted the OIG's recommendations.<sup>66</sup> The OIG finds by preponderant evidence that a disinterested lay person in the same position as Sharpe, with the knowledge of the essential facts he would know in that position, reasonably would believe that the disclosure evidenced gross mismanagement. Sharpe disclosed his concerns with mismanagement to the OIG and to GSA, including both Roth and Neufeld.

*d. Gross Waste of Funds*

"Gross waste of funds' is a more than debatable expenditure that is significantly out of proportion to the benefit reasonably expected to accrue to the government."<sup>67</sup> This includes circumstances where an agency uses funding in ways not permitted by law.<sup>68</sup>

Sharpe was acutely aware of FAS's investment of ASF funds in 18F and recognized that the investment of ASF funds could not be recovered if 18F continued to add staff and operate at a low utilization rate (*i.e.*, by performing projects where they billed less than 50% of their time as billable hours). He also knew that the ASF-funded staffing had grown "enormously," notwithstanding his efforts to pause hiring without adequate cost recovery controls. Moreover, Sharpe reported deficiencies in 18F's use of IAAs which could limit GSA's ability to recover payment for 18F's work for other agencies. As discussed more fully above, the mismanagement resulted in a \$31.66 million cumulative net loss from 18F's launch in FY 2014 through the third quarter of FY 2016.

Sharpe made protected disclosures to the OIG and to GSA, including to Roth and Neufeld, concerning gross waste of funds, and the OIG's *Evaluation of 18F* report confirmed his disclosures. The OIG finds by preponderant evidence that a disinterested lay person in the same position as Sharpe, with the

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<sup>65</sup> *Evaluation of 18F* at 19.

<sup>66</sup> *Evaluation of 18F* at 21-22; *see also White v. Dep't of the Air Force*, 391 F. 3d 1377, 1382 (Fed. Cir. 2004) (to constitute "gross mismanagement," the whistleblower must identify "such serious errors by the agency that a conclusion the agency erred is not debatable among reasonable people. The matter must also be significant.").

<sup>67</sup> *Embree v. Dep't of Treasury*, 70 M.S.P.R. at 85.

<sup>68</sup> *Cf., Van Ee v. E.P.A.*, 64 M.S.P.R. 693, 698 (1994)(employee disclosed gross waste of funds by revealing agency's plan to use \$400 thousand for a research study that did not meet legislative requirements).

knowledge of the essential facts he would know in that position, reasonably would believe that the disclosure evidenced gross waste of funds.

*e. Abuse of Authority*

“Abuse of authority’ is comprised of an arbitrary and capricious exercise of power by a Federal official or employee that adversely affects the rights of any person or results in personal gain or advantage to the official or preferred other persons.”<sup>69</sup> This includes the “[h]arassment and intimidation of other employees” by a supervisor who uses his influence “to denigrate other staff members in an abusive manner and to threaten the careers of staff members with whom he disagrees.”<sup>70</sup> Importantly, unlike reports of mismanagement and waste of funds, “[t]here is no de minimis standard for abuse of authority as a basis of a protected disclosure under the WPA.”<sup>71</sup>

Sharpe reported that the creation of a third service with access to the ASF constituted an abuse of authority. The OIG finds by preponderant evidence that the Administrator’s creation of the TTS cannot be characterized as an arbitrary and capricious decision constituting an abuse of authority. Throughout the process, Roth sought the advice of counsel and adjusted her plans to meet that advice. Although the creation of a third service did affect the authorities Sharpe previously had exercised overseeing the ASF, this consequence more appropriately is addressed as a possible violation of law and as a threatened personnel action.

Sharpe also reported that Roth, through her March 31, 2016 email entitled “Areas for Review,” a critical analysis for Sharpe’s performance of his duties, was trying to intimidate and bully him. Following his initial December 2 and 3, 2015 report to the OIG, Sharpe interpreted subsequent comments and actions by Roth and Neufeld as veiled threats and intimidation. Neufeld began to review ASF-funded projects under Sharpe’s management on December 8, 2015, five days after Sharpe’s December 3 non-concurrence. On January 20, 2016, Roth initiated increased scrutiny of FAS operations by “deep dives” into FAS ASF-funded projects - and Neufeld *personally* led these reviews. On March 24, 2016, the day before he had to concur or non-concur in the final draft order, Sharpe met with Roth and Neufeld, and was told about certain SES members who were on probation and could receive punitive reassignments, which Sharpe interpreted to be a “veiled threat.” On March 29, 2016, four days

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<sup>69</sup> *Nelson v. Dep’t of the Army*, 658 F. App’x 1036, 1039 (Fed. Cir. 2016)(citation omitted).

<sup>70</sup> *Pasley v. Dep’t of the Treasury*, 109 M.S.P.R. 105, 114 (2008).

<sup>71</sup> *Pasley v. Dep’t of the Treasury*, 109 M.S.P.R. at 114 .

after Sharpe recorded his non-concurrence, Roth sent Sharpe a lengthy memorandum that charged him and his deputy with failures in their leadership and oversight of FAS.

Sharpe made protected disclosures to the OIG concerning intimidation that show an abuse of authority. As this report discusses more fully below, Sharpe identified incidents that occurred immediately before or following the dates he had to record a concurrence or non-concurrence regarding the proposed, new service, and that he found these incidents to be intimidating and threatening. While not required, Sharpe has provided more than de minimis evidence of intimidation. In addition to temporal proximity, the context of the comments – the unprecedented nature of the deep dives for FAS; the fact that the Deputy Administrator personally conducted the dives; the mention of transferring SES members in multiple discussions on the third service; and the harsh nature of the criticism of Sharpe and his deputy in Roth’s memorandum of issues for review after Sharpe non-concurred – are relevant to show how Sharpe perceived Roth’s and Neufeld’s comments and actions.

