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January 11, 2007

Barr P. Huefner
United States Senate
Committee On The Judiciary
Room 224
Senate Dirksen Office Building
Washington, DC 20510

Dear Mr. Huefner:

Enclosed are Paul R. Berger's answers to questions from members of the Committee. For your convenience, the text of the questions is set forth along with the applicable answers.

Sincerely,

David M. Becker

Enclosure

Paul R. Berger
555 13th Street, N.W.
Washington, DC 20004

January 11, 2007

Barr P. Huefner
United States Senate
Committee On The Judiciary
Room 224
Senate Dirksen Office Building
Washington, DC 20510

Dear Mr. Huefner:

Enclosed are my answers to questions submitted by Senators Specter and Grassley on December 13, 2006.

Thank you very much for your attention.

Sincerely,

Paul R. Berger

ANSWERS TO SENATOR SPECTER'S QUESTIONS

Thank you Chairman Specter for the opportunity to respond to your questions concerning the United States Securities and Exchange Commission's investigation of Pequot Capital.

1. Were you a member of the SEC Compensation Committee in 2005?

Answer

I was a member of the Compensation Committee of the Division of Enforcement in 2005.

a. Did you concur in the recommendation by Messrs. Hanson and Kreitman that Gary Aguirre receive a two-step merit increase in his salary?

Answer

Yes. This was the most common increase given to Division of Enforcement employees at that time.

b. As a member of the Compensation Committee, did you review Mr. Aguirre's performance evaluations?

Answer

Yes.

2. Did you encourage Bob Hanson to generate a supplemental evaluation of Mr. Aguirre's performance on or around August 1, 2005? Why?

Answer

I asked Mr. Hanson, along with Mr. Kreitman, to consider whether they should include in their evaluation of Mr. Aguirre language reflecting their repeated criticisms of his performance. I left the decision to them, since they were closer to his work.

3. In your written statement at page 15, you note that "during the summer of 2005, Mr. Aguirre's supervisors showed me a draft work evaluation for the period running through the end of April 2005 . . . . I had no problem with the evaluation . . . . I noted, though, that the draft evaluation did not contain any constructive criticism . . . . They decided that, to be fair to Mr. Aguirre, they should include some constructive criticism." Isn't it true that on August 1, 2005, you ordered Mr. Hanson to generate a supplemental evaluation of Mr.

Aguirre's work well after the time when you first saw the "work evaluation" as part of your responsibilities on the Compensation Committee?

Answer

I don't recall when I first saw a draft evaluation for Mr. Aguirre, other than it was in the summer of 2005. I am quite confident that, as noted above, I suggested to Mr. Hanson and Mr. Kreitman that they consider whether to include language reflecting their repeated criticisms of Mr. Aguirre's performance. My purpose in making this suggestion was simply to be candid with Mr. Aguirre about his shortcomings. I made the identical suggestion at the same time concerning another lawyer supervised by Mr. Hanson and Mr. Kreitman. That lawyer had no involvement in the Pequot investigation and has not been the subject of any adverse personnel action.

4. Did you suggest that Linda Thomsen terminate Mr. Aguirre? Why?

Answer

I believe I first considered whether to extend Mr. Aguirre's employment in mid to late August 2005. At that time the Division of Enforcement's Administrative Officer notified me that Mr. Aguirre's one-year probationary period was about to end. That left us with what was a business decision either to end Mr. Aguirre's employment or grant him, in essence, permanent tenure in the absence of serious misconduct.

I asked Mr. Kreitman and Mr. Hanson for their recommendation. They noted that, despite Mr. Aguirre's talents and hard work, because of his resistance to supervision, refusal to work with his colleagues, unreliability, and volatile temper, it was unlikely that he could become a successful contributor to the work of the Division of Enforcement. After further discussion, I concurred with this recommendation, and Mr. Kreitman, Mr. Hanson, and I met with Ms. Thomsen and discussed it fully.

In reaching our conclusion we considered the totality of Mr. Aguirre's performance, both those aspects reflected in the recommendation of his supervisors to the Compensation Committee and the opinion of those same persons reflected in the supplemental evaluation.

5. Was there anything untoward, unethical or illegal in your conduct with respect to the Pequot investigation?

Answer

No. All actions that I took, or declined to take, were lawful and motivated solely by the interests of the investing public. We investigated where the facts and law took us.

ANSWERS TO SENATOR GRASSLEY'S QUESTIONS

Questions

Introductory Statement

Firing someone just after giving him a pay raise is pretty unusual. If the reasons that Gary Aguirre's supervisors have given for terminating him are the true reasons, then it is hard to understand why he would have gotten a positive evaluation and a pay raise. Further, the lack of corroborating contemporaneous documentation is another questionable area. If Mr. Aguirre was an employee with a troubled history at the SEC it is difficult to understand why there is so little documentation of communications between his supervisors to show it.

Answers

Introductory Statement

Awarding Mr. Aguirre a two-step increase at the end of July 2005 does not demonstrate that the reasons given for not extending Mr. Aguirre's appointment a month later were not "the true reasons." Notwithstanding Mr. Aguirre's difficulties with supervision and shortcomings as a colleague, he was awarded a two-step merit increase to reward his hard work during the period under evaluation.

I did not consider whether Mr. Aguirre's employment should be terminated in connection with the deliberations of the Compensation Committee nor in connection with the virtually contemporaneous supplemental evaluation prepared by Mr. Aguirre's supervisors. I believe I first considered whether to extend Mr. Aguirre's employment in mid to late August 2005. At that time the Division of Enforcement's Administrative Officer notified me that Mr. Aguirre's one-year probationary period was about to end. That left us with what was a business decision either to end Mr. Aguirre's employment or grant him, in essence, permanent tenure in the absence of serious misconduct.

I asked Mr. Kreitman and Mr. Hanson for their recommendation. They noted that, despite Mr. Aguirre's talents and hard work, because of his resistance to supervision, refusal to work with his colleagues, unreliability, and volatile temper, it was unlikely that he could become a successful contributor to the work of the Division of Enforcement. After further discussion, I concurred with this recommendation, and Mr. Kreitman, Mr. Hanson, and I met with Ms. Thomsen and discussed it fully.

In reaching our conclusion we considered the totality of Mr. Aguirre's performance, both those aspects reflected in the recommendation of his supervisors

to the Compensation Committee and the opinion of those same persons reflected in the supplemental evaluation.

As to corroborating contemporaneous documentation about Mr. Aguirre's workplace issues, as early as December 2004 I raised with Mr. Aguirre my concerns about his ability to respond to supervision. Mr. Aguirre acknowledged in writing that I had raised such a question. I responded to Mr. Aguirre and noted that he mis-characterized my concern as questions about his "ability to take instructions from a younger supervisor." In fact, as the evidence shows, I corrected him that my concerns had to do with his "comfort in reporting to someone less experienced . . . ."

Second, the supplemental evaluation itself provides documentation for the concerns of Mr. Aguirre's supervisors about his willingness to take supervision. Mr. Aguirre dismisses the evaluation as an attempt to paper the record to support his termination, but as all involved have testified, it was prepared precisely so the documentary record would be consistent with the verbal complaints, and it was prepared a month before Mr. Aguirre's termination.

Third, while not contemporaneous or in writing, the sworn testimony of *all* of Mr. Aguirre's supervisors about their experiences with Mr. Aguirre provides compelling substantiation for the decision not to extend his employment.

In retrospect, perhaps Mr. Aguirre's supervisors would have been in a better position to rebut Mr. Aguirre's allegation had they immediately documented each of Mr. Aguirre's temper tantrums; each time Mr. Aguirre left the SEC building because he had become upset with his supervisors; each time Mr. Aguirre resigned; each time Mr. Aguirre behaved in such a hostile and abusive manner as to cause counsel to complain about him; each time he behaved in an inappropriate manner in testimony; each time he sent out subpoenas in violation of the Right to Financial Privacy statute; each time he demanded of counsel things that were clearly inconsistent with SEC policy; and each time he stopped talking to his Assistant Director, and documented these events. In his testimony, Mr. Aguirre never denied that each of these instances occurred.

Our failure to be more critical sooner and in writing hardly establishes that the grounds for terminating Mr. Aguirre were any different than what was stated at the time and under oath to the Committee. It should be clear to all concerned that there is no evidence – direct or circumstantial – that supports Mr. Aguirre's allegation that he was terminated because he sought the deposition of Mr. Mack. That allegation rests not on evidence but only on Mr. Aguirre's surmise.

Question 1

(1) According to documents provided by the SEC, on August 1, 2005, the Division of Enforcement was to transmit the final results of the merit pay recommendations to the

Office of Human Resources. Emails produced by the SEC for August 1, note two separate conversations, one between you and Lawrence West[7] and another between you and Susan Markel[8].

(a) The email between you and Ms. Markel starts with you stating:

"Susan, I need to make another change to the merit pay schedule." Markel responded:

"I am on a conference call, but unless it is a typo, you may want to circulate it to all of the Comp Committee and Linda and see if anyone has a problem with making the change."

To which you replied:

"Not a typo. We should talk."

Markel replied that she would call you. (i) What did you discuss? (ii) Was this concerning the August 1, 2005, re-evaluation of Mr. Aguirre? (iii) Was the "change" to the merit pay schedule distributed to the members of the Compensation Committee and Linda Thomsen as Ms. Markel proposed? (iv) Why or why not? (v) How many other changes did you make to the merit pay schedule? (vi) Please identify all such changes.

(b) The email between you and Lawrence West (also dated August 1, 2005, but time stamped following you exchange with Ms. Markel) has a subject line of "your voicemail" and has Mr. West responding to you stating he called and you didn't pick up, you responded:

"I'll talk to you tomorrow -- personnel issue."

(i) What was the "personnel issue" you sought to discuss with Mr. West?

(ii) Did it relate in any manner to the supplemental re-evaluation of Mr. Aguirre prepared on August 1, 2005? If so, please provide a detailed explanation of your conversations with Mr. West regarding this email.

Answers

(a) As far as I can recall, the email with Susan Markel had nothing to do with Mr. Aguirre. At some time either during the Compensation Committee meeting in July or thereafter, I learned that the supervisors' written evaluation should not contain words such as "Highest" and "High." Because I was told to remove that language before transmittal of the merit pay packages, I was trying to contact Susan Markel, the Division of Enforcement's Chief Accountant and the coordinator for the Division's Compensation Committee, to ask whether my changes had been incorporated into the written evaluations. Since Ms. Markel had charge of the final

packages, I wanted to make sure that the changes had been made and were put into the final report. I spoke to Ms. Markel and resolved that issue.

(b) As far as I can recall the email with Mr. West had nothing to do with Mr. Aguirre. I believe that my email to Mr. West related to another personnel matter, which concerned trying to find a position for a staff lawyer who had been on medical leave.

Question 2

(2) During your time with the SEC, while you were a member of the compensation committee, (a) how many supplemental re-evaluations were submitted to the committee as part of the evaluation process? (b) How many of these reevaluations did you review? (c) Did these re-evaluations change the decision of the compensation committee?

Answer

As of the summer of 2005, the Compensation Committee procedure was fairly new. The committee had been in existence for three years. Although, as I testified, additions to evaluations entitled "supplemental evaluation" were rare, it was not unusual for changes (either positive or negative) to be made to an evaluation. It was also not unusual, after some discussion, for the Compensation Committee or the Director of Enforcement to change the recommendations of a particular Assistant Director.