



FEB 17 2011

MEMORANDUM FOR: Todd J. Zinser
Inspector General

FROM: Jane Lubchenco, Ph.D. 
Under Secretary of Commerce
for Oceans and Atmosphere

SUBJECT: Office of Inspector General Review of GCEL Performance
Management and Other Issues (December 14, 2010)

Thank you for your memorandum of December 14, 2010, titled "GCEL Performance Management and Other Issues" (December Memorandum). The December Memorandum asks that I apprise you of any action taken in response within 60 days. I am doing so by this memorandum.

Process for Evaluating GCEL Attorney Performance – In the December Memorandum, you expressed concern about the use of a pass-fail rating system for attorneys in the National Oceanic and Atmospheric Administration (NOAA) General Counsel Office for Enforcement and Litigation (GCEL) from Fiscal Years 2005-2009. Specifically, you note that your office reviewed a number of appraisals and found the forms allowed ratings of pass or fail only; and further noted that: (1) the appraisals generally did not include written comments from the rating officials; (2) none contained employee self-assessments; and (3) some did not include signatures by the employee or supervisor or reflect that a progress review had been conducted.

The NOAA Office of General Counsel and I share your concern about this rating system. As you note in the December Memorandum, NOAA has been working for several years to replace the pass-fail system with a five-tiered performance appraisal system for these bargaining unit employees not covered by the Commerce Alternative Personnel System. In 2007, NOAA undertook an effort to negotiate collectively with those impacted NOAA bargaining units to replace the pass/fail system, which resulted in litigation before the Federal Labor Relations Authority (FLRA) that was not resolved until June 2009. Rather than resume collective negotiations following the FLRA decision, NOAA has decided to end those collective discussions, and will shortly so notify the bargaining units. Once that step is taken, the NOAA Office of the General Counsel (NOAA GC) will provide notice to its bargaining unit to initiate individual negotiations to implement the five-tier performance appraisal system. Until those negotiations are complete, NOAA GC must continue to use the pass/fail system currently in place for attorneys in the bargaining unit.



The lack of written comments from the rating official, self-assessments from the employee, or reviewing official signature of the year-end rating are a reflection of the pass-fail system. Under the pass-fail system, these steps are not required under NOAA's Administrative Order governing the pass/fail performance appraisal system. *See* NAO 202-430, Section 7.01.c.3(a) (written comments required only for employees given a failing performance evaluation); Section 7.02a (employees may choose to present a self-assessment or the rating official may solicit a voluntary self assessment, but in neither case is such an assessment mandatory); Sections 7.01.a.3 and 7.01.c.3(b) (reviewing official must sign the performance plan upon issuance at the beginning of the rating period; the reviewing official does not need to sign the year-end rating unless the rating is "Does Not Meet Expectations"). Once we no longer use the pass-fail system, this Administrative Order will not govern our attorneys and we will have more robust performance assessments of our attorneys.

With respect to the other performance appraisal issues raised in your report, as you note, these were brought to the attention of GCEL management in the fall of 2009 and, in response, GCEL took corrective action before receipt of your December 2010 memorandum. GCEL attorney performance plans for the FY10 rating period (ending September 30, 2010) properly documented that year-end reviews had been conducted, and reflected both summary ratings and ratings for each element; GCEL attorney performance plans for the FY11 rating period (beginning on October 1, 2010) have been issued and contain the necessary employee and supervisor signatures with progress reviews to be conducted in April 2011.

2001 Special Act Award – In the December Memorandum, you indicated that you found “troubling” the issuance of a Special Act award to a GCEL attorney regarding his work to date on a then-pending enforcement action a decade ago. Because this award pre-dated my tenure here and the attorney's immediate supervisor is no longer with NOAA, I am not in a position to comment in specific detail about whether the granting of the award was appropriate in that particular case. I would note that NOAA's practice is consistent with other federal agencies – the fact that a case is pending is not a disqualification from recognition through a Special Act or other service award.

Safety Concerns – In your report, you reference a March 2010 email from a GCEL attorney expressing concern for the safety of NOAA personnel in the Northeast as a result of your office's review of the NOAA enforcement program. NOAA takes employee safety seriously, and I appreciate your concern.

In response to this March 2010 email, the NOAA Deputy General Counsel consulted with the NOAA General Counsel, NOAA Deputy Under Secretary for Operations and the NOAA Chief Administrative Office, which is the office that has responsibility for security at NOAA facilities. We then followed up with guidance to Northeast GCEL employees providing specific information on how to handle threats and other security issues. This guidance encouraged employees to notify their supervisors, local law enforcement, and the regional Commerce Department Servicing Security Office of any threats or specific concerns, so that both NOAA and law enforcement personnel could take appropriate action. More recently, on December 17, 2010, William Broglie, NOAA's Chief Administrative Officer, issued additional NOAA-wide

guidance to senior NOAA management for handling threats against NOAA employees. As you note, the March 2010 email did not identify any specific threats, nor has NOAA since received any notice of specific threats to its employees in the Northeast.

In April 2010, the NOAA Deputy General Counsel discussed security concerns with an Assistant Special Agent-in-charge from your office, and was informed that your office was monitoring NOAA security issues and would inform NOAA if it became aware of any specific threats. To the best of my knowledge, your office has not informed NOAA that it has become aware of any threats against NOAA employees. We anticipate that if your office becomes aware of any threats in the future, that your office will promptly inform the NOAA Chief Administrative Officer, as well as NOAA GC and OLE management so that NOAA may take appropriate action.

NOAA will continue to monitor this situation closely, and will take appropriate action as necessary to protect its employees. Likewise, NOAA will inform you of any specific threats to NOAA enforcement personnel in the Northeast that we become aware of.