The OIG finds by preponderant evidence that a disinterested lay person in the same position as Sharpe, with knowledge of the essential facts that would be known by the FAS Commissioner, reasonably would believe that the disclosure evidenced an abuse of authority in the form of intimidation.

#### B. PERSONNEL ACTION

Both the IG Act and the CSRA prohibit employees who have the authority to do so from taking, failing to take, or threatening to take or fail to take, a personnel action as reprisal for another employee’s engagement in a protected activity.<sup>72</sup> The CSRA defines “personnel action” to include “a detail, transfer, or reassignment” and “any other significant change in duties, responsibilities, or working conditions.”<sup>73</sup>

The OIG finds by preponderant evidence that former Administrator Roth had the authority to take or threaten personnel actions against Sharpe, Roth’s direct subordinate. The OIG further finds by preponderant evidence that Administrator Roth took actions toward Sharpe that threatened him with transfer or other adverse personnel action, and significantly changed his responsibilities with regard to the ASF.

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<sup>72</sup> 5 U.S.C. App. 3, at § 7(c); 5 U.S.C. §§ 2302(b)(8), (b)(9).

<sup>73</sup> 5 U.S.C. § 2302(a)(2)(iv) and (xii).

## *Threatened Transfer*

Threatening to take a personnel action in reprisal for protected activity is prohibited by 5 U.S.C. § 2302(b)(8) and (9), as well as Section 7(c) of the IG Act. The term “threatened” is given a “fairly broad interpretation” and includes implied threats from statements or notices that “give signs of” a future personnel action, such as when a supervisor identifies serious performance deficiencies that signal or warn of an upcoming adverse consequence.<sup>74</sup>

Sharpe identified several comments that he viewed as veiled threats of adverse action unless he supported the Administrator’s proposal of the third service. Sharpe told the OIG and a witness that on the evening of December 2, 2015, before Sharpe went to the OIG the next day, Sharpe met with Roth and Neufeld and was accused of “not playing ball.” He said that Neufeld also mentioned transferring SES employees in the meeting with Roth, which Sharpe found threatening. Although Neufeld told us that transfers were discussed but that Sharpe raised the subject, the OIG investigation corroborated Sharpe’s recollection. Additionally, Sharpe told us, and Roth’s emails reflect, that on December 3, 2015, Roth expressed her frustration when Sharpe told her that he had non-concurred with her draft order for the third service and that he had gone to the OIG rather than come to her first.

According to Sharpe, the threats continued in connection with his subsequent non-concurrence on the final draft order for the third service. Sharpe told us that in a meeting on March 16, 2016, Roth instructed Sharpe to find a way to make the third Service work for FAS. Sharpe told us, and Roth’s emails confirm, that on March 18, 2016, Roth told him to take his concerns regarding TTS to General Counsel Durmer. When Sharpe followed Roth’s direction and visited Durmer stating his concerns regarding the TTS, Sharpe related that Durmer opined, “If any one of us [SES] cant [sic] execute in good faith, we can resign.” On March 24, 2016, the day before Sharpe had to record his concurrence or non-concurrence on the final draft Order to authorize the TTS and the use of ASF funding for TTS, Roth told Sharpe she needed him to

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<sup>74</sup> *Gergick v. General Services Administration*, 43 M.S.P.R. 651, 656-657 (1990)(finding that where agency knew of employee’s report to the OIG, and thereafter conducted an extensive level of inquiry into the employee’s actions, agency’s inquiry “reflected more than a passing thought of [adverse action such that] the likelihood of [adverse] action was not insignificant,” and the dictionary definition of “threaten” was met); *Mastrullo v. Dep’t of Labor*, 123 M.S.P.R. 110, 121-122 (2015) (noting that the distinction between counseling and a threat is not a bright one, and that a notice of performance deficiency can be viewed as an implied threat to take retaliatory action.) In *Mastrullo*, the Board held that “the term ‘threaten’ means, among other things, ‘to give signs of the approach of (something evil or unpleasant),’ and that it should be given fairly broad interpretation.” *Ibid.*

make the new service work for FAS and “not to walk away’ from the agreement.” Sharpe reported that at the same meeting, Roth made an out-of-context comment about punitive SES transfers that led some to retire. Roth denied any discussion of transfers with Sharpe. The OIG’s investigation found preponderant evidence supporting Sharpe’s accounts of these conversations.

Sharpe reported that Roth and Neufeld also increased their scrutiny of Sharpe’s performance as FAS Commissioner because he had non-concurred and reported to the OIG. Sharpe knew that a few days after he reported to the OIG and registered his objections to the new service, Neufeld asked the CFO to review the ASF portfolios and criticized Sharpe’s stewardship of the ASF. Roth later ordered Neufeld personally to conduct a “deep dive” that might be followed by a “deeper dive” in the ASF-funded programs. Witnesses observed that Neufeld, who was acting on Roth’s behalf, seemed “more on the attack,” treated the FAS ASF-funded projects differently than the 18F projects, and frequently used inflammatory language about ASF projects losing money even though Sharpe inherited many of these projects on becoming the FAS Commissioner.

Sharpe also reported that Roth sent a threatening and retaliatory memorandum after he non-concurred in the final draft for the third service. GSA emails reflect that Roth began drafting the memorandum three days before the March 25 deadline for concurrence/non-concurrence. According to Neufeld, Roth and he already knew that Sharpe planned to non-concur because it was “no secret that [Sharpe] was not on board with the idea.” On March 29, 2016, Roth sent Sharpe a memorandum critical of Sharpe’s performance. Captioned “Areas for Review,” the final memorandum, partially drafted by Neufeld, harshly criticized Sharpe and his deputy’s leadership of FAS for “the level of oversight and rigor that is provided to major program areas within FAS.”

While generally letters of performance concerns are not treated as threats, we found that Roth’s sweeping criticism in the “Areas for Review” memorandum of Sharpe’s oversight of FAS (as well as his deputy’s) was written, with Neufeld’s collaboration, as a formal documentation of performance deficiencies to justify the personnel action, Sharpe’s involuntary transfer, she was planning.<sup>75</sup> Underscoring the threatening nature of the

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<sup>75</sup> Cf. *Delosreynes v. GSA*, 2016 WL 2610719 (M.S.P.B. May 5, 2016) at ¶¶ 7-8 (threatened personnel action generally does not include letters of performance concerns, progress reviews or counseling letters. *Delosreynes* relied on *King v. Dep’t of HHS*, 133 F. 3d 1450, 1452 (Fed. Cir. 1998), which did not consider or address implied threats); see *Mastrullo v. Dep’t of Labor*, 123 M.S.P.R. at 12.

March 29, memorandum, Roth's criticism represented a dramatic departure from how Roth perceived Sharpe's performance less than four months earlier on December 17, 2015, when Roth rated Sharpe at the highest level she awarded any GSA SES official, 4 out of 5, and also awarded Sharpe a performance bonus. Although Roth told investigators that Sharpe did not "build bridges well" with his SES colleagues, she rated him a Level 4 in Building Coalitions, the SES category relevant to this stated concern. Similarly, Roth stated that she felt that Sharpe did not have a "good pulse" on the work of FAS and did not engage well with important developments in FAS. However, her official narrative for rating Sharpe recognized that he had achieved "several significant accomplishments" and that under his oversight, FAS demonstrated consistent and extensive communication across the organization, rating Sharpe a level 4.5 in both "Leading Change" and "Leading People."

As early as January 2016, when the deep dives were announced, Roth began meetings with her chief human resources officer, CPO Harris, about Sharpe's performance, and continued meeting with Harris and General Counsel Durmer about performance options and the need to document performance issues before a reassignment. By April 14, just over two weeks after Roth sent the memorandum critical of Sharpe's performance, a draft order for transferring both Sharpe and his deputy had been prepared.

The OIG finds by preponderant evidence that Roth's statements and actions following Sharpe's disclosures of his concerns with a third service to her, the OIG, and others, threatened Sharpe with transfer, or worse.

#### *Significant Change in Responsibilities*

Personnel actions include a "significant change" in an employee's "responsibilities." 5 U.S.C. § 2303(a)(2)(xi).<sup>76</sup> Sharpe complained that Roth significantly diminished his responsibilities once the order creating third service became effective, April 29, 2016.

Prior to the creation of the TTS, Sharpe reviewed ASF-funded investments in his capacity as FAS Commissioner. Sharpe had the authority in the first instance to provide or reduce funding, including for 18F programs funded by the ASF. The June 2, 2015 MOA provided governance for FAS oversight and funding of ASF investments in 18F, then under OCSIT:

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<sup>76</sup> *McDonnell v. Dep't of Agriculture*, 108 M.S.P.R. 443, 451 (2008); *Daniels v. Dep't of Veterans Affairs*, 105 M.S.P.R. 248, 254 (2007).

18F shall provide quarterly financial reports for review to the Administrator, FAS, CIO, and CFO, and shall annually update its business projections. Based on this reporting and other considerations, FAS, *subject to the direction and control of the Administrator, may provide additional funding or reduce funding levels.*

OCSIT/18F, in turn, was responsible for executing approved Executive Business Cases (EBCs), submitting increased funds requests for approved EBCs through GSA's normal budgeting process, ensuring all employees paid out of the ASF had an acquisition nexus, and related day-to-day management. Although, as discussed earlier, Sharpe complained when Roth rejected his requests to pause 18F hiring, the MOA'S governance model preserved his authority. On March 22, 2016, three days before Sharpe had to vote on the new service, General Counsel Durmer assured him: "[T]he relationship[s] between FAS and OCSIT/18F will continue in the new service. You will maintain the same level of oversight and management of the fund as you have had."

The MOA remained in force under the April 29, 2016 Order creating the new service.<sup>77</sup> In her interview, Roth told us that she had to change the governance model because Sharpe removed himself from the IRB process due to his concerns over approving business investments for 18F. As a consequence, she believed that a process was needed to determine what type of investment to use to fund 18F investments. In Sharpe's absence from the IRB process, according to Roth, it became necessary for the Administrator's Office to make a decision in consultation with OGC. She delegated that responsibility to Neufeld.

However, our investigation showed that at the time she signed the April 29, 2016 Order, Roth assumed that there would no role for Sharpe in the decisions to use ASF funding for TTS. She already had requested, on April 14, that CPO Harris provide a skeleton transfer memorandum for removing both Sharpe and his deputy, Youel Page, from their leadership positions in FAS. These plans changed on or about May 16, 2016, when General Counsel Durmer and his staff advised Roth, Neufeld, and CPO Harris that Roth's plan to replace the FAS leadership would be retaliatory, and they would be

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<sup>77</sup> GSA Directive 5440.696, § 4(a)(3)-(4).

reinstated. The governance changed sometime after that meeting and, as discussed earlier, evolved over the summer and fall.

Under the new governance that developed, the investment of ASF funding for TTS projects was “to be made jointly by FAS and TTS” with the Administrator or her designee (Neufeld) having the final authority. Sharpe had the “discretion to either approve or not approve the business case,” but Neufeld, as the Administrator’s designee, had “final determinative authority either way.” How Roth’s new governance worked in practice became apparent from Neufeld’s approval of the IAA for \$2.2 million in ASF funding to cover a TTS project that was “in arrears,” before Sharpe could understand why ASF funds were being used to pay for services that his staff advised had not been ordered.

Roth’s new governance model gave the FAS and TTS Commissioners shared approval authority for using the ASF to fund TTS projects, although only the FAS Commissioner is accountable for the ASF under the Modernization Act. Now, Sharpe could only exercise control over ASF investments in TTS projects when the TTS Commissioner agreed. In Sharpe’s view: “This le[ft] the ASF in Adam’s hands on behalf of the Administrator, I [was] placed in a wink and nod do as I am directed process.” Moreover, TTS could use the ASF to develop products and services, without having any “ability, or therefore interest, to recover its costs against ASF,” because Sharpe was left responsible for reselling those products and services to repay the ASF even though FAS questioned their viability.

The Modernization Act of 2006 that created FAS and the ASF made two officials accountable for the fund, the Administrator and the FAS Commissioner. When Sharpe signed the MOA in 2015, he could protect the ASF by approving or disapproving investments subject to the direction and control of the Administrator. Roth reduced the FAS Commissioner’s authority: Sharpe had to share his authority with another Commissioner; and the Deputy Administrator not only replaced the Administrator, but showed a willingness to act without Sharpe’s input.

The OIG finds by preponderant evidence that Sharpe’s authority over the ASF diminished significantly for TTS project investments. The new governance process established by Administrator Roth reduced the FAS Commissioner’s authority under the MOA and limited Sharpe’s ability to ensure that ASF investments are supported by a sound business plan,

including customer interest and cost recovery, and undermined his ability to satisfy the FAS Commissioner's responsibility of accountability for the ASF.

C. KNOWLEDGE:

The OIG finds by preponderant evidence that when Administrator Roth took or threatened personnel action against Sharpe, she had knowledge of his protected disclosures.

We find that on December 3, 2015, the Administrator knew about Sharpe's concerns regarding the TTS and knew that Sharpe had reported those concerns to the OIG. Sharpe advised Roth on December 3, 2015 that he had reported his concerns regarding 18F to the OIG, and that he had requested an investigation.

Specifically, Administrator Roth was aware of Sharpe's concerns that a new service that overlapped FAS would violate the Modernization Act and create duplication and waste. Sharpe had previously raised these concerns during the months leading to the Administrator's November 30, 2015 draft order for the new service and in Sharpe's initial December 3, 2015 non-concurrence.

After his December 3 non-concurrence, Sharpe continued to raise his concerns regarding the TTS in subsequent communications to Roth and Neufeld, as well as to General Counsel Durmer. Following the Administrator's decision to approve the new service, Sharpe raised his concerns about the proposed changes in governance, as well as when the OIG's *Evaluation of 18F* confirmed his warnings of mismanagement and abuse in TTS/18F.

D. CAUSATION:

The investigation considered several factors in order to determine whether the preponderance of the evidence supports a finding that personnel action would have been threatened or taken absent Sharpe's protected communications: (1) the stated reason for the personnel action, (2) the timing between the protected activity and personnel action, (3) the presence of a reprisal motive, and (4) any disparate treatment between Sharpe and other similarly situated individuals who did not engage in protected activity.<sup>78</sup>

*Threatened Transfer*

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<sup>78</sup> *Savage v. Dept. of Army*, 122 M.S.P.R. 612, 635 (2015)

Considering the totality of the evidence as a whole, the OIG finds by preponderant evidence a nexus between Sharpe's protected activities and the implied threats of transfer: if Sharpe had not engaged in protected activities, transfer would not have been threatened. The OIG finds the extremely close temporal link between Sharpe's disclosures and the threatened personnel action to be highly probative, and also finds substantial evidence of a reprisal motive. In addition, we find that the only person similarly situated was treated the same – Roth intended to transfer both Sharpe and Youel Page from their positions in FAS.

Stated Reasons: Sharpe reported that he was threatened by comments as well as written communications. The reasons for the January 10, 2016 memorandum that launched the ASF portfolio reviews that became the deep dives, and the March 29, 2016 memorandum, are stated in the documents.

In the memorandum attached to an email sent January 10, 2016, Roth primarily addressed Sharpe's request for a pause in hiring and her reasons for denying that request. Before closing, Roth changed her focus to FAS and noted her "surprise to find that there remain many systemic underperforming programs that do not have breakeven plans or only have a plan to achieve breakeven in several years." Roth told Sharpe that she would schedule portfolio reviews for ASF-supported programs in February.

The March 29, 2016 "Areas for Review" memorandum identified several performance deficiencies Roth found with FAS leadership, Sharpe and Youel Page. Roth pointed to instances when she was "met with resistance" and found responses "hostile and counterproductive" and at times "flippant." Roth concluded that her experience "suggests a pattern to me that I found troubling." The memorandum is replete with highly charged comments such as: "I have concern with the level of oversight and rigor," "leadership seems to be lacking," "I have struggled to understand if your front office is providing oversight," "I needed to be involved far more than expected [sic]," "I was disappointed," "lower than I would expect," "protracted timeline did not give me confidence," "how lacking efforts were," "I was surprised at how little FAS Commissioner office knew about programs," and "[a] program's response to my question was only as good as their executive, and was generally disappointing." Roth noted efforts to improve on some of the concerns, and encouraged Sharpe to continue these efforts and seek her help if needed.

Roth told investigators that she sent the memorandum to help Sharpe improve, and that she did not consider this a counseling memorandum and

had not consulted her human resources staff before sending the memorandum. CPO Harris, however, had advised Roth that performance deficiencies had to be documented before a person could be reassigned.

Knowledge/Timing: The OIG finds the timing of the incidents Sharpe cites and their proximity to his protected activities highly probative of causality.<sup>79</sup> On December 8, 2015, almost immediately after Roth and Neufeld learned on December 3, 2015, that Sharpe was non-concurring and Roth learned that Sharpe had requested the OIG to investigate 18F, Neufeld began to build a performance case for removing Sharpe and his deputy from their positions. That process stopped in mid-May 2016 - only after General Counsel Durmer advised Roth and Neufeld that a transfer would be overturned as retaliatory. The following timeline illustrates this point:

## Causation – Events Timeline

<b>Event</b>	<b>Date</b>
<b>Roth initiated formal Third Service (i.e., TTS) discussions</b>	October 2015
<b>Sharpe voiced objection to TTS</b>	October
<b>Draft Order for TTS circulated with concurrence due Dec. 3</b>	November 30
<b>Roth and Neufeld met with Sharpe and discussed concurrence, “playing ball,” and SES reassignments</b>	December 2
<b>Sharpe notified OIG of his intent to non-concur with the proposed new service</b>	December 2 and 3
<b>Sharpe notified Roth of non-concurrence &amp; OIG contact</b>	December 3
<b>Roth informed Sharpe that she was “dismayed” with how he handled things rather than come to her first</b>	December 4
<b>Neufeld expressed to Youel Page his disappointment in how things were handled</b>	December 4

<sup>79</sup> *Mastrullo v. Dep’t of Labor*, 123 M.S.P.R. at 119-120 (personnel action taken within 1-2 years of protected activity satisfies knowledge/timing test for causality); *Clark Co. School Dist. v. Breeden*, 532 U.S. 268, 273 (2001)(20 months later is no causality at all, citing cases that reject 3 and 4 month periods).

<b>Event</b>	<b>Date</b>
<b>Chrousos emailed Neufeld: “Is she really not going to fire [Sharpe]?”</b>	December 7
<b>Neufeld initiated investigation into Sharpe’s ASF-funded portfolios (“perpetually money-losing business lines”)</b>	December 8
<b>Roth rated Sharpe at highest SES level she awarded in 2015</b>	December 17
<b>Roth initiated contact with CPO Harris (Human Resources) about performance issues with Sharpe and discussed the issue of transfer. Harris advised Roth performance issues must be documented and employees given an opportunity to improve.</b>	<b>2016</b> January
<b>Roth began documenting performance concerns regarding Sharpe</b>	January 7
<b>Roth initiated contact with General Counsel Durmer regarding SES transfers and reassignments</b>	January
<b>Roth initiated meetings with Sharpe to discuss ASF-funded business lines</b>	January 10
<b>Roth initiated “Deep Dive” into ASF-funded portfolios</b>	January 20
<b>Multiple Deep-Dive meetings conducted by Roth/Neufeld</b>	February-March
<b>Roth continued to meet with CPO Harris and General Counsel Durmer to discuss performance concerns and transfer re: Sharpe</b>	February-April
<b>Roth and Neufeld raised additional performance concerns about Sharpe</b>	March 3-4
<b>Roth circulated draft order for TTS</b>	March 11
<b>Roth directed Sharpe that he needed to find a way to make TTS work for FAS</b>	March 16
<b>Roth told Sharpe to contact General Counsel Durmer regarding any concerns about ASF funding for TTS. Sharpe advised Roth that he would honor the June 2015 MOA.</b>	March 18
<b>Roth circulated final draft order for TTS, concurrence due March 25</b>	March 18

<b>Event</b>	<b>Date</b>
<b>Sharpe reported to OIG his intent to non-concur with the revised third service Order.</b>	March 21
<b>Roth sent self emails documenting Sharpe's alleged performance issues</b>	March 22
<b>Roth sent email to Neufeld to use in drafting documentation of Sharpe's alleged performance deficiencies</b>	March 22
<b>Sharpe informed Roth he intended to non-concur</b>	March 24
<b>Roth/Neufeld met with Sharpe, told Sharpe he needed to make TTS work and mentioned removals/transfers</b>	March 24
<b>Sharpe formally non-concurred</b>	March 25
<b>Neufeld sent Roth revised memorandum of Sharpe's alleged performance deficiencies</b>	March 28
<b>Roth sent Sharpe memorandum on his alleged performance deficiencies</b>	March 29
<b>Sharpe contacted OIG</b>	March 30
<b>Roth and Neufeld met with Harris to discuss Sharpe's transfer and request transfer templates</b>	Early April
<b>Harris delivered draft transfer orders to Roth</b>	April 14 (Approx.)
<b>Sharpe responded to Roth's March 29 performance memorandum</b>	April 27
<b>General Counsel Durmer advised Roth and Neufeld that Sharpe's transfer would likely be overturned as retaliatory</b>	May 16 (Approx.)
<b>Sharpe learned that Roth delegated her oversight role over ASF investment activities to Neufeld</b>	July 20, 2016
<b>Roth adopted a new governance model for the ASF that significantly reduced Sharpe's authority.</b>	July-October 2016

In the months leading to their initial December 3, 2015 non-concurrence, Sharpe and his deputy raised concerns about the Administrator's proposal for

a third service. On December 2, 2015, the day before all concurrences/non-concurrences were to be recorded, Roth and Neufeld pressured Sharpe to support the new service proposal, and let Sharpe know that they were considering transferring SES employees. On December 4, after Sharpe notified Roth that he had gone to the OIG and was non-concurring, Roth expressed that she was “stunned” by Sharpe’s actions. That same day, Roth emailed Sharpe that she had been “frustrated” and “quite taken aback and dismayed” that Sharpe did not come to her directly. Roth’s subsequent January 7, 2016 email to herself about the events records Roth’s ongoing frustration that Sharpe took his concerns to the OIG when he could have gone to her. On December 4, 2015, the day after the non-concurrence, Neufeld also conveyed his disappointment to Sharpe’s deputy, Youel Page. Neufeld recognized that while Youel Page and Sharpe had been “expressing displeasure in small group meetings,” he was surprised that they had not gone to him and told them that “communication clearly needs to improve if any of these things – 18F, FAS, or GSA generally – is going to succeed the way taxpayers need to.”

On December 8, 2015, Neufeld initiated the investigation into Sharpe’s oversight of FAS’s ASF portfolio that soon evolved into “the deep dives.” On December 8, Neufeld alerted the CFO that he was concerned with “some of the perpetually money-losing business lines under FAS.” Neufeld wanted “far better answers” for each business line, and told the email recipients that he was concerned that GSA was not being a “proper steward[] of taxpayer funds” for the affected FAS offices. Sharpe and his deputy were included on the email, and consequently knew that Neufeld meant them, the two senior executives over FAS.

On January 7, 2016, Neufeld again emailed the CFO stating that Roth wanted to make sure that 18F was treated like other ASF-funded programs. Neufeld asserted that “Denise has been looking for someone to take an objective look at 18F financials, and has been frustrated at the clear witch-hunt mentality Tom [Sharpe] has been taking.” Neufeld then framed Sharpe’s actions towards the CFO as “try[ing] to bully [the CFO] in[to] recommending an 18F hiring freeze to Denise.” Contrary to Neufeld’s characterization of Sharpe and 18F, the OIG found that the OCFO also found problems with 18F’s financials and recommended a hiring pause; we found no support, however, for Neufeld’s statement that Sharpe had bullied the CFO about 18F’s hiring.

On January 10, 2016, Roth denied Sharpe’s earlier request for a hiring freeze. In the same email, Roth expanded Neufeld’s initiation of an OCFO

review of ASF portfolios, and announced that she would conduct formal ASF portfolio reviews with FAS. On January 20, 2016, Roth notified Neufeld and the CFO that she wanted to take “a deep dive into the ASF portfolios in February” and contemplated the possibility of a subsequent, “deeper dive.” Roth stated that the reason for these reviews was Sharpe’s concerns with 18F’s financial performance when he could not demonstrate all of FAS’s investments were returning on their investment. As noted above, these reviews were unprecedented for FAS.

A couple of weeks after rating Sharpe’s FY 2016 performance on December 17, 2017, at the highest level that any GSA SES executives received, in early January, 2016, Roth approached CPO Harris about performance improvement options for Sharpe. Harris advised Roth that a transfer was possible but the rating official would have to work with the employee to improve performance and document issues before a transfer could be processed.

On March 11, 2016, Roth circulated a new draft order for the third service. In a meeting that day, Youel Page pointed out that nothing differentiated the new service from FAS’s ITS. On March 16, 2016, Roth told Sharpe and Youel Page that they needed to find a way to make the third service work for FAS. On March 18, 2016, Roth asked Sharpe to speak with OGC regarding his concerns with meeting the FAS Commissioner’s responsibilities under the Modernization Act if a third service was approved. Later that day, Sharpe met with General Counsel Durmer and the Deputy General Counsel, who provided their legal views on the third service. Durmer then stated to Sharpe that any executive who cannot execute an order in good faith could resign. While Sharpe found the meeting useful, he did not find it to be decisive – and he continued to think through his concerns and form a position.

In his March 21, 2016, follow-up email to General Counsel Durmer, Sharpe identified his specific concerns with how 18F was mismanaging ASF’s investment of 18F funds, incurring substantial losses, intruding on FAS’s acquisition program responsibility, and disregarding the IAA process for providing services for other agencies. The General Counsel’s March 21 response did not address those specific matters, but instead advised that “the resolution of those type concerns remains your responsibility by working with agency leadership.” Durmer further stated: “Accountability remains with the FAS Commissioner subject to the direction and control of the Administrator. The statutorily created relationship vis a vis the ASF remains unchanged in

this order. Nor can it be.” The same day, Sharpe reported to the OIG his intent to non-concur and his fear that he may lose his job. On March 22, 2016, Roth started preparing a memorandum, with Neufeld’s help, to document Sharpe’s performance deficiencies as a Commissioner.

General Counsel Durmer’s caution that Sharpe was responsible and accountable, in response to Sharpe’s concerns about 18F’s failings, provided Sharpe context when Roth again told him on March 24, 2016, that Sharpe needed to make the service work for FAS. In this meeting between Roth, Neufeld, and Sharpe, Roth’s discussion of the third service turned to comments about reassigning SES members, which Sharpe found threatening. On March 25, 2016, Sharpe entered his non-concurrence into the CDT system. Four days later on March 29, Roth emailed Sharpe her memorandum on Areas for Review that recited the leadership failures at the Commissioner level.

Sharpe responded to Roth’s March 29, 2016 Areas for Review memorandum on April 27, 2016, well before his June 30 midyear review. By that time, however, Roth already intended to remove him from his position as FAS Commissioner and reassign him to another position. Since January, Roth had been meeting with Harris and Durmer to discuss SES personnel issues. In early April 2016, Roth requested that Harris prepare a draft personnel transfer memorandum for an SES employee. Harris delivered draft transfer orders to Roth on April 14, 2006. Harris understood this was for Sharpe, although both Roth and Neufeld thought one of the SES positions listed in the memorandum was for Youel Page. Nonetheless, both Roth and Neufeld acknowledged their intent was to transfer Sharpe as well.

As discussed above, on or about May 26, 2016, General Counsel Durmer advised Roth and Neufeld that the transfer would be overturned as retaliation. As a result, Roth dropped her plan to transfer Sharpe and his deputy, Youel Page. Although Roth’s March 29, 2016 memorandum included what she described as longstanding concerns, Sharpe’s FY 2016 midyear performance review only focused on Sharpe’s measurable performance metrics.

Reprisal Motive: Evidence of a retaliatory motive is probative, but not required, to show causality between the employee’s protective activity and a

personnel action.<sup>80</sup> While the evidence is mixed, the OIG found by a preponderance of the evidence that Roth had a retaliatory motive as a result of Sharpe's protected activities.

As a general matter, Roth, Neufeld, and Sharpe maintained professional and cordial relationships. By example, the OIG found that Roth reached out to hear and understand Sharpe's positions, and frequently sought counsel's guidance on the issues Sharpe raised. Although Sharpe's relationship with Neufeld was tenser, the investigation similarly found instances where he was supportive of Sharpe, and showed patience when Sharpe revisited his concerns about the TTS and his lack of control over the misuse of ASF funds. In her January 7, 2016 email to herself, Roth included notes of a meeting she held with Sharpe where she recognized Sharpe's value to the team and regretted that the process she created for the third service order had left Sharpe feeling marginalized.

While Roth expressed her willingness "to find common ground for everyone to get comfortable with [her proposed new service,]" there was a perception that everyone needed to agree to make it happen. When that did not happen, Roth struck a different tone. She expressed her disappointment with Sharpe when he advised her on December 3, 2015, that he was non-concurring, and that he had reported his concerns to the OIG. Roth's email the following day also acknowledged her frustration and dismay with Sharpe that he felt he had to go to the OIG rather than come to her. The same day that Roth spoke to Sharpe about a new process on December 8, 2015, Neufeld directed the CFO to review the ASF-portfolios under Sharpe's management, and then Neufeld expressed his doubt to the CFO that FAS leaders were good stewards of taxpayer funds with these projects. On January 7, 2016, Neufeld told the CFO that Roth saw a "witch-hunt mentality" in Sharpe. While generally Sharpe had a cordial, professional relationship with Roth, Sharpe and others noticed a "total shift in A-suite behavior" toward FAS after Sharpe's non-concurrence. Witnesses used terms "very critical," "hyper-critical," "nastier," and "pressure but nothing retaliatory has been explicitly told" to describe the new relationship. One witness described this as "torture by review" that was intended to either drive Sharpe and Youel Page out, or, instead, to concur with Roth's proposal.

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<sup>80</sup> *Marano v. Dep't of Justice*, 2 F.3d 1137, 1140-41 (Fed. Cir. 1993); see also *Hathaway v. M.S.P.B.*, 981 F. 2d 127, 1242 (Fed. Cir. 1992) (noting comment in the legislative history of the WPA that "such evidence would be 'rare'").

Sharpe's opposition raised a particular concern for Roth. While she did not need Sharpe's concurrence to create the new service, Roth was concerned that Sharpe might terminate the ASF funding that was critical for the new service to function. Under the terms of the June 2015 MOA for funding OCSIT/18F, Sharpe still could reduce the ASF funding. OGC had determined that the June 2015 agreement had to remain in place in order for the new service to use ASF funding. In their March 24, meetings, Roth asked Sharpe whether he intended to close the MOA and terminate ASF funding of TTS. In response, Sharpe assured Roth that while he disagreed with her proposal, he would not walk away from the June 2015 agreement.

On Tuesday, March 29, 2016, after Sharpe recorded his second non-concurrence on Friday, March 25, 2016, Roth sent Sharpe her "Areas for Review" memorandum. Roth asserted that while she did not intend for this to be a counseling memorandum, she identified in the memorandum numerous areas where Sharpe needed to take steps to improve his performance. Although the letter expressed concerns with Sharpe's performance, and that of Youel Page, Sharpe's deputy, the letter was not sent to give time for Sharpe to improve. For several months before she sent the letter, Roth had been meeting with her staff about how to address Sharpe's performance and reassignment options. In early April 2016, well before she received Sharpe's response to the March 29 "Areas for Review" memorandum, Roth asked CPO Harris for a draft memorandum for transferring Sharpe. On or about April 14, 2016, less than three weeks after Sharpe's second non-concurrence, CPO Harris delivered to Roth a draft order for reassigning both Sharpe and his deputy. Sharpe had not yet even responded to Roth's memorandum. In these circumstances, the OIG finds by preponderant evidence that the March 29, 2016 memorandum was not prepared in order to help Sharpe address the performance deficiencies that Roth identified, but, was issued instead, to support Roth's plan to remove Sharpe from his position as FAS Commissioner in reprisal for his protected disclosures.

Disparate Treatment: The OIG finds that the only person similarly situated to Sharpe was Youel Page, Sharpe's deputy, who also non-concurred on December 3, 2015, and joined Sharpe in his objections to TTS during the relevant time period. As noted, Roth intended to remove Youel Page as well.

### *Significant Change in Responsibilities*

The OIG finds by preponderant evidence that Roth significantly diminished Sharpe's responsibilities in reprisal for Sharpe's engaging in protected activity.

Stated Reasons: As discussed previously, the June 2, 2015 MOA provided governance for the use of the ASF by OCSIT/18F. Roth adopted a new governance model that formally reduced the FAS Commissioner's authority over the ASF after creating the TTS.

As an interim measure, Roth advised that Neufeld would oversee investments on her behalf. In an email to Sharpe on July 20, 2016, she explained that this "is an appropriate role for the deputy administrator and compliments the role of chair of the IRB which also is assigned to the deputy administrator, per its charter." In her interview, Roth told us that she changed the governance model because Sharpe had removed himself from the IRB process due to his concerns over approving business investments for 18F. As a consequence, she was faced with instituting a process to determine what type of investment, such as the ASF or Economy Act, to use to fund 18F investments. In Sharpe's absence from the IRB process, according to Roth, it became necessary for the Administrator's Office to make a decision in consultation with OGC. Roth delegated that responsibility to Neufeld.

We did not find any evidence that Sharpe removed himself from the process. Instead, as the facts discussed previously show, Roth's July 20, 2016 email advising that she had assigned investment oversight to Neufeld created uncertainty about how the new process would work, and particularly whether Sharpe even would have a meaningful role as the statutory Commissioner accountable for the ASF. His efforts to seek guidance from Roth, Neufeld, and General Counsel Durmer do not show withdrawal from Roth's new governance process.

Knowledge/Timing: The OIG finds the timing of Roth's adoption of the new governance process, and the proximity of Sharpe's protected activities to Roth's efforts to remove Sharpe from his position, sufficiently probative of causality.

As noted above, Roth told us that Sharpe's withdrawal from the process precipitated her adoption of a new governance model. We did not find that Sharpe had withdrawn from the process. We found, however, that at the time she signed the April 29, 2016 Order, Roth assumed that there would be no role

for Sharpe in the decisions to use ASF funding for TTS. She already had requested, on April 14, that CPO Harris provide a skeleton transfer memorandum for removing both Sharpe and his deputy, Youel Page, from their leadership positions in FAS. On or about May 16, 2016, however, General Counsel Durmer and his staff advised Roth, Neufeld, and CPO Harris that Roth's plan to replace the FAS leadership would be retaliatory, and would likely be overturned. That meeting meant that Sharpe would remain the FAS Commissioner.

Although the June 2, 2015 MOA incorporated in the Administrator's Order creating TTS remained, Roth adopted a new governance model that shared Sharpe's authority for approving ASF investments in TTS with the TTS Commissioner, and gave Neufeld wide discretion to act with or even without waiting for Sharpe's views. The temporal proximity between being told that her planned transfer of Sharpe would like be overturned as retaliatory and her subsequent decision to reduce Sharpe's authority as FAS Commissioner in the new governance process is probative of causality.

Reprisal Motive: As noted earlier, evidence of a retaliatory motive is probative, but not required, to show causality between the employee's protective activity and a personnel action.

While here too the evidence is mixed, the OIG found by a preponderance of the evidence that Roth's retaliatory motive in seeking Sharpe's removal from FAS, addressed above, continued when she reduced Sharpe's authority over the ASF after learning he could not be transferred. Roth's September 26, 2016 response to Sharpe's email offering to provide the needed controls for TTS, in light of the widespread 18F financial deficiencies found by the OIG, adds support to this finding. Rather than take Sharpe's email as an opportunity to explore options that might serve the interests of both Services, Roth used her response as an opportunity to say she was "disappointed" with his views and to urge him to become a "constructive partner" to TTS.

Disparate Treatment: The OIG finds that the Modernization Act's assignment of responsibilities to the FAS Commissioner requires a determination that no person was similarly situated to Sharpe.

## VII. CONCLUSION

The OIG investigated Sharpe's complaints that former Administrator Roth retaliated against him for protected activity.

The OIG found by a preponderance of the evidence that Sharpe engaged in protected activities as defined both by the IG Act and the CSRA. Sharpe made complaints and disclosures to the OIG and cooperated with the OIG's investigation and evaluations. He reported information that reasonably evidenced violations of law, gross mismanagement, gross waste of funds, and an abuse of authority. Sharpe reported these concerns to Administrator Roth, Deputy Administrator Neufeld, General Counsel Durmer, and to the OIG.

The OIG also found by a preponderance of the evidence that Administrator Roth had the authority to take or threaten to take personnel actions, and that she made statements and took actions that threatened Sharpe with transfer because of his protected activities. After receiving guidance from GSA's General Counsel, Roth did not follow through on the threat of transfer. However, she significantly changed Sharpe's responsibilities by adopting a new governance process for TTS's use of the ASF, in reprisal for Sharpe's protected activity.

The OIG has referred this report to the Office of Special Counsel.