



INVESTIGATIVE REPORT

U.S. Patent and Trademark Office

Review of Conduct by a High- Ranking Official in the Hiring of a Trademark Organization Employee

~~NOT FOR PUBLIC RELEASE~~

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Contents

| | |
|--|-----------|
| I. Introduction | 1 |
| I. Executive Summary | 1 |
| II. Scope and Methodology | 2 |
| III. Organization of the Report | 3 |
| 2. Background | 4 |
| I. Overview of the USPTO and the Trademark Organization | 4 |
| II. Legal and Regulatory Overview | 5 |
| III. Allegation to be Resolved | 8 |
| 3. Analysis | 10 |
| I. Facts | 10 |
| A. Commissioner Cohn’s Background | 10 |
| B. Commissioner Cohn’s Relationship with the Applicant | 11 |
| C. The Hiring Process for TMO-2013-0008 | 15 |
| D. The Hiring of the Applicant | 17 |
| II. Analysis | 27 |
| A. Commissioner Cohn Violated 5 C.F.R. §§ 2635.101 and 2635.702 When She Used Her Public Office for the Applicant’s Private Gain. | 27 |
| B. Commissioner Cohn Did Not Act Impartially and Gave Preferential Treatment, Violating 5 C.F.R. § 2635.101(b)(8) and 5 U.S.C. § 2302(b). | 30 |
| C. Commissioner Cohn Took Insufficient Steps to Avoid Creating an Appearance That She Was Violating Federal Ethical Rules. | 31 |
| D. Commissioner Cohn Failed to Adhere to Federal Ethics Regulations by Neglecting to Obtain Agency Designee Authorization Under 5 C.F.R. § 2635.501(a) Before Participating in the Hiring Process. | 33 |
| 4. Conclusions and Recommendations | 35 |
| I. Findings | 35 |
| II. Conclusions | 35 |
| III. Recommendations | 35 |
| A. Recommendation 1 | 35 |
| B. Recommendation 2 | 36 |
| C. Recommendation 3 | 36 |
| D. Recommendation 4 | 36 |
| E. Recommendation 5 | 36 |

F. Recommendation 6..... 37

I. Introduction

On April 26, 2013, an anonymous whistleblower complainant sent a letter to the Office of Inspector General (OIG) of the United States Department of Commerce alleging that the Commissioner of Trademarks of the United States Patent and Trademark Office (USPTO), Deborah Cohn, improperly used her position to ensure the hiring of the fiancé (Applicant) of an immediate family member (Relative). The Complainant further alleged that the Applicant was not among the most qualified candidates.¹

In conducting this investigation, the OIG's objective was to determine whether Commissioner Cohn was involved in the hiring of the Applicant and whether her involvement violated applicable laws.

I. Executive Summary

Our investigation uncovered several violations of law and lapses in judgment in connection with the hiring of the Applicant. In particular, the OIG obtained sufficient evidence to conclude that Commissioner Cohn violated several federal laws by advancing the Applicant's candidacy twice after his application had effectively been rejected by her subordinates. For example, we found that, after her subordinates did not select the Applicant for an initial interview, Commissioner Cohn instructed them to include the Applicant on the interview list and later, after her subordinates did not select the Applicant to receive an offer, Commissioner Cohn effectively created a new position specifically for the Applicant.

As a result, we concluded that Commissioner Cohn violated 5 C.F.R. § 2635.702 and 702(a), which prohibits federal officials from using their public office for an individual's private gain, and 5 U.S.C. § 2302(b) and 5 C.F.R. § 2635.101(b)(8), which in general terms prohibit an employee from giving preferential treatment to any applicant for employment. In addition, we found that Commissioner Cohn violated 5 C.F.R. § 2635.101(b)(14), the federal regulation requiring federal employees to avoid any actions creating the appearance that they are violating the law or the ethical standards, and that she failed to adhere to the federal ethics regulations in 5 C.F.R. § 2635.501(a), by neglecting to obtain appropriate authorization before participating in the hiring process involving the Applicant.

Finally, the OIG obtained evidence that Commissioner Cohn permitted – and even encouraged – other individuals who were seeking jobs at USPTO to use her name when they requested assistance from Cohn's own subordinates. We found that these actions at a minimum created an appearance that she was using her public office for these other private individuals' benefit, which therefore constituted a violation of Section 2635.101(b)(14).

¹ Although the complainant asserted that the Applicant was the fiancé of Commissioner Cohn's Relative, the relevant witnesses told the OIG that the Applicant and the Relative are not engaged to be married. The nature of this relationship is discussed in greater detail below.

Beyond these violations of law, however, we also found that Commissioner Cohn's conduct in connection with the Applicant's hiring reflected poor judgment. As a long-term senior manager in the federal government, she should have known about the federal laws governing hiring and should have steered clear of any appearance of impropriety. At a minimum, Commissioner Cohn should have sought ethics-related guidance from authorized ethics officials and acted accordingly.

In making these findings, we note that Commissioner Cohn's behavior appears to be commonplace in the Trademark organization. In fact, we found that the conduct of several of the USPTO employees – including senior managers who were responsible for overseeing Trademark's hiring processes – suggested a lack of understanding of the rules governing federal hiring. For instance, USPTO employees who were involved with the hiring process told the OIG that USPTO employees, including Commissioners, commonly provide recommendations for particular applicants during the hiring process and that these recommendations typically ensure those candidates obtain interviews, even if they had previously been rejected for interviews. We concluded that, without a procedure defining how such recommendations shall be accepted and evaluated, such practices invite preferential treatment, favoritism, and unfair competition for USPTO employment; can unfairly influence and pressure employees in hiring; and can result in violations of federal regulations and statutes. At a minimum, the current practice creates the perception that such improper conditions exist.

Accordingly, we make several recommendations at the conclusion of this report. We specifically recommend that USPTO devise a process to handle recommendations for applicants for USPTO employment. This process should be designed to ensure that such recommendations are based on merit, rather than personal relationships alone. We also recommend that USPTO consider establishing a policy that employees are recused from hiring decisions involving those with whom they have a personal relationship within the scope of the federal regulations and that USPTO should provide comprehensive training regarding the federal laws governing hiring to relevant USPTO employees.

We believe these and other recommendations will bolster the hiring practices at the USPTO and ensure that its hiring is conducted in a fair, open manner in accordance with federal laws.

II. Scope and Methodology

In the course of the investigation, the OIG interviewed the subject of the complaint and relevant witnesses, reviewed records, and researched applicable legal standards. The interviews of the subject and key witnesses were recorded. Some witnesses were interviewed more than once. The OIG obtained records from the complainant, witnesses, and the USPTO Office of Human Resources. The OIG also obtained electronic files from the USPTO.

Following the completion of the investigation, the OIG prepared a draft report presenting the relevant evidence and the OIG's analysis. The OIG provided a copy of the draft report to Commissioner Cohn and her attorney to provide an opportunity for them to review the report and provide comments.

Commissioner Cohn later provided written comments to the report, as well as a second letter from her counsel stating that Commissioner Cohn did not consent to the public release of the report or her comments, requesting the legal authority allowing the OIG to release the report and/or her comments without her consent, and noting that the Privacy Act allows her to sue the agency in federal court. Cohn's attorney also reiterated, "[i]n order to avoid any costly and unnecessary litigation," that Commissioner Cohn did not consent to public release of the report.

III. Organization of the Report

This report first gives a brief overview of the Trademark organization and discusses the relevant laws at issue in the investigation. It then specifies the allegations in the case, presents the facts determined during the investigation, and analyzes the relevant laws. The report closes with the OIG's findings, conclusions, and recommendations for the USPTO.

2. Background

This section provides an overview of the USPTO and its Trademark organization, the laws at issue in this investigation, and the allegations to be resolved.

I. Overview of the USPTO and the Trademark Organization

The USPTO is the federal agency responsible for granting U.S. patents and registering trademarks.³ Its mission is to foster innovation and competitiveness by providing high-quality and timely examination of patent and trademark applications, guiding domestic and international intellectual property policy, and delivering intellectual property information and education worldwide.

The agency employs more than 11,000 people, including engineers, scientists, attorneys, analysts, and computer specialists, and its operations are funded through fees for patents and trademarks.⁴ It comprises two major components, the Patents organization and the Trademarks organization.⁵ The Patents organization employed nearly 10,000 employees, generated fees of more than \$2.5 billion, and granted 290,083 patents in fiscal year 2013.⁶

The Trademark organization is considerably smaller, employing 670, receiving fees totaling \$263 million, and registering 193,121 trademarks.⁷ As reported in the USPTO's Performance and Accountability Report FY 2013 (PAR), the

Trademark organization registers marks (trademarks, service marks, certification marks, and collective membership marks) that meet the requirements of the Trademark Act of 1946, as amended, and provides notice to the public and businesses of the trademark rights claimed in the pending applications and existing registrations of others. The core process of the Trademark organization is the examination of applications for trademark registration. As part of that process, examining attorneys make determinations of registrability under the provisions of the Trademark Act, which includes searching the electronic databases

³ A patent for an invention is a grant of property rights by the U.S. Government through the USPTO that excludes others from making, using, or selling the invention in the United States. USPTO, *Patents*, <http://www.uspto.gov/patents/index.jsp> (last visited June 9, 2014). A trademark, on the other hand, includes any word, name, symbol, or device, or any combination used, or intended to be used, in commerce to identify and distinguish the goods of one manufacturer or seller from goods manufactured or sold by others, and to indicate the source of the goods. USPTO, *Trademarks Process*, <http://www.uspto.gov/trademarks/basics/tradedefin.jsp> (last visited June 9, 2014).

⁴ USPTO, PAR 9, 73, <http://www.uspto.gov/about/stratplan/ar/USPTOFY2013PAR.pdf> (last visited June 9, 2014).

⁵ USPTO, *CCR 1*, <http://www.uspto.gov/about/stratplan/USPTOFY2013CCR.pdf> (last visited June 9, 2014).

⁶ USPTO Website: PAR, *supra*, at 79; USPTO Website: CCR, *supra*, at 3,

⁷ USPTO Website: CCR, *supra*, at 1.

for any pending or registered marks that are confusingly similar to the mark in a subject application, preparing letters informing applicants of the attorney's findings, approving applications to be published for opposition, and examining statements of use in applications filed under the Intent-to-Use provisions of the Trademark Act.⁸

At the end of fiscal year 2013, the USPTO employed 409 Trademark Examining Attorneys.⁹ During the time frame at issue, these attorneys were placed in one of 17 law offices, labeled Law Offices 101 through 117, and each law office was supervised by a Managing Attorney. The Trademark organization is headed by the Commissioner for Trademarks.¹⁰ The Secretary of Commerce appoints the Commissioner for a five-year term and can reappoint a Commissioner upon expiration of that term.¹¹ All employees of the Trademark organization report to the Commissioner.¹²

II. Legal and Regulatory Overview

Employees of the Trademark organization are subject to the Standards of Ethical Conduct for Employees of the Executive Branch, as codified in Title 5 of the Code of Federal Regulations (C.F.R.) Part 2635, as well as Title 5 of the United States Code (U.S.C.). The most relevant ethics laws include:

1) Regulations prohibiting using public office for private gain:

a) 5 C.F.R. § 2635.101(a) provides,

Public service is a public trust. Each employee has a responsibility to the United States Government and its citizens to place loyalty to the Constitution, laws and ethical principles above private gain. To ensure that every citizen can have complete confidence in the integrity of the Federal Government, each employee shall respect and adhere to the principles of ethical conduct set forth in this section, as well as the implementing standards contained in this part and in supplemental agency regulations.

⁸ USPTO, *PAR 8-9*, www.uspto.gov/about/stratplan/ar/USPTOFY2013PAR.pdf (last visited May 29, 2014).

⁹ *Id.* at 9.

¹⁰ See USPTO, *USPTO Leadership*, <http://www.uspto.gov/about/bios/index.jsp> (last visited May 29, 2014); USPTO, *Deborah Cohn*, http://www.uspto.gov/about/bios/cohn_bio.jsp (last visited May 29, 2014). The Patents organization is similarly headed by a Commissioner for Patents. USPTO, *Patents Organization*, <http://www.uspto.gov/patents/organization.jsp> (last visited May 29, 2014).

¹¹ USPTO, *Agency Organization Order 45-1*, II(G), available at <http://www.uspto.gov/about/AOO45-1.pdf> (executed June 24, 2001).

¹² OIG Investigative Record Form (IRF): Interview III with Deborah Cohn, Commissioner of Trademarks, USPTO, Tr. 69-71 [hereinafter *OIG IRF: Cohn Interview III*].

b) 5 C.F.R. § 2635.101(b)(7) provides,

The following general principles apply to every employee and may form the basis for the standards contained in this part. Where a situation is not covered by the standards set forth in this part, employees shall apply the principles set forth in this section in determining whether their conduct is proper.

....

(7) Employees shall not use public office for private gain.

c) 5 C.F.R. § 2635.702 provides,

An employee shall not use his public office for his own private gain, for the endorsement of any product, service or enterprise, or for the private gain of friends, relatives, or persons with whom the employee is affiliated in a nongovernmental capacity, including nonprofit organizations of which the employee is an officer or member, and persons with whom the employee has or seeks employment or business relations. The specific prohibitions set forth in paragraphs (a) through (d) of this section apply this general standard, but are not intended to be exclusive or to limit the application of this section.

(a) Inducement or coercion of benefits. An employee shall not use or permit the use of his Government position or title or any authority associated with his public office in a manner that is intended to coerce or induce another person, including a subordinate, to provide any benefit, financial or otherwise, to himself or to friends, relatives, or persons with whom the employee is affiliated in a nongovernmental capacity.

....

(d) Performance of official duties affecting a private interest. To ensure that the performance of his official duties does not give rise to an appearance of use of public office for private gain or of giving preferential treatment, an employee whose duties would affect the financial interests of a friend, relative or person with

whom he is affiliated in a nongovernmental capacity shall comply with any applicable requirements of § 2635.502.¹³

2) Regulations and statutes requiring employees to act impartially and prohibiting preferential treatment:

a) 5 C.F.R. § 2635.101(b)(8) provides,

The following general principles apply to every employee and may form the basis for the standards contained in this part. Where a situation is not covered by the standards set forth in this part, employees shall apply the principles set forth in this section in determining whether their conduct is proper.

....

(8) Employees shall act impartially and not give preferential treatment to any private organization or individual.

b) 5 U.S.C. § 2302(b)(6) provides,

Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority –

...

(6) grant any preference or advantage not authorized by law, rule, or regulation to any employee or applicant for employment (including defining the scope or manner of competition or the requirements for any position) for the purpose of improving or injuring the prospects of any particular person for employment[.]

3) A regulation requiring employees to avoid actions creating an appearance that they are violating ethical standards:

5 C.F.R. § 2635.101(b) (14) provides,

¹³ Section 2635.502 discusses “[p]ersonal and business relationships,” and subsection (a) requires an employee to consider the appearance of her involvement in matters affecting a member of her household or with whom she has a covered relationship, as defined, and “not participate in the matter unless he has informed the agency designee of the appearance problem and received authorization from the agency designee in accordance with paragraph (d) of this section.” 5 C.F.R. § 2635.502(a).

The following general principles apply to every employee and may form the basis for the standards contained in this part. Where a situation is not covered by the standards set forth in this part, employees shall apply the principles set forth in this section in determining whether their conduct is proper.

....

(14) Employees shall endeavor to avoid any actions creating the appearance that they are violating the law or the ethical standards set forth in this part. Whether particular circumstances create an appearance that the law or these standards have been violated shall be determined from the perspective of a reasonable person with knowledge of the relevant facts.

- 4) A regulation requiring employees to follow a particular process when concerned that their participation in matters would raise questions regarding their impartiality:

5 C.F.R. § 2635.501(a) provides,

This subpart contains two provisions intended to ensure that an employee takes appropriate steps to avoid an appearance of loss of impartiality in the performance of his official duties. Under § 2635.502, unless he receives prior authorization, an employee should not participate in a particular matter involving specific parties which he knows is likely to affect the financial interests of a member of his household, or in which he knows a person with whom he has a covered relationship is or represents a party, if he determines that a reasonable person with knowledge of the relevant facts would question his impartiality in the matter. An employee who is concerned that other circumstances would raise a question regarding his impartiality should use the process described in § 2635.502 to determine whether he should or should not participate in a particular matter.

III. Allegation to be Resolved

The complainant alleged that Commissioner Cohn forced her subordinates to hire the Applicant, the fiancé of her Relative, as an examining attorney in the Trademark organization.¹⁴ The complainant alleged that, although the Applicant was not among the most qualified for an

¹⁴ OIG Hotline Complaint (Apr. 26, 2013) [hereinafter *Hotline Complaint*].

interview, he was interviewed at Commissioner Cohn's direction.¹⁵ The letter further alleged that, although he was ranked last among those screened and interviewed, Commissioner Cohn "intervened to make sure he was hired."¹⁶ The complainant alleged that the Applicant's "primary qualifications [were] that he [wa]s engaged to Mrs. Cohn's [Relative] and in need of a job."¹⁷

The OIG set out to resolve whether Commissioner Cohn was involved in the hiring process in violation of federal law.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

3. Analysis

I. Facts

A. Commissioner Cohn's Background

Commissioner Cohn has served as Commissioner for Trademarks at the USPTO since December 2010.¹⁸ She currently earns an adjusted salary of \$181,500 per year.¹⁹ In 2013, she earned \$179,700 and received a cash award of \$25,000.²⁰ She stated that, prior to holding this position, she was Deputy Commissioner for Trademark Operations at the USPTO for approximately five years, and prior to that she was a group director of the Trademark law offices²¹ and a trademark examining attorney.²² Regarding her current role, she stated that she “oversee[s] the Trademark [o]rganization . . . handle[s] policy matters, and . . . a variety of operational . . . issues, areas. The entire Trademark [o]rganization reports to [her].”²³

Commissioner Cohn stated to the OIG that she communicates with her Relative frequently and “get[s] together with [the Relative]” approximately once every two weeks.²⁴ In his OIG interview, the Applicant similarly characterized Commissioner Cohn and her Relative’s relationship as “close.”²⁵ Evidence showed that Commissioner Cohn provided financial support to her Relative for many years, including from 2008 through 2010.²⁶

¹⁸ Press Release, USPTO, USPTO Commissioner for Trademarks Lynne Beresford to Retire After More Than Three Decades with the Agency (Nov. 8, 2010) (on file with the OIG); Deborah Cohn Electronic Official Personnel File (Dec. 31, 2010, SF 50); see also OIG IRF: Interview I with Deborah Cohn, Commissioner of Trademarks, USPTO, Tr. 60-65 [hereinafter *OIG IRF: Cohn Interview I*].

¹⁹ Deborah Cohn Electronic Official Personnel File (Jan. 12, 2014, SF 50).

²⁰ *Id.* (Dec. 1, 2013, SF 50; Dec. 31, 2010, SF 50). In 2012, she earned \$179,700 and received a cash award of \$25,000. *Id.* (Nov. 18, 2012, SF 50; Dec. 31, 2010, SF 50). In 2011, she also earned \$179,700 and received a cash award of \$25,000. *Id.* (Nov. 20, 2011, SF 50; Dec. 31, 2010, SF 50).

²¹ *OIG IRF: Cohn Interview I, supra*, at Tr. 67-75.

²² See *OIG IRF: Cohn Interview III, supra*, at Tr. 1374-80.

²³ *OIG IRF: Cohn Interview I, supra*, at Tr. 87-95.

²⁴ *OIG IRF: Cohn Interview III, supra*, at Tr. 2817-23, 2839-41.

²⁵ See *OIG IRF: Interview I with the Applicant, Trademark Examiner Attorney, USPTO, Tr. 1167-70* [hereinafter *OIG IRF: Applicant Interview I*].

²⁶ See, e.g., *OIG IRF: Cohn Interview III, supra*, at Tr. 2912-3002, 3018-85 (Commissioner Cohn stated to the OIG that she paid for the Relative’s rent when the Applicant was living with the Relative, and before 2010, Commissioner Cohn was “happy to pay for everything”); *OIG IRF: Review of Electronic Documents Received from USPTO* (documents showing financial support). The OIG’s draft report noted that Commissioner Cohn had provided financial support to the Relative through 2013. In her response to the draft report, Commissioner Cohn stated that she explained in her interview with the OIG that she had not provided financial support to her Relative since 2010. Letter from Commissioner Cohn to the OIG 1-2 (June 26, 2014) (on file with the OIG). We note that, in her interview with the OIG, Commissioner Cohn stated that she provided her Relative with financial support prior to her Relative’s graduation from graduate school, which occurred in May 2010. See *Cohn Interview III, supra*, at Tr. 3075-85. While we elected to modify the text of the report to reflect Commissioner Cohn’s comments, we

B. Commissioner Cohn's Relationship with the Applicant

In her interview with the OIG, Commissioner Cohn stated that the Applicant is in a romantic relationship with her Relative, and, as of July 2013, Commissioner Cohn had known Applicant for at least four years.²⁷ The Applicant stated in his interview that he and Commissioner Cohn's Relative have been living together for three to four years, and later informed the OIG that they are both listed on the title of the condominium in which they currently reside and on which they closed in January 2013.²⁸ Contrary to the assertion in the complaint, Commissioner Cohn's Relative and the Applicant are not and have never been engaged.²⁹

The OIG established that Commissioner Cohn and the Applicant have interacted socially at dinners and family events.³⁰ For example, in November 2011, Commissioner Cohn invited the Applicant and the Applicant's brother to attend a private tour of the West Wing of the White House.³¹ She also has given the Applicant gifts, such as birthday presents, over the years.³²

note that the evidence established that Commissioner Cohn did provide some measure of financial support to the Relative, including monetary gifts, through January 2014. See, e.g., OIG IRF: Review of Electronic Documents Received from USPTO (Aug. 18, 2013, e-mail showing that Commissioner Cohn used her credit card to reserve a hotel room in New York City in the names of her Relative and the Applicant; July 14, 2011, e-mail showing that Commissioner Cohn's spouse paid for her Relative's hotel room in New Jersey with his rewards points; June 14, 2010, e-mails showing that Commissioner Cohn reserved accommodations for her Relative and the Applicant, stating "and I'll also give you money for restaurants").

²⁷ See, e.g., OIG IRF: Cohn Interview I, *supra*, at Tr. 180-87; OIG IRF: Review of Electronic Documents Received from USPTO (Aug. 20, 2008, e-mail from Commissioner Cohn to Relative regarding an internship opportunity for the Applicant).

²⁸ OIG IRF: Applicant Interview I, *supra*, at Tr. 93-94, 115-16; OIG IRF: Review of Documents Received from the Applicant (Mar. 19, 2014, e-mail from the Applicant to OIG).

²⁹ OIG: IRF Applicant Interview I, *supra*, at Tr. 100-03.

³⁰ See OIG IRF: Review of Electronic Documents Received from USPTO (e-mails referring to dinners with the Applicant).

³¹ OIG IRF: Review of Electronic Documents Received from USPTO (Nov. 1, 2011, e-mail from Commissioner Cohn to an Intellectual Property Advisor of the Office of the Intellectual Property Enforcement Coordinator, Executive Office of the President; Nov. 9, 2011, e-mail from Commissioner Cohn to the same Intellectual Property Advisor thanking him for the tour). In arranging for this tour, Commissioner Cohn sent to the coordinator Personally Identifiable Information (PII), including Social Security numbers, using her non-secure e-mail address in violation of Department of Commerce and USPTO policies. See, e.g., U.S. Department of Commerce Office of the Chief Information Officer, Electronic Transmission of PII Policy, http://ocio.os.doc.gov/ITPolicyandPrograms/IT_Privacy/PROD01_008240 (last visited May 29, 2014) ("The Commerce policy is that if sensitive PII must be electronically transmitted, then it shall not be sent unless it is specifically protected by secure methodologies such as encryption, Public Key Infrastructure (PKI), secure sockets layer (SSL). Federal Information Processing Standards (FIPS) Publication 140-2, Security Requirements for Cryptographic Modules, provides the standard to which encryption methodologies must conform."); USPTO, *Rules of the Road* 9-10 (Oct. 2012), available at http://popa.org/wp-content/uploads/99022_rules_of_the_road.pdf ("Do not store or transmit sensitive data without proper protection as defined in applicable Federal laws and regulations . . . Sensitive data includes records about individuals in which there is a reasonable expectation of privacy . . . The following are examples of sensitive data that is not discussed or transmitted on PTONet or related computing services: Anything with sensitive personnel data such as names with Social Security numbers . . .").

³² OIG IRF: Cohn Interview III, *supra*, at Tr. 3120-45.

Evidence showed that since 2010 Commissioner Cohn repeatedly exerted significant effort to help the Applicant obtain a job. She confirmed to the OIG that she sent e-mails to help him find a job and network for him.³³ For example, in July 2010, Commissioner Cohn e-mailed her Relative using her USPTO e-mail address and informed the Relative that Commissioner Cohn had sent the Applicant's resume to three individuals, that one of them will "follow up" with another individual, and that the other will "make some calls" to help the Applicant.³⁴ On another occasion, Commissioner Cohn used her USPTO e-mail address to send the Applicant's resume to an attorney who previously worked at a personal injury law firm and is married to a current USPTO trademark examiner,³⁵ noting that the Applicant "would be thrilled to have the opportunity to talk to someone at [the] firm."³⁶ Further, in 2010, using her USPTO e-mail address, Commissioner Cohn forwarded the Applicant's resume to an "old friend,"³⁷ "in case [the friend is] still in touch with the antitrust attorney [she] mentioned to [the Applicant] (or anyone else who might have job connections). [The Applicant]'s firm is folding, so he'll be out of work shortly. He had been really interested in antitrust, so I thought I'd follow up on that at least."³⁸ In an e-mail to her Relative, Commissioner Cohn suggested that the Applicant contact an individual by e-mail, attaching his resume, and provided a "[s]uggested message" that she drafted for him to send.³⁹

Documents established that Commissioner Cohn also communicated, using her USPTO e-mail address, with intellectual property practitioners, such as one "good friend" of hers,⁴⁰ to try to

³³ See, e.g., *OIG IRF: Cohn Interview III, supra*, at Tr. 1251-62; 2371-78, 1336-37. Evidence showed that she provided him with similar help before he graduated from law school. See, e.g., *OIG IRF: Review of Electronic Documents Received from USPTO* (Aug. 20, 2008, e-mail from Commissioner Cohn to her Relative stating that an employee from a state prosecutor's office will be contacting the Applicant about an intern position, and "he should plan to hear from her;") Apr. 2, 2008, e-mail from Commissioner Cohn to her Relative stating that "[The Applicant] should send his resume with a cover letter to" the attorney in charge of summer hiring at a state prosecutor's office and providing the contact information for that attorney). The Applicant was successful in obtaining a position with the state prosecutor's office. See *OIG IRF: Cohn Interview III, supra*, at Tr. 1055-119; *OIG IRF: HR Documents, supra*, at Attach. I (Resume of the Applicant).

³⁴ *OIG IRF: Review of Electronic Documents Received from USPTO* (July 13, 2010, e-mail from Commissioner Cohn to her Relative); *OIG IRF: Cohn Interview III, supra*, at Tr. 1462-73. One of these individuals worked in the "healthcare business" and had many contacts; the second was an "old friend" whose husband, a developer and builder, had connections with attorneys and could help; and the third was a "good friend of [hers]" who was an attorney working at an intellectual property law firm, and "ha[d] a lot of contacts and like[d] to help young people who are good and need jobs." *OIG IRF: Cohn Interview III, supra*, at Tr. 1228-53, 1912-36.

³⁵ *OIG IRF: Cohn Interview III, supra*, at Tr. 1590-630.

³⁶ *OIG IRF: Review of Electronic Documents Received from USPTO* (May 7, 2011, e-mail from Commissioner Cohn to a Trademark Examiner, USPTO; May 7, 2011, e-mail from Commissioner Cohn to relatives).

³⁷ *OIG IRF: Cohn Interview III, supra*, at Tr. 1793-801.

³⁸ *OIG IRF: Review of Electronic Documents Received from USPTO* (July 12, 2010, e-mail from Commissioner Cohn to a friend).

³⁹ *OIG IRF: Review of Electronic Documents Received from USPTO* (Mar. 29, 2011, e-mail from Commissioner Cohn to her Relative stating, "Suggested message: Dear [contact], Debbie Cohn suggested that I get in touch with you to [sic] regarding my job search. I greatly appreciate your kind offer and would love to meet with you to discuss any ideas or suggestions you might have. Please let me know if we can arrange a time that would be convenient. Attached is my resume for your consideration. Thanks very much for your help. Very truly yours, [The Applicant]."); *OIG IRF: Cohn Interview III, supra*, at Tr. 2324-31.

⁴⁰ *OIG IRF: Cohn Interview III, supra*, at Tr. 1912-33.

secure a position for the Applicant.⁴¹ According to Commissioner Cohn, she had worked with that friend when they were both trademark examining attorneys at the USPTO “many years ago” and remained friends.⁴² At the time of the e-mail, the friend was an attorney with an intellectual property law firm that Commissioner Cohn described as “well-known” and respected in the field of trademark law.⁴³ The friend’s profile on her firm’s website states that her focus is on U.S. and international trademark law and that she appears before the Trademark Trial and Appeal Board.⁴⁴ Commissioner Cohn forwarded the Applicant’s resume to this friend, using her USPTO e-mail account, and thanked her friend “for [her] help.”⁴⁵ In an interview with the OIG, Commissioner Cohn confirmed that she was thanking this attorney for helping the Applicant find employment.⁴⁶ Additionally, in 2011, Commissioner Cohn forwarded the Applicant’s resume to a former Associate Commissioner at USPTO, stating, “[H]ere it is. I really appreciate any help.”⁴⁷ The employee responded that she would “[k]eep [her] eyes and ears opened, and touch base with [her] contacts once the budget situation is resolved.”⁴⁸ A review of some of Commissioner Cohn’s e-mails reveals that she sent more than 15 e-mails from her USPTO e-mail account to aid the Applicant in finding employment during this period.

E-mails indicate that Commissioner Cohn was invested in the Applicant’s employment status, and she stated to OIG that she was “concerned for him” when he was looking for work.⁴⁹ She stated in an e-mail in March 2011 that he was “having a very tough time finding a permanent job”⁵⁰ and explained in an interview with the OIG that “anybody who’s having a tough time finding a job needs help from people who can help him.”⁵¹ When the Applicant obtained employment at a law firm in 2011, Commissioner Cohn wrote to her Relative, “I hope [Applicant] enjoys his new job! Just wanted to remind him to send [Commissioner Cohn’s friend] a note telling her he got a job and thanking her for all her help. You never know what

⁴¹ OIG IRF: Review of Electronic Documents Received from USPTO (July 13, 2010, e-mail from Commissioner Cohn to a friend).

⁴² See *OIG IRF: Cohn Interview III, supra*, at Tr. 1368-70, 1932-35.

⁴³ *OIG IRF: Cohn Interview III, supra*, at Tr. 2696-716.

⁴⁴ [Website of law firm] (last visited May 29, 2014).

⁴⁵ OIG IRF: Review of Electronic Documents Received from USPTO (July 13, 2010, e-mail from Commissioner Cohn to a friend).

⁴⁶ *OIG IRF: Cohn Interview III, supra*, at Tr. 1919-32.

⁴⁷ OIG IRF: Review of Electronic Documents Received from USPTO (Apr. 5, 2011, email from Commissioner Cohn to a former Associate Commissioner).

⁴⁸ OIG IRF: Review of Electronic Documents Received from USPTO (Apr. 5, 2011, email from Commissioner Cohn to a former Associate Commissioner). Commissioner Cohn also sent her Relative an e-mail in which she stated, “In case [the Applicant] gets a call (and I don’t know who it would be from), the person who referred him is [a Trademark Trial and Appeal Board judge].” OIG IRF: Review of Electronic Documents Received from USPTO (Feb. 15, 2012, e-mail from Commissioner Cohn to her Relative). Commissioner Cohn stated in an interview with the OIG that this judge was previously in private practice “for a number of years” practicing trademark law. *OIG IRF: Cohn Interview III, supra*, at Tr. 2140-45, 2163-64. She further stated to the OIG that she could not recall a conversation with him, but that he “probably had some contacts or may have said that . . . let me have [Applicant]’s resume, and . . . I’ll pass it along.”

⁴⁹ *OIG IRF: Cohn Interview III, supra*, at Tr. 1410.

⁵⁰ OIG IRF: Review of Electronic Documents Received from USPTO (Mar. 28, 2011, e-mail from a friend to Commissioner Cohn).

⁵¹ *OIG IRF: Cohn Interview III, supra*, at Tr. 2410-11.

might happen in the future and it would be good for her to know he has a job.”⁵² Commissioner Cohn separately e-mailed the Applicant to relay her congratulations and stated that they will “have to celebrate soon.”⁵³ Around this time, Commissioner Cohn showed her interest in the Applicant’s employment when she noted in an e-mail to a friend that she “was starting to worry” about Applicant’s employment.⁵⁴

Although the Applicant stated to the OIG that Commissioner Cohn never edited his resume, and he only worked on it with Relative,⁵⁵ and Commissioner Cohn informed the OIG that she did not recall editing his resume,⁵⁶ evidence showed that Commissioner Cohn had a few Word versions of his resume on her USPTO computer, and that she sent e-mails from her USPTO e-mail address examining and critiquing the Applicant’s resume in 2011.⁵⁷ In one e-mail she told another relative that “[the Applicant’s] current job needs to be rewritten” and asked whether “his email address is an issue?”⁵⁸ That individual responded by e-mail that he would review a copy of the resume with her, he “agree[d] that the current job needs to be changed,” and that he “s[aw] a few more edits/changes.”⁵⁹ Commissioner Cohn responded by e-mail that she would “get more information about his current job.”⁶⁰ When Commissioner Cohn’s Relative sent Commissioner Cohn the Applicant’s “updated resume” the next day, Commissioner Cohn responded that it “looks much better” and that she would send it to her other relative for him to review as well.⁶¹ She stated in an interview with the OIG that these e-mails indicate that she had a conversation with her Relative or the Applicant regarding his resume.⁶²

The Applicant told the OIG that he does not mention his connection to Commissioner Cohn and her Relative in conversations at the USPTO.⁶³ The Applicant reported to the OIG that he did not believe that the other Attorney Advisors who started working with him at the USPTO (his classmates) were aware about the connection.⁶⁴ But he also stated that “people know” about his relationship, particularly because he recalled discussing it during his second interview for the Attorney Advisor position.⁶⁵ The Applicant also explained to the OIG that, after he

⁵² OIG IRF: Review of Electronic Documents Received from USPTO (Aug. 1, 2011, e-mail from Commissioner Cohn to her Relative).

⁵³ *Id.* (July 14, 2011, e-mail from Commissioner Cohn to the Applicant and Commissioner Cohn’s Relative).

⁵⁴ See *id.* (Aug. 18, 2011, e-mail from Commissioner Cohn to a friend).

⁵⁵ OIG IRF: Interview II with the Applicant, Trademark Examiner Attorney, USPTO, 2 [hereinafter *OIG IRF: Applicant Interview II*].

⁵⁶ OIG IRF: Cohn Interview III, *supra*, at Tr. 2619-22, 2643-45.

⁵⁷ See, e.g., OIG IRF: Review of Electronic Documents Received from USPTO (Mar. 24, 2011, e-mail from Commissioner Cohn to another relative; Mar. 25, 2011, e-mail from Commissioner Cohn to her Relative). In her interview with the OIG, Commissioner Cohn agreed that in these e-mails she was examining and critiquing the Applicant’s resume. OIG IRF: Cohn Interview III, *supra*, at Tr. 2636-42.

⁵⁸ OIG IRF: Review of Electronic Documents Received from USPTO (Mar. 24, 2011, e-mail from Commissioner Cohn to another relative).

⁵⁹ *Id.* (Mar. 24, 2011, e-mail from Commissioner Cohn to another relative).

⁶⁰ *Id.* (Mar. 24, 2011, e-mail from Commissioner Cohn to another relative).

⁶¹ *Id.* (Mar. 25, 2011, e-mail from Commissioner Cohn to her Relative).

⁶² See OIG IRF: Cohn Interview III, *supra*, at Tr. 2650-80.

⁶³ See OIG IRF: Applicant Interview I, *supra*, at Tr. 722-42.

⁶⁴ *Id.* at Tr. 794-811, 883-93.

⁶⁵ See *id.* at Tr. 722-46.

began working at the USPTO, a Managing Attorney (Manager 1) told him that “people know” about the relationship and “reinforced” for the Applicant that he should not “bring it up casually.”⁶⁶ The Applicant also stated to the OIG that he told Commissioner Cohn’s Relative that he did not want to bring up at the USPTO his connection with Commissioner Cohn, and the Relative “probably communicated that to [Commissioner Cohn]. Otherwise [he and Commissioner Cohn would] probably hang out more.”⁶⁷

C. The Hiring Process for TMO-2013-0008

According to the Hiring Plan and interviews with employees involved in the hiring process, applicants for the “Attorney Advisor (Trademarks)” position (job announcement number TMO-2013-0008) were evaluated based on a screening process and interviews.⁶⁸ Two senior managers (Senior Manager 1 and Senior Manager 2) jointly supervised the hiring process, although one of the Senior Managers was technically identified as the hiring official for this announcement.⁶⁹ Both Senior Manager 1 and Senior Manager 2 have been directly involved in hiring candidates since at least 2005.⁷⁰

According to the human resources specialist contact for this announcement, 732 individuals applied for the position. USPTO human resources specialists first checked each of the applicants for minimum eligibility, and then provided a certificate list of approximately 500 individuals who were eligible for interviews.⁷¹ A Managing Attorney of one of the law offices (Manager 2) informed the OIG in an interview that Manager 2 coordinated the initial screening of those applicants referred through the certificate list.⁷² According to Manager 2, a group of subject matter experts reviewed the applicants’ resumes, applications, and transcripts, and filled out forms, which applied points to aspects of each applicant’s experience, such as his or her experience in trademark law, law school achievements, written recommendations, prior experience in the Trademark organization, and experience practicing trademark law.⁷³ For example, if an applicant received a written personal recommendation from a current Trademark organization “employee with knowledge of the applicant’s work,” he or she could receive up to five points, and if the applicant received a written personal recommendation from a current Trademark organization “manager with knowledge of the applicant’s work,” he or she

⁶⁶ *Id.* at Tr. 722-34; 812-42.

⁶⁷ *Id.* at Tr. 863-73; see also *id.* at Tr. 851-55.

⁶⁸ OIG IRF: HR Documents (Hiring Plan Summary); OIG IRF: Interview II with Manager 2, Managing Attorney, USPTO, Attach. 4 [hereinafter OIG IRF: *Manager 2 Interview II*].

⁶⁹ See OIG IRF: Interview I with Senior Manager 1, Trademark Law Offices, USPTO [hereinafter OIG IRF: *Senior Manager 1 Interview I*]; OIG IRF: Interview III with Senior Manager 1, Trademark Law Offices, USPTO, I [hereinafter OIG IRF: *Senior Manager 1 Interview III*]; IRF: Interview I with Senior Manager 2, Trademark Law Offices, USPTO [hereinafter OIG IRF: *Senior Manager 2 Interview I*]; OIG IRF: Interview II with Senior Manager 2, Trademark Law Offices, USPTO, Tr. 57-59 [hereinafter OIG IRF: *Senior Manager 2 Interview II*].

⁷⁰ OIG IRF: *Senior Manager 1 Interview III*, *supra*, at 1.

⁷¹ OIG IRF: Interview with Human Resources Specialist, Office of Human Resources, USPTO.

⁷² OIG IRF: Interview I with Manager 2, Managing Attorney, USPTO [hereinafter OIG IRF: *Manager 2 Interview I*].

⁷³ OIG IRF: *Manager 2 Interview II*, *supra*, at 2 and Attachs. 1, 4.

could receive up to 20 points.⁷⁴ As another example, if an applicant had been a member of his or her law school's law journal, he or she received five points.⁷⁵

Manager 2 told the OIG that, after the subject matter experts finished their review, the total number of points was calculated for each applicant.⁷⁶ Then all applicants who had received 40 or more points in this first screening were selected to move on to the second screening.⁷⁷ Approximately 256 applicants moved on to the second screening.⁷⁸ Human Resources personnel then asked these candidates to provide answers to certain "knowledge, skills, abilities" questions and, after the subject matter experts reviewed and scored those responses, the points from both screenings were tallied and the candidates were ranked to determine who would move on to the first interview.⁷⁹ Manager 2 explained to the OIG that the organization tried to limit the number of interviews to five applicants per spot, between 150 and 200 total, because they could not handle more than 200 applicant interviews.⁸⁰ Manager 2 stated to the OIG that the interview list was then provided to the Managing Attorneys of each law office, who made the final determination of whom to interview.⁸¹ Documents indicate that approximately 175 individuals were interviewed in the first round.⁸²

Manager 2 told the OIG that, at the interview stage, the points reset, and the previous points did not factor into whether an applicant was hired.⁸³ The individuals proceeded through two interviews.⁸⁴ After the second interview, the 17 law office managers ranked their top choices, and then "me[t] as a group and kind of d[id] a draft where they . . . [went] around the room and t[ook] turns picking people."⁸⁵ Senior Manager 2 noted that, in the usual hiring process, the managers of the law offices ranked their candidates in order, but sometimes managers would "change their minds" and decide to pick their number two candidates.⁸⁶ After the "draft picks," Senior Manager 1 and Senior Manager 2 reviewed the selections to ensure that the individuals were fully qualified.⁸⁷

Senior Manager 1 reported to the OIG that Senior Manager 1 and Senior Manager 2 discussed the number of individuals that they would hire from this vacancy before informing the law office

⁷⁴ *Id.*, at Attach. 4, see also *id.* at Attach. 1.

⁷⁵ *Id.* at Attach. 1, 4.

⁷⁶ *Id.* at 2.

⁷⁷ *Id.*

⁷⁸ OIG IRF: Manager 2 Interview I, *supra*.

⁷⁹ See OIG IRF: Manager 2 Interview II, *supra*, at 2.

⁸⁰ *Id.* at 2-3.

⁸¹ *Id.* at 3.

⁸² OIG IRF: Manager 2 Interview I, *supra*; see also OIG IRF: Manager 2 Interview II, *supra*, at Attach. 7 (Initial Interviews Results spreadsheet).

⁸³ OIG IRF: Manager 2 Interview II, *supra*, at 3. Manager 2 stated further, however, that some of the *facts* previously considered in the screening phase may be considered by the Managing Attorneys in the interview phase – for example, an applicant's law school activities. See *id.*

⁸⁴ OIG IRF: Senior Manager 2 Interview II, *supra*, at Tr. 193-99.

⁸⁵ *Id.* at Tr. 199-205.

⁸⁶ *Id.* at Tr. 536-51.

⁸⁷ OIG IRF: Senior Manager 1 Interview I, *supra*, at 1; see also Senior Manager 2 Interview II, *supra*, at Tr. 220-25.

managers.⁸⁸ At the start of the fiscal year, their target number of hires for the vacancy was 26, but they “were pushing that up.”⁸⁹ In fact, Senior Manager 1 stated that Senior Manager 1 “had been arguing for quite some time to increase it considerably” and wanted to go above 30, “so [they] kept discussions open.”⁹⁰ According to Senior Manager 1, after discussing the number with the budget and planning group, and they “got to the absolute point where [they] had to . . . tell the managers this is the number you should be thinking of when you’re hiring, [they] said 29.”⁹¹ Senior Manager 1 stated that the number of hires occasionally changed during the hiring process, and that, while there had been occasions in which the number of positions decreased, it usually increased.⁹² Senior Manager 1 stated that they “kept those discussions going even while the . . . interviewing process was going” because Senior Manager 1 “saw . . . [trademark] filings as going up and the inventory work to be done as going up, and [Senior Manager 1] was very worried about having not enough hired and . . . wait[ing] another year before” hiring more individuals.⁹³

Senior Manager 2 explained that, before the hiring process started, Senior Manager 1 and Senior Manager 2 discussed how many new employees each law office should receive and gave the managers of those offices an idea of the numbers.⁹⁴ Senior Manager 1 and Senior Manager 2 considered various factors such as the size of each law office, each office’s previous “training load,” and each office’s “training load” were it to receive additional employees.⁹⁵ Commissioner Cohn stated that she typically approved the total number of hires and did not get involved with the specifics of which office would get what number of candidates.⁹⁶

D. The Hiring of the Applicant

The Applicant informed the OIG that, prior to applying for the attorney advisor position at issue in this investigation, he had heard about the attorney advisor position with the Trademark organization as a result of his relationship with the Relative of Commissioner Cohn, and the Applicant thought it sounded appealing.⁹⁷ The Applicant stated to the OIG that Commissioner Cohn was aware that he was interested in this position in the past and let him know that the office was not hiring at that time.⁹⁸ The Applicant explained to the OIG that he learned of the

⁸⁸ OIG IRF: Interview II with Senior Manager 1, Trademark Law Offices, USPTO, Tr. 134-47 [hereinafter *OIG IRF: Senior Manager 1 Interview II*].

⁸⁹ *Id.* at Tr. 148-51.

⁹⁰ *Id.* at Tr. 151-54.

⁹¹ *Id.* at Tr. 154-60.

⁹² *Id.* at Tr. 164-65.

⁹³ *Id.* at Tr. 164-72.

⁹⁴ See *OIG IRF: Senior Manager 2 Interview II, supra*, at Tr. 325-75.

⁹⁵ *Id.*

⁹⁶ See *OIG IRF: Cohn Interview III, supra*, at Tr. 163-88.

⁹⁷ *OIG IRF: Applicant Interview I, supra*, at Tr. 170-80.

⁹⁸ *OIG IRF: Applicant Interview I, supra*, at Tr. 376-82. Commissioner Cohn confirmed to the OIG that she discussed this position with the Applicant. *OIG IRF: Cohn Interview III, supra*, at Tr. 298-300, 334.

vacancy at issue from Commissioner Cohn's family member.⁹⁹ According to the Applicant, Commissioner Cohn believed that he would be qualified for this job, that he "would do a good job, and that it was . . . something that [he] should pursue."¹⁰⁰ The Applicant told the OIG that he informed Commissioner Cohn that he had applied for the attorney advisor position.¹⁰¹

The Applicant applied for the position through USA Jobs.¹⁰² On his application, the Applicant answered a number of "Vacancy Questions," including four questions regarding his law degree and experience.¹⁰³ The third question stated, "Please indicate the choice that reflects the number of years of experience you possess practicing Trademark law."¹⁰⁴ There were five possible responses: (1) "Less than 1 year," (2) "1-2 years," (3) "3-5 years," (4) "More than 5 years," or (5) "I do not have experience practicing Trademark Law."¹⁰⁵ In his OIG interview, the Applicant stated that he did not do trademark work in any of his previous legal jobs.¹⁰⁶ However, the Applicant chose option 1 – "[l]ess than 1 year."¹⁰⁷ In an interview with the OIG, when asked why he selected this option, rather than the fifth option, the Applicant responded that he could not recall.¹⁰⁸ The Applicant stated that it was plausible that he may have had some minimal discussions on trademark law, and that is why he picked the "[l]ess than 1 year" option, and he did not think that he would have picked this option just to get further along in the hiring process.¹⁰⁹ The Applicant also stated in his OIG interview that he believed "zero is more accurate."¹¹⁰

According to USPTO records and witness testimony, the Applicant did not receive the 40 points required to pass the first screening and therefore was not originally selected for an interview.¹¹¹ Commissioner Cohn stated in her OIG interview that she gave a Manager a list with names of individuals, including the Applicant, whom Commissioner Cohn wanted to receive a first interview.¹¹² Commissioner Cohn later told the OIG that she provided this list to the Manager when the Manager asked Commissioner Cohn "who [she] would like to put on

⁹⁹ OIG IRF: Applicant Interview I, *supra*, at Tr. 165-69; 383-85.

¹⁰⁰ *Id.* at Tr. 354-58.

¹⁰¹ OIG IRF: Cohn Interview I, *supra*, at Tr. 190.

¹⁰² See OIG IRF: Applicant Interview I, *supra*, at Tr. 185-94; OIG IRF: HR Documents, *supra*, Attach. 1 (the Applicant's Application).

¹⁰³ OIG IRF: HR Documents, *supra*, Attach. 1 (the Applicant's Application).

¹⁰⁴ *Id.*; OIG IRF: Review of Vacancy Questions and Possible Answers, Attach. 2 [hereinafter OIG IRF: Vacancy Questions] (vacancy questions and possible responses).

¹⁰⁵ OIG IRF: Vacancy Questions, *supra*, Attach. 2 (vacancy questions).

¹⁰⁶ OIG IRF: Applicant Interview I, *supra*, at Tr. 162-64.

¹⁰⁷ OIG IRF: HR Documents, *supra*, Attach. 1 (the Applicant's Application).

¹⁰⁸ OIG IRF: Applicant Interview II, *supra*, at 1.

¹⁰⁹ *Id.* at 2.

¹¹⁰ *Id.* at 1.

¹¹¹ See OIG IRF: Senior Manager 2 Interview II, *supra*, at Tr. 595-605; 682-85; OIG IRF: Manager 2 Interview II, *supra*, at 3, Attach. 3.

¹¹² See OIG IRF: Cohn Interview I, *supra*, at Tr. 234-36; see also OIG IRF: Senior Manager 2 Interview II, *supra*, at Tr. 241-43.

the interview list.”¹¹³ Commissioner Cohn explained that she believed the screening process was only used “to whittle down the number of people that come in for interviews,” and although the screening process evaluated an individual’s trademark experience and related criteria, they were “not the exclusive criteria . . . and that’s why we traditionally have used recommendations to bring people onboard or to at least get people interviews.”¹¹⁴

Commissioner Cohn informed the OIG, however, that she had not reviewed the legal work product of any of the individuals whom she added to the interview list, and that she knew at the time that the Applicant did not have any trademark experience or any legal experience relevant to this job.¹¹⁵ She told the OIG that she “wanted [the Applicant] to get an interview.”¹¹⁶ The Manager who received the list told the OIG that, in the Manager’s conversation with Commissioner Cohn, Commissioner Cohn was “very clear . . . that these people were to be treated exactly the same as everybody else;” she was not pressuring for those individuals to be hired, but she wanted them to receive first-round interviews.¹¹⁷ According to Manager 2, those individuals, including the Applicant, were then added to the interview list.¹¹⁸ Senior Manager 2 stated to the OIG that the Applicant would not have obtained a first interview without Commissioner Cohn’s instruction.¹¹⁹

Senior Manager 1 and Commissioner Cohn stated to the OIG that it was not uncommon to receive referrals or recommendations from USPTO commissioners, including Commissioner Cohn, regarding applicants for open positions.¹²⁰ Commissioner Cohn told the OIG that “[a]

¹¹³ OIG IRF: Cohn Interview III, *supra*, at Tr. 504-508.

¹¹⁴ *Id.* at Tr. 394-423.

¹¹⁵ *Id.* at Tr. 376-78, 821-24, 845-49.

¹¹⁶ *Id.* at Tr. 682-83.

¹¹⁷ OIG IRF: Senior Manager 2 Interview II, *supra*, at Tr. 245-54; see also OIG IRF: Senior Manager 2 Interview II, *supra*, at Tr. 178-90 (explaining that applicants who did not previously work for the USPTO received interviews either if they were ranked high enough after the resume review or if Commissioner Cohn recommended them).

¹¹⁸ OIG IRF: Manager 2 Interview I, *supra*, at Attach. 1 (e-mail confirms that a Manager was instructed to add five names, including the Applicant’s, to the interview list); OIG IRF: Senior Manager 2 Interview II, *supra*, at Tr. 255-63 (the names were passed on to the coordinator of the interview process).

¹¹⁹ See OIG IRF: Senior Manager 2 Interview II, *supra*, at Tr. 595-605, 682-85. The OIG has no reason to believe that the other recommendations from Commissioner Cohn were not based on merit. In fact, all of the other candidates had some experience with trademark law. See OIG IRF: Review of Human Resources Documents Attach. 4-7. For example, one of the candidates had previously worked at the USPTO. OIG IRF: Senior Manager 2 Interview II, *supra*, at Tr. 624-26. Commissioner Cohn stated in her OIG interview that she included this former employee in her list of five candidates whom she would like interviewed. OIG IRF: Cohn Interview I, *supra*, at Tr. 210-15. After her second interview, that former employee was given the most points possible by one of the law offices. OIG IRF: Senior Manager 1 Interview I, *supra*, Attach. 1 (Ranking by Law Office spreadsheet). The former employee had received “great recommendations from top executives and was doing a great job,” according to Senior Manager 2, and was selected by one of the law offices for a position. OIG IRF: Senior Manager 2 Interview II, *supra*, at Tr. 392-95; 646-50.

¹²⁰ See, e.g., OIG IRF: Senior Manager 1 Interview II, *supra*, at Tr. 177-97; OIG IRF: Senior Manager 1 Interview I, *supra*, at 1; OIG IRF: Cohn Interview I, *supra*, at Tr. 531-46; OIG IRF: Cohn Interview III, *supra*, at Tr. 242-43, 421-23, 442-47, 482-83; see also OIG IRF: Interview I with Manager 1, Managing Attorney, USPTO, 2 [hereinafter OIG IRF: Manager 1 Interview I] (stating that he had heard rumors of Commissioner Cohn advocating for “friends of Debbie”). Commissioner Cohn stated to the OIG that she had also passed along resumes, names, or referrals for the intern program a few times in the past. OIG IRF: Cohn Interview III, *supra*, at Tr. 3319-24.

lot of people got interviewed based on recommendations.”¹²¹ Senior Manager 1 stated to the OIG that recommendations have come from “all sorts of sources” to one of the managers or other individuals who organize scheduling, and they eventually all get funneled to one of the Managers.¹²² Manager 2 informed the OIG that the law offices “have interviewed candidates that were recommended by executive management both from the USPTO and Department of Commerce,” and to his “knowledge this was not the first time Commissioner Cohn submitted a name for an interview.”¹²³ Commissioner Cohn stated to the OIG that, in general terms, she is “not the only one” who passes along resumes in the hiring process and agreed that it happens “a lot.”¹²⁴ In addition to helping the Applicant, Commissioner Cohn spoke with hiring officials at the USPTO to aid her Relative’s friends in finding work with the Trademark organization in previous years.¹²⁵ Senior Manager 1 added that recommendations from USPTO staff, particularly higher-level officials, are given weight and recommended individuals typically receive an initial interview.¹²⁶ Senior Manager 1 noted, however, that any applicants referred still must meet the basic qualifications, and the hiring officials are not *required* to hire an individual who receives a referral.¹²⁷

In an interview with the OIG, Commissioner Cohn stated that she did not obtain any advice or counsel from an ethics official, attorney, or any other USPTO employee before recommending the Applicant for the attorney advisor position or otherwise contacting anyone involved with

¹²¹ OIG IRF: Cohn Interview III, *supra*, at Tr. 241-43.

¹²² OIG IRF: Senior Manager 1 Interview III, *supra*, at 2.

¹²³ OIG IRF: Receipt of Information from Manager 2, Managing Attorney, USPTO, at Attach. 1 (May 22, 2014, e-mail from Manager 2 to the OIG).

¹²⁴ OIG IRF: Cohn Interview III, *supra*, at Tr. 3369-75.

¹²⁵ See, e.g., OIG IRF: Review of Electronic Documents Received from USPTO (Mar. 25, 2008, e-mail from Commissioner Cohn to her Relative informing the Relative that there may be an internship opportunity at the Trademark organization and that Commissioner Cohn spoke with a “Manager . . . and he would be happy to talk to [the Relative’s] friend about it Make sure [the Relative’s friend] mentions [Commissioner Cohn’s] name when he calls;” Mar. 27, 2008, e-mail from Commissioner Cohn to her Relative’s colleague in which Commissioner Cohn informs the colleague that Commissioner Cohn spoke with someone from the Trademark organization’s internship program regarding the colleague’s interest in the summer internship, and suggested that he consider a fall internship, which would “get [him] in the door for next summer;” provides him with contact information; and informs the colleague that her contact would be “happy to talk with [the colleague] further,” and if he calls her contact, to mention Commissioner Cohn’s name). In two e-mails, she stated that the candidate should “mention [her] name when he calls” her contact regarding the intern program. OIG IRF: Review of Electronic Documents Received from USPTO (Mar. 25, 2008, e-mail from Commissioner Cohn to her Relative; Mar. 27, 2008, e-mail from Commissioner Cohn to her Relative’s colleague). In an interview with the OIG, Commissioner Cohn stated that she did so “so that [the manager] would know how he got the phone call.” OIG IRF: Cohn Interview III, *supra*, at Tr. 3339-42. She agreed that it was her preference to tell the potential candidate to mention her name for this reason. *Id.* at Tr. 3590-618. She stated that she did not think that a candidate mentioning her name would pressure the manager to hire that individual because he had not hired individuals whose names she had passed along to him in the past. *Id.* at Tr. 3343-65. Commissioner Cohn informed the OIG more generally that people asked her “all the time” about examiner positions, and she explained to them what time of year the Trademark organization accepts applications, and “[o]ften [she] would pass them onto [Senior Manager 2], or to [Senior Manager 2] for [Senior Manager 2] to ask [one of the law office managers] to give them a call.” *Id.* at Tr. 3491-500.

¹²⁶ See OIG IRF: Senior Manager 1 Interview I, *supra*, at 1; OIG IRF: Senior Manager 1 Interview II, *supra*, at Tr. 669-74.

¹²⁷ OIG IRF: Senior Manager 1 Interview I, *supra*, at 1.

the hiring process at issue here.¹²⁸ She did not do so because “it just didn’t occur to [her] that it would be problematic”¹²⁹ or that “there was . . . even an appearance of a problem”¹³⁰ She also stated to the OIG that, although she understood that there were ethics rules involving hiring members of an employee’s family, she was not trained or spoken to about any other ethics rules related to hiring or making recommendations.¹³¹

In the Applicant’s interview with the OIG that, the applicant stated that after he learned that he would be interviewed for the attorney advisor position, but before the interview, he spoke with Commissioner Cohn about “what sort of things should [he] be highlighting – [because] she knows [his] background.”¹³² He stated that he did not recall the specifics of the conversation, but the Applicant remembered asking her “do I want to go off on this tangent, and – mostly she said, yeah, that would – you know, that’s basically what you should [do]”¹³³

The Applicant was interviewed for the attorney advisor position in January 2013 by three law office managers.¹³⁴ After the first round of interviews, the Applicant was ranked as “highly qualified” based on his interview and received a second interview,¹³⁵ which occurred later that month.¹³⁶ The Applicant recalled speaking with Commissioner Cohn after the interviews, and Commissioner Cohn telling him that “it sounds like [he] did fine.”¹³⁷

Manager I,” a Managing Attorney of one of the law offices, stated to the OIG that he did not recall being present in the room in which the Applicant was asked about his connection to Commissioner Cohn; however, Manager I stated to the OIG that on the day of the second interview or a few days later, another employee mentioned that the Applicant was married to Commissioner Cohn’s Relative, and he therefore knew that Commissioner Cohn was connected to the Applicant prior to hiring him.¹³⁸

¹²⁸ OIG IRF: Interview II with Deborah Cohn, Commissioner of Trademarks, USPTO, Tr. 61-71 [hereinafter *Cohn Interview II*]. She also did not speak with anyone at USPTO after providing the recommendation or otherwise speak with members of the hiring staff. *Id.* at 75-82.

¹²⁹ *Id.* at Tr. 73-74

¹³⁰ *Id.* at Tr. 79-82

¹³¹ See OIG IRF: *Cohn Interview III*, *supra*, at Tr. 531-56.

¹³² OIG IRF: *Applicant Interview I*, *supra*, at Tr. 206-20.

¹³³ *Id.* at Tr. 222-29.

¹³⁴ OIG IRF: Review of Documents from Manager 2, Managing Attorney, USPTO, Attach. 2 & 3 (Interviews for Trademark Examining Attorney Position TMO-2013-0008 spreadsheet; Initial Hiring Panel e-mail); *Id.* at Attach. 3 (May 24, 2013, e-mail from Manager 2 stating the members of the hiring panel); see also OIG IRF: *Applicant Interview I*, *supra*, at Tr. 475-81.

¹³⁵ OIG IRF: Review of Documents from Manager 2, Managing Attorney, USPTO, at Attach. 4 (Initial Interviews Results spreadsheet).

¹³⁶ OIG IRF: Interview II with Manager I, Managing Attorney, USPTO, 2 [hereinafter OIG IRF: *Manager I Interview II*].

¹³⁷ OIG IRF: *Applicant Interview I*, *supra*, at Tr. 240-47.

¹³⁸ OIG IRF: *Manager I Interview II*, *supra*, at 2. Senior Manager I told the OIG that Senior Manager I knew during the hiring process that the Applicant was the boyfriend of Commissioner Cohn’s Relative and that Commissioner Cohn “knew him pretty well” OIG IRF: *Senior Manager I Interview II*, *supra*, at Tr. 389-96. Similarly,

After the second set of interviews, each law office assigned points to the candidates and ranked its top 20 candidates.¹³⁹ Sixteen of the 17 law offices did not assign the Applicant any points.¹⁴⁰ Only one law office assigned him points, and the manager of that law office, Manager I, ranked him 19th of the office's top 20 candidates.¹⁴¹ After all the candidates were ranked by points, the Applicant was ranked 75th of the 76 candidates who received points.¹⁴² During the draft of applicants by the Managing Attorneys, Manager I did not select the Applicant for the vacancy in his office.¹⁴³ Manager I stated to OIG that there were other candidates in his top 20 list who were better qualified than the Applicant.¹⁴⁴ No other law office chose the Applicant either, and he was therefore not offered a position.

Senior Manager 2 told the OIG that Commissioner Cohn asked Senior Manager 2 after the interviews "how the people she recommended did[,]""¹⁴⁵ including the Applicant, and "if anyone wanted to hire [the Applicant].""¹⁴⁶ Senior Manager 2 informed Commissioner Cohn that the Applicant received "a second interview and things like that."¹⁴⁷ Commissioner Cohn stated in her interview with the OIG that she saw Manager I's list, in which the Applicant was ranked 19th out of 20 ranked candidates.¹⁴⁸

Commissioner Cohn also approached Senior Manager I to inquire about how the Applicant fared in the hiring process.¹⁴⁹ Senior Manager I stated to the OIG that Senior Manager I informed her that the Applicant was not selected, but the Applicant "did fine in the process."¹⁵⁰ Senior Manager I further informed Commissioner Cohn that Manager I4 had indicated an interest in the Applicant, but ultimately selected another individual.¹⁵¹ Senior Manager I recalled that Commissioner Cohn responded, "Okay. That's fine."¹⁵²

Commissioner Cohn stated to the OIG that Senior Manager 2 had some knowledge that the Applicant was dating Commissioner Cohn's Relative at the time that Commissioner Cohn recommended that he be interviewed, given that Commissioner Cohn and Senior Manager 2 work very closely together. *OIG IRF: Cohn Interview I, supra*, at Tr. 231-48.

¹³⁹ See *Senior Manager I Interview I, supra*, Attach. I (Ranking by Law Office spreadsheet).

¹⁴⁰ See *id.* (Ranking by Law Office spreadsheet).

¹⁴¹ See OIG IRF: Review of Documents from Manager I, Managing Attorney, USPTO, Attach. I (Law Office [Redacted] Attorney Candidates spreadsheet); *Senior Manager I Interview I, supra*, Attach. I (Ranking by Law Office spreadsheet).

¹⁴² *Senior Manager I, supra*, Attach. I (Ranking by Law Office spreadsheet).

¹⁴³ *OIG IRF: Manager I Interview I, supra*, at 1.

¹⁴⁴ *OIG IRF: Manager I Interview II, supra*, at 2.

¹⁴⁵ *OIG IRF: Senior Manager 2 Interview II, supra*, at Tr. 388-91, 406-10.

¹⁴⁶ *Id.* at Tr. 500-02.

¹⁴⁷ *Id.* at Tr. 388-91.

¹⁴⁸ *OIG IRF: Cohn Interview I, supra*, at Tr. 342-48, 370-78.

¹⁴⁹ *OIG IRF: Senior Manager I Interview II, supra*, at Tr. 310-13.

¹⁵⁰ *Id.* at Tr. 319-21; see also *OIG IRF: Senior Manager I Interview I, supra*, at 2 (Senior Manager I stated to the OIG that Senior Manager I informed Commissioner Cohn that, although the Applicant was qualified, he was not selected as anyone's top choice).

¹⁵¹ See *OIG IRF: Senior Manager I Interview I, supra*, at 2; *OIG IRF: Senior Manager I Interview II, supra*, at Tr. 317-21.

¹⁵² *OIG IRF: Senior Manager I Interview II, supra*, at Tr. 321.

According to Senior Manager I, several days later Commissioner Cohn approached Senior Manager I again and “indicated that . . . [they] would be able to hire another person, as [Senior Manager I] had been asking for up to that point, and she . . . wanted to put in her recommendation for [the Applicant] again.”¹⁵³ Senior Manager I stated to the OIG that Commissioner Cohn informed Senior Manager I that the Applicant was a strong candidate and hoped that others would have observed that.¹⁵⁴ In an interview with the OIG, Commissioner Cohn recalled telling Senior Manager I that the Applicant “would be a great examining attorney,” and she saw “that [Manager I] ha[d] him on his list.”¹⁵⁵ She told the OIG that she asked Senior Manager I whether Manager I “might be interested in hiring [the Applicant].”¹⁵⁶ She stated to the OIG that she told Senior Manager I that, “since [Manager I] had put him in his group[,] would [Manager I] be interested in hiring him?”¹⁵⁷ According to Commissioner Cohn, she told Senior Manager I to “definitely . . . let [Manager I] know who [the Applicant] is, what his relationship is to [Commissioner Cohn].”¹⁵⁸ According to Senior Manager I, Commissioner Cohn “really liked [the Applicant] and she realized that [Manager I] had indicated . . . he had an interest in hiring him, amongst other people. And . . . since we have the extra slot, she wanted me to see if [Manager I], with that recommendation, would be interested in hiring him.”¹⁵⁹

Commissioner Cohn recalled that Senior Manager I told her that Senior Manager I would speak with Manager I, but Senior Manager I did not “want him to feel any pressure,” and Commissioner Cohn agreed.¹⁶⁰ Senior Manager I also remembered Commissioner Cohn stating that “she didn’t want anyone to feel pressured,”¹⁶¹ and that she had said, “If [Manager I] doesn’t want to [hire the Applicant], that’s okay too. You know, I just want – I would like to see if he was actually interested in hiring him or not.”¹⁶² In an interview with the OIG, Commissioner Cohn confirmed that she believed that, if she had talked to Manager I directly about hiring the Applicant, that it would put too much pressure on Manager I to hire the Applicant, and so she thought that it was “good” that Senior Manager I asked Manager I whether he would like to hire the Applicant and “alleviate[d] any pressure.”¹⁶³

Commissioner Cohn also stated that, although most of the hiring decisions had been made by that point, “we had made a decision to hire more people.”¹⁶⁴ However, the USPTO did not produce any evidence showing that anyone else was hired, and in an interview with the OIG,

¹⁵³ *Id.* at Tr. 322-26.

¹⁵⁴ OIG IRF: *Senior Manager I Interview I, supra*, at 2; see also OIG IRF: *Cohn Interview I, supra*, at Tr. 326-30, 342-43.

¹⁵⁵ OIG IRF: *Cohn Interview I, supra*, at Tr. 268-72, 342-44.

¹⁵⁶ *Id.* at Tr. 344.

¹⁵⁷ *Id.* at Tr. 268-72.

¹⁵⁸ *Id.* at Tr. 281-82.

¹⁵⁹ OIG IRF: *Senior Manager I Interview II, supra*, at Tr. 326-31.

¹⁶⁰ OIG IRF: *Cohn Interview I, supra*, at Tr. 344-48.

¹⁶¹ OIG IRF: *Senior Manager I Interview II, supra*, at Tr. 596-98.

¹⁶² *Id.* at Tr. 332-34.

¹⁶³ OIG IRF: *Cohn Interview III, supra*, at Tr. 883-96, 949-61.

¹⁶⁴ OIG IRF: *Cohn Interview I, supra*, at Tr. 292-95.

Senior Manager I confirmed that no additional candidates other than the Applicant were hired after the law offices made their selections.¹⁶⁵

Manager I recalled that, approximately one to two weeks after he made his initial selection with the other managers, Senior Manager I asked him whether he was interested in hiring the Applicant.¹⁶⁶ Senior Manager I told the OIG that Senior Manager I recalled stating to Manager I that, if he were willing to hire the Applicant, he could have an extra hire.¹⁶⁷ Both Senior Manager I and Manager I recalled that Senior Manager I informed Manager I that he was not required to hire the Applicant.¹⁶⁸ Senior Manager I informed the OIG that Senior Manager I stated to Manager I, “You don’t have to choose him, but, you know, given [Commissioner Cohn’s] strong recommendation of him, you know, we wanted to give you a chance to pick him if you were really interested.”¹⁶⁹ Manager I informed the OIG that he treated requests from Senior Manager I like a request from his direct supervisor.¹⁷⁰

Manager I believed that he “had nothing to lose” by hiring the Applicant and was aware that the Applicant knew someone “high up” at the USPTO, so he agreed to hire the Applicant.¹⁷¹ In a later interview with the OIG, Manager I stated that he had heard that the Applicant was married to Commissioner Cohn’s Relative, and although he did not consider this relationship in evaluating the Applicant, he stated to the OIG that he considered Commissioner Cohn’s recommendation in determining whether to hire the Applicant.¹⁷² Manager I stated to the OIG that he found the request from Senior Manager I unusual because the hiring process is typically independent.¹⁷³ Manager I told the OIG that, although he did not feel pressured to hire the Applicant, Manager I was aware that Senior Manager I was having this conversation with him at Commissioner Cohn’s request and, by hiring the Applicant, Manager I would be doing Commissioner Cohn a favor.¹⁷⁴

A couple of days after Manager I agreed to hire the Applicant, Manager I had a conversation with Commissioner Cohn.¹⁷⁵ She thanked him for hiring the Applicant and informed him that he did not have to be worried about her meddling with management of his office.¹⁷⁶ Manager I reported no such concerns to the OIG.¹⁷⁷

¹⁶⁵ OIG IRF: Senior Manager I Interview III, *supra*, at 2.

¹⁶⁶ OIG IRF: Manager I Interview I, *supra*, at 1.

¹⁶⁷ OIG IRF: Senior Manager I Interview I, *supra*, at 2.

¹⁶⁸ OIG IRF: Manager I Interview I, *supra*, at 1; OIG IRF: Senior Manager I Interview II, *supra*, at Tr. 339-42.

¹⁶⁹ OIG IRF: Manager I Interview II, *supra*, at Tr. 339-42.

¹⁷⁰ OIG IRF: Manager I Interview II, *supra*, at 1.

¹⁷¹ OIG IRF: Manager I Interview I, *supra*, at 1.

¹⁷² OIG IRF: Manager I Interview II, *supra*, at 2.

¹⁷³ *Id.*

¹⁷⁴ OIG IRF: Manager I Interview I, *supra*, at 2.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

In February 2013, the Applicant received a tentative offer for a position as Trademark Attorney Advisor.¹⁷⁸ Thereafter, the Applicant called Commissioner Cohn “because [he] was excited.”¹⁷⁹ When asked whether he was aware that Commissioner Cohn recommended him for an interview, the Applicant told the OIG that he was “not surprised.”¹⁸⁰ He added that Commissioner Cohn thought he would be good at the job.¹⁸¹ Commissioner Cohn confirmed to OIG that she believed that, but for her talking to Senior Manager I about the Applicant, the Applicant would not be a trademark examiner today.¹⁸²

The OIG asked the relevant witnesses what would have occurred if Manager I wished to hire someone other than the Applicant. In Senior Manager I’s first interview with the OIG, Senior Manager I stated that Senior Manager I informed Manager I that if Manager I was not interested in hiring the Applicant, Manager I would not have an additional position to fill as he saw fit – the offer to hire an additional attorney was only applicable to hiring the Applicant.¹⁸³ In Senior Manager I’s second interview with the OIG, Senior Manager I stated that the law offices would have hired another person because Senior Manager I “really wanted to fill that slot,” and Manager I “seemed very interested in the Applicant.”¹⁸⁴ Senior Manager I added that, if Manager I had requested to hire an individual other than the Applicant when offered the additional position, Senior Manager I would have brought that request to Senior Manager 2 and Senior Manager I’s supervisor “for their consideration.”¹⁸⁵ Commissioner Cohn stated in her interview that, if Manager I had not wanted to hire the Applicant, “we would have allocated the spot – we would either let him hire somebody else, or if he didn’t want to we would have given the spot to someone else.”¹⁸⁶ Senior Manager 2 stated to the OIG that, if another spot had come available, where it would have been allocated would have “depend[ed] on . . . those factors [used to initially allocate spots among the law offices, such as] . . . their training load . . . , how many people they could handle.”¹⁸⁷

The USPTO presented no evidence of any evaluation of these factors in connection with the creation of the additional position offered to the Applicant. The USPTO presented no evidence that the hiring managers determined who was best qualified to fill the new slot or analyzed which law office should receive the new position; rather, Manager I was asked if he would like to hire the Applicant in the new slot, per the direction of Commissioner Cohn. In Senior Manager 2’s interview, Senior Manager 2 stated that Senior Manager 2 understood that

¹⁷⁸ OIG IRF: Applicant Interview I, *supra*, at Tr. 561-73; OIG IRF: Review of Human Resources Documents II, Attach. I [hereinafter OIG IRF: HR Documents II].

¹⁷⁹ OIG IRF: Applicant Interview I, *supra*, at Tr. 575-78.

¹⁸⁰ *Id.* at Tr. 344-46.

¹⁸¹ *Id.* at Tr. 354-58.

¹⁸² OIG IRF: Cohn Interview I, *supra*, at Tr. 486-89.

¹⁸³ OIG IRF: Senior Manager I Interview I, *supra*, at 2.

¹⁸⁴ OIG IRF: Senior Manager I Interview II, *supra*, at Tr. 549-62.

¹⁸⁵ Senior Manager I Interview I, *supra*, at Attach. 2 (e-mail from Senior Manager I to the OIG); see also OIG IRF: Senior Manager I Interview II, *supra*, at Tr. 623-27.

¹⁸⁶ OIG IRF: Cohn Interview I, *supra*, at Tr. 447-50.

¹⁸⁷ OIG IRF: Senior Manager 2 Interview II, *supra*, at Tr. 440-62.

Manager 1 was offered the opportunity to pick a second employee for his office if he wanted to hire the Applicant.¹⁸⁸ Senior Manager 2 agreed that the Applicant's selection and his placement in Manager 1's law office were essentially already decided before anybody spoke with Senior Manager 2 about it.¹⁸⁹ From Senior Manager 2's "perspective, [Senior Manager 2] was like, great," because Senior Manager 2 had been "advocating for hiring more people."¹⁹⁰ Although Senior Manager 2 also knew of the Applicant's relationship with Commissioner Cohn's Relative, Senior Manager 2 stated to the OIG that Senior Manager 2 did not have concerns about the Applicant's qualifications.¹⁹¹

Senior Manager 1 similarly stated to the OIG that Senior Manager 1 had advocated to Commissioner Cohn during the hiring process that they should hire additional examiners; however, Senior Manager 1 "let it drop" once the law offices made their selections (before Commissioner Cohn informed Senior Manager 1 that Senior Manager 1 could add the Applicant).¹⁹² Senior Manager 1 stated to the OIG that Senior Manager 1 did not know how Commissioner Cohn came to the decision to create another spot.¹⁹³ When asked by the OIG whether it seemed strange to Senior Manager 1 that the law offices were being offered an additional position for the Applicant, given the Applicant's connection to the Commissioner, Senior Manager 1 answered, "It was not typical."¹⁹⁴

Shortly after Manager 1 agreed to hire the Applicant, another Managing Attorney approached Senior Manager 1 with a request to hire one of two additional candidates because of examiner resignations in that manager's office.¹⁹⁵ Senior Manager 1 proceeded through the typical allocation process described above, such as reviewing the training loads of the various law offices.¹⁹⁶ Senior Manager 1 stated that Senior Manager 1 spoke with Senior Manager 1's supervisor and Commissioner Cohn to obtain their approvals for an additional hire and other administrative personnel to make sure the hiring would meet relevant work projections, and Senior Manager 1 and Senior Manager 2 reviewed the applications of the two candidates from which the Managing Attorney was going to select.¹⁹⁷ Ultimately, however, a hiring freeze was imposed that week which prevented the hiring of this additional person.¹⁹⁸

¹⁸⁸ See OIG IRF: Senior Manager 2 Interview I, *supra*, at 2.

¹⁸⁹ See OIG IRF: Senior Manager 2 Interview II, *supra*, at Tr. 452-59.

¹⁹⁰ *Id.* at Tr. 459-62.

¹⁹¹ OIG IRF: Senior Manager 2 Interview I, *supra*, at 2.

¹⁹² OIG IRF: Senior Manager 1 Interview III, *supra*, at 2.

¹⁹³ *Id.*

¹⁹⁴ OIG IRF: Senior Manager 1 Interview II, *supra*, at Tr. 397-406.

¹⁹⁵ See OIG IRF: Senior Manager 1 Interview III, *supra*, at 2.

¹⁹⁶ See *id.*

¹⁹⁷ See *id.*

¹⁹⁸ See *id.*

In March 2013, the USPTO sent the Applicant a formal written offer for a Trademark Attorney Advisor position with Manager I's law office at salary level GS-0905-11, step 01.¹⁹⁹ The Applicant started working at USPTO about two months later.²⁰⁰

II. Analysis

A. Commissioner Cohn Violated 5 C.F.R. §§ 2635.101 and 2635.702 When She Used Her Public Office for the Applicant's Private Gain.

The OIG concluded that Commissioner Cohn violated various federal regulations prohibiting her from using her public office for private gain, by ensuring that the Applicant obtained an interview, effectively creating a new position for the Applicant after he was not selected, and recommending that Manager I fill the new slot in his law office with the Applicant. Section 2635.702 of Title 5 of the Code of Federal Regulations prohibits an employee from using his public office for the "private gain of friends, relatives, or persons with whom the employee is affiliated in a nongovernmental capacity."²⁰¹ In addition to this general prohibition, subsection (a) of that section identifies the following specific prohibition: "An employee shall not use or permit the use of his Government position or title or any authority associated with his public office in a manner that is intended to coerce or induce another person, including a subordinate, to provide any benefit, financial or otherwise, to himself or to friends, relatives, or persons with whom the employee is affiliated in a nongovernmental capacity."²⁰² The evidence in this investigation established that Commissioner Cohn violated both the general prohibition articulated in Section 702 and the specific provision in 702(a).

It is indisputable that Commissioner Cohn was affiliated with the Applicant in a nongovernmental capacity, given her Relative's long-term personal and financial relationship with him, their social outings, gift giving between them, and Commissioner Cohn's extensive efforts since 2010 to secure the Applicant a job. It is also undeniable that the Applicant benefitted from being hired within the meaning of Section 702. The only question was whether Commissioner Cohn used her position for the Applicant's private gain.

The evidence showed that she did. Commissioner Cohn became involved in the hiring process on multiple occasions to further the Applicant's application for the Attorney Advisor position, including resuscitating his candidacy twice after his application had effectively been rejected by her subordinates. First, Commissioner Cohn instructed one of her subordinates to include the Applicant on the interview list, after the subject matter experts had not given him enough

¹⁹⁹ OIG IRF: HR Documents II, *supra*, at Attach. 2.

²⁰⁰ The Applicant's Electronic Official Personnel File (SF 50).

²⁰¹ 5 C.F.R. § 2635.702.

²⁰² 5 C.F.R. § 2635.702(a). Similarly, Section 2635.101(a) of Title 5 of the CFR requires each government employee to "place loyalty to the Constitution, laws and ethical principles above private gain," and to "respect and adhere to the principles of ethical conduct set forth in this section." Later, in subsection (b)(7), the regulation more concretely prohibits employees from using their "public office for private gain." 5 C.F.R. § 2635.101(b)(7).

points to move past the first screening, which excluded him from the initial interview list.²⁰³ We concluded that, by instructing her subordinates to include him on the interview list, Commissioner Cohn used her position to provide a benefit to the Applicant, namely advancing his application after it had already been effectively rejected.

In addition, and perhaps more importantly, we found that, after the Applicant was interviewed but not selected to be hired by any law office, Commissioner Cohn directed her subordinate, Senior Manager 1, to convey to Senior Manager 1's subordinate Commissioner Cohn's recommendation of the Applicant – namely, that she believed he “would be a great examining attorney.”²⁰⁴ Commissioner Cohn told the OIG that she directed Senior Manager 1 to “definitely . . . let [Manager 1] know who [the Applicant] is, what his relationship is to [Commissioner Cohn].”²⁰⁵ The evidence also established that Commissioner Cohn asked Senior Manager 1 to approach this subordinate, Manager 1, about whether he would hire the Applicant if Manager 1 were given an additional attorney position to fill.

We concluded that Commissioner Cohn's conduct was tantamount to creating a new Attorney Advisor position specifically for the Applicant.²⁰⁶ We found no evidence to suggest that Manager 1 was given a real opportunity to select any of the 17 candidates whom he ranked higher than the Applicant. In fact, Senior Manager 1 recalled stating to Manager 1 that, if he were willing to hire the Applicant, he could have an extra hire.²⁰⁷ Although in their interviews with the OIG, Commissioner Cohn and Senior Manager 1 stated, hypothetically, that Manager 1 could have declined to hire the Applicant or select another applicant to fill the new slot in his law office, the implication of Senior Manager 1's offer was clear: if Manager 1 wanted to hire the Applicant, Manager 1 could have a second new attorney. Similarly, Senior Manager 2 stated that Senior Manager 2 understood that Manager 1 was offered the opportunity to hire a second employee for his office, if he wanted to hire the Applicant.²⁰⁸ In addition, we found no evidence that any candidates other than the Applicant were considered (by Commissioner Cohn or any

²⁰³ We note that the evidence established that Commissioner Cohn recommended or instructed that four additional other candidates be included on the interview list. That act, however, does not provide Commissioner Cohn with a defense to whether she used her position for the Applicant's private gain, particularly in light of the fact that a few of those other candidates were not selected to be interviewed in the normal process. In fact, depending on the nature of her relationship with those other candidates, her recommendation or instruction to include those individuals could also amount to a violation of Sections 702 and 702(a) of Title 5 of the Code of Federal Regulations. We considered those actions to be outside the scope of this review, however, and did not examine in detail the nature of those recommendations or instructions.

²⁰⁴ OIG IRF: *Cohn Interview 1, supra*, at Tr. 342-44.

²⁰⁵ OIG IRF: *Cohn Interview 1, supra*, at Tr. 281-82.

²⁰⁶ In her comments to the OIG's draft report, Commissioner Cohn stated: “The position was added to an existing group of new positions in accordance with the hiring needs of the organization, and was in fact requested by the Senior Managers in charge of hiring.” Letter from Commissioner Cohn to the OIG, *supra*, at 2. As a threshold matter, we note that this report describes on pages 17 and 26 above that the Senior Managers advocated for additional examiner positions in connection with this, and other, hiring processes. This fact, however, does not disturb our conclusions. The focus of the OIG's inquiry is on Commissioner Cohn's actions in approving their request and effecting the creation of that additional position. As described in this report, the evidence is overwhelming that Commissioner Cohn effectively created that position specifically for the Applicant.

²⁰⁷ OIG IRF: *Senior Manager 1 Interview 1, supra*, at 2.

²⁰⁸ See OIG IRF: *Senior Manager 2 Interview 1, supra*, at 2.

Managing Attorney) for this newly-created position, even though he was ranked 74 of the 75 candidates receiving points after the second interview round, or that Trademark officials evaluated to which law office that additional position should be designated, all of which supports a finding that the position was created exclusively for the Applicant.²⁰⁹

In making this conclusion, we note that Commissioner Cohn's conduct in this instance did not occur in a vacuum. To the contrary, her conduct in securing a position for the Applicant with USPTO was consistent with her extensive efforts to secure a position for the Applicant in the past, which included using her official USPTO e-mail account and her name to urge others – including subordinate USPTO employees and attorneys practicing before the Trademark organization – to hire or otherwise help the Applicant.

For these reasons, we also concluded that the evidence described above established that Commissioner Cohn's conduct violated subsection (a) of Section 702, which specifically prohibits “[a]n employee [from] . . . us[ing] or permit[ing] the use of his Government position . . . in a manner that is intended to coerce or induce another person, including a subordinate, to provide any benefit, financial or otherwise, to . . . persons with whom the employee is affiliated in a nongovernmental capacity.”²¹⁰ Commissioner Cohn's actions were clearly intended to – and did – induce her subordinates to provide the Applicant a benefit. Not only did she recommend or instruct them to interview him after his application was effectively rejected, but she induced Manager I into offering a position to the Applicant by offering an additional position for his unit.²¹¹ The evidence was clear that, but for Commissioner Cohn's inducement, Manager I would not have offered the Applicant a position in his law office.

We recognize that, over the course of the discussions between Commissioner Cohn and Senior Manager I about approaching Manager I, both Commissioner Cohn and Senior Manager I apparently expressed concern about appearing to pressure Manager I to select the Applicant. Accordingly, they elected to convey her recommendation of the Applicant and her offer to provide an additional position for Manager I through Senior Manager I. We are troubled that Commissioner Cohn and Senior Manager I believed this construct would alleviate the problem,

²⁰⁹ In her comments to the OIG, Commissioner Cohn asserted that the draft report inaccurately implied that the Applicant was not well qualified for the position. Letter from Commissioner Cohn to the OIG, *supra*, at 2-3. The OIG made no findings regarding whether the Applicant was qualified for the position. Our analysis turned not on the Applicant's qualifications, but rather Commissioner Cohn's conduct in effectively creating a position for the Applicant. At the same time, however, we note that the evidence established that Commissioner Cohn's subordinates reviewed the applicant pool and initially did not select the Applicant for an interview, thereby effectively rejecting his application. They later included him on the interview list only at Commissioner Cohn's behest. Moreover, after the first interview round, he received points from only one manager and was ranked 74 out of 75 applicants who received points. The one manager who did give him points ranked him 19 out of 20 applicants.

²¹⁰ 5 C.F.R. § 2635.702(a).

²¹¹ Additionally, the evidence supported that Commissioner Cohn's practice with respect to the hiring process was to approve the number of candidates to be hired, rather than to determine where new hires would be placed. Yet here, Commissioner Cohn, Manager I's clear superior, asked Manager I through Senior Manager I whether Manager I would like to hire the Applicant, a candidate she knew Manager I had ranked next to last on his list and who was not ranked by any of the other 16 law offices.

as Senior Manager I is Manager I's superior in the organization and Senior Manager I was overtly communicating on behalf of the highest-ranking official in the Trademark organization. The fact that Commissioner Cohn's views were conveyed indirectly through Senior Manager I, rather than directly from her to Manager I, is immaterial. Subordinate employees will inevitably feel pressure to take action in accordance with their supervisors' express recommendation, regardless of who conveys that recommendation. Given her long tenure in management at USPTO, Commissioner Cohn should have been aware of this. In fact, these discussions between her and Senior Manager I arguably exacerbate the nature of Commissioner Cohn's conduct because it shows that she understood at the time that her conduct could apply improper pressure on her subordinates.

We also recognize that Manager I told the OIG that he did not feel pressured to hire the Applicant. Our analysis, however, focuses on the conduct of Commissioner Cohn, not her subordinates' subjective response to that conduct. Commissioner Cohn should not have used her status to place any employee in such a position.²¹²

B. Commissioner Cohn Did Not Act Impartially and Gave Preferential Treatment, Violating 5 C.F.R. § 2635.101(b)(8) and 5 U.S.C. § 2302(b).

Commissioner Cohn's conduct in securing the Applicant's employment with the USPTO also violated 5 U.S.C. § 2302(b) and 5 C.F.R. § 2635.101(b)(8), which in general terms prohibit an employee from giving preferential treatment to any applicant for employment. Section 2302(b) of Title 5 of the U.S. Code provides that "[a]ny employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority . . . grant any preference or advantage not authorized by law, rule, or regulation to any employee or applicant for employment . . . for the purpose of improving or injuring the prospects of any particular person for employment." Similarly, Section 2635.101(b)(8) of Title 5 of the Code of Federal Regulations requires employees to act "impartially and not give preferential treatment to any private organization or individual." Because Commissioner Cohn is an employee who has authority to direct others to take, recommend, or approve any personnel actions, she could not grant preferences and advantages to the Applicant for the purpose of improving or injuring his prospects for employment.

²¹² In Commissioner Cohn's comments to the OIG's draft report, she asserted that "[t]he OIG attempts to prove that I gained from recommending the employment of my Relative's friend" and that "[t]he OIG concludes wrongly that I saved money by the hiring of this friend because I was no longer required to financially support my relative." Letter from Commissioner Cohn to the OIG, *supra*, at 1. As a threshold matter, we note that the report contained no findings or conclusions concerning Commissioner Cohn's personal benefit in connection with the Applicant's hiring. Moreover, we note that it is not necessary to find that Commissioner Cohn benefited personally to establish violations of Sections 702 or 702(a). Those provisions expressly prohibit an official from using their position to provide a benefit to "friends, relatives, or persons with whom the employee is affiliated in a nongovernmental capacity" (Section 702) or "persons with whom the employee is affiliated in a nongovernmental capacity" (Section 702(a)). Therefore, the OIG's finding that Commissioner Cohn used her office for the Applicant's private gain is sufficient to support a conclusion that she violated Sections 702 and 702(a).

In this case, the evidence established that Commissioner Cohn gave preferential treatment and advantages to the Applicant in the hiring process and thereby violated 5 U.S.C. § 2302(b) and 5 C.F.R. § 2635.101(b)(8). As described above, the evidence shows that, after the Applicant was not selected by any law office, Commissioner Cohn effectively created a position specifically for the Applicant.

The evidence further established that Commissioner Cohn did not take any comparable actions for other individuals.²¹³ In fact, the evidence established that Commissioner Cohn would typically approve the total number of hires and would not get involved with the specifics of which office would get what number of candidates.²¹⁴ The general practice for hiring in the Trademark organization was that Senior Manager 1 and Senior Manager 2 would discuss how many new employees each law office should receive, weighing a variety of variables such as the size of each law office, each office's previous "training load," and each office's "training load" were it to receive additional employees.

None of this typical deliberation appears to have occurred in connection with the hiring of the Applicant. Instead, Commissioner Cohn saw that Manager 1 had ranked the Applicant – 19 on a list of 20 applicants – and approached Senior Manager 1 about giving Manager 1's law office an additional position if he would hire the Applicant. In fact, when asked by the OIG whether it seemed strange to Senior Manager 1 that Manager 1 was being given an additional position for the Applicant, given the Applicant's connection to the Commissioner, Senior Manager 1 answered, "It was not typical." Similarly, one of Commissioner Cohn's subordinates, who was personally familiar with Commissioner Cohn's conduct in relation to the Applicant's hiring, told the OIG: "I could see where some people might think that [the Applicant] wasn't treated the same as every other person."²¹⁵ As a result, we concluded that Commissioner Cohn clearly gave the Applicant an advantage over the other applicants for that position for the purpose of improving his prospects for employment, in violation of 5 U.S.C. § 2302(b) and 5 C.F.R. § 2635.101(b)(8).

C. Commissioner Cohn Took Insufficient Steps to Avoid Creating an Appearance That She Was Violating Federal Ethical Rules.

The Code of Federal Regulations provides that "[e]mployees shall endeavor to avoid any actions creating the appearance that they are violating the law or the ethical standards set forth Whether particular circumstances create an appearance that the law or these standards

²¹³ We recognize that Commissioner Cohn approved the creation of an additional Attorney Advisor position after the Applicant was hired, although a subsequent hiring freeze ultimately prevented the organization from hiring anyone for the position. That action, however, was markedly different from the creation of the spot in Manager 1's law office. For instance, the evidence established that one or more attorneys were leaving one of the other law offices, and that Senior Manager 1 then requested that Commissioner Cohn and a budget official approve an additional position to replace the departing attorneys. There is no evidence that the position was created for any specific applicant. Therefore, the approval of the second, additional position proceeded in accordance with the organization's typical hiring process, in stark contrast with the hiring of the Applicant.

²¹⁴ See OIG IRF: *Cohn Interview III*, *supra*, at Tr. 163-88.

²¹⁵ OIG IRF: *[Redacted] Interview*, *supra*, at *[Redacted]*.

have been violated shall be determined from the perspective of a reasonable person with knowledge of the relevant facts.”²¹⁶ By contacting various hiring officials and following up with those personnel regarding the Applicant, Commissioner Cohn created the appearance that she was violating the ethical rules in Part 2635.

For example, we concluded that a reasonable person would believe that Commissioner Cohn was violating the ethical standard prohibiting her from using her public office for private gain after learning that she instructed her subordinates to place her Relative’s long-term boyfriend on a list of individuals to be interviewed after the organization’s subject matter experts had reviewed his application and had not selected him to move forward in the hiring process. Similarly, we concluded that a reasonable person would conclude that Commissioner Cohn had violated the governing ethical standards when she asked Senior Manager I to approach Manager I with her recommendation for the Applicant and the offer of a new, second position for his law office. In fact, when asked about Commissioner Cohn’s request to Senior Manager I, one of Commissioner Cohn’s subordinates told the OIG that [redacted] had “some concern that the appearance wouldn’t look great.”²¹⁷ As noted above, Commissioner Cohn herself apparently understood the ethical problems inherent in approaching Manager I about hiring the Applicant, which is the reason she asked Senior Manager I to speak to Manager I. We therefore concluded that the evidence established that Commissioner Cohn’s actions violate regulation 5 C.F.R. § 2635.101(b)(14).

We found that Commissioner Cohn also violated this regulation before the Applicant obtained the USPTO position. In particular, the evidence established that Commissioner Cohn used her official USPTO e-mail address to contact attorneys practicing in intellectual property law, including at least one attorney who represents clients before the Trademark organization, to secure the Applicant employment.²¹⁸ In addition, the OIG obtained evidence that Commissioner Cohn permitted – and even encouraged – other individuals who were seeking jobs to use her name when they requested assistance from Cohn’s own subordinate. We found that these actions at a minimum created an appearance that she was using her public office for the Applicant’s and these other private individuals’ benefit, which therefore constituted a violation of Section 2635.101(b)(14).

Further, Commissioner Cohn’s actions created possible conflicts of interest in Trademark organization cases. For example, when Commissioner Cohn sent the Applicant’s resume to a friend who practices before the Trademark organization, the friend accepted the Applicant’s

²¹⁶ 5 C.F.R. § 2635.101(b)(14).

²¹⁷ See OIG IRF: [Redacted], *supra*, at [Redacted].

²¹⁸ In her response to the draft report, Commissioner Cohn stated that in contacting various friends “to help the Applicant make contacts for jobs,” she did so in her personal, rather than professional, capacity. Letter from Commissioner Cohn to the OIG, *supra*, at 2. Even if she intended to e-mail these individuals in her personal capacity, by e-mailing intellectual property practitioners, who should know her position by virtue of their practice, using her USPTO e-mail address, she created the appearance that she was using her public office for the Applicant’s gain. We also note that the finding that she violated Section 2635.101(b)(14) is based particularly on her e-mails with attorneys practicing in her field and Trademark organization employees, rather than all of her e-mails to her friends seeking aid for Applicant.

resume and expressed a willingness to help Commissioner Cohn. As a result, any decision by the Trademark organization in favor of this attorney or her law firm could be seen as tainted: one could argue that, by helping Commissioner Cohn, the law firm would receive, or could at least expect to receive, a positive result in their Trademark organization cases. The situation appears improper, and Commissioner Cohn should have avoided creating this conflict of interest for the private gain of the Applicant.

D. Commissioner Cohn Failed to Adhere to Federal Ethics Regulations by Neglecting to Obtain Agency Designee Authorization Under 5 C.F.R. § 2635.501(a) Before Participating in the Hiring Process.

According to Section 2635.501(a) of Title 5 of the C.F.R., unless a matter affects the financial interest of a member of his household or involves individuals with whom he has a covered relationship,²¹⁹ “[a]n employee who is concerned that *other circumstances* would raise a question regarding his impartiality should use the process described in § 2635.502 to determine whether he should or should not participate in a particular matter.”²²⁰ Section 2635.502(a) provides that an “employee should not participate in the matter unless he has informed the agency designee

²¹⁹ Section 2635.502(b)(1) defines a “covered relationship” as follows:

- I) An employee has a covered relationship with:
 - (i) A person, other than a prospective employer described in §2635.603(c), with whom the employee has or seeks a business, contractual or other financial relationship that involves other than a routine consumer transaction;
 -
 - (ii) A person who is a member of the employee's household, or who is a relative with whom the employee has a close personal relationship;
 - (iii) A person for whom the employee's spouse, parent or dependent child is, to the employee's knowledge, serving or seeking to serve as an officer, director, trustee, general partner, agent, attorney, consultant, contractor or employee;
 - (iv) Any person for whom the employee has, within the last year, served as officer, director, trustee, general partner, agent, attorney, consultant, contractor or employee; or
 - (v) An organization, other than a political party described in 26 U.S.C. 527(e), in which the employee is an active participant

²²⁰ 5 C.F.R. § 2635.501(a) (emphasis added); see also 5 C.F.R. § 502(a)(2) (“An employee who is concerned that circumstances other than those specifically described in this section would raise a question regarding his impartiality should use the process described in this section to determine whether he should or should not participate in a particular matter.”).

of the appearance problem and received authorization from the agency designee in accordance with paragraph (d) of this section.”²²¹

Here, facts show that Commissioner Cohn recognized that her conduct with regard to Manager I raised ethical problems. As noted above, Commissioner Cohn approached Senior Manager I, rather than Manager I directly, with her recommendation that Manager I hire the Applicant for the newly-created position in his law office. As we found above, approaching Manager I indirectly through Senior Manager I did not alleviate the inherent pressure on Manager I. In fact, Manager I told the OIG that he believed he would be doing Commissioner Cohn a favor by hiring the Applicant. Additionally, after the Applicant was hired, Commissioner Cohn informed Manager I that Manager I did not need to be concerned that she would meddle with management of his office, showing that she recognized that her actions to get the Applicant hired were, or at least could be viewed as, inappropriate for the benefit of the Applicant. In light of her actions at the time, we found Commissioner Cohn’s statement to the OIG that she was not concerned that her participation in the hiring process would raise a question regarding her impartiality to be not credible.²²² The evidence established that Commissioner Cohn was aware that her involvement in the hiring process raised a question as to her impartiality, and she should have obtained a determination from USPTO’s designee authorizing her to participate in the hiring process before she did so.

Beyond the violations of law described above, we also concluded that Commissioner Cohn’s conduct described in this report reflected poor judgment. As a long-term senior manager in the federal government, she should have known about the federal laws governing hiring and she should have known that her recommendations to her subordinates would inherently apply pressure on those employees. Further, her suggestion to the OIG that her decision to recommend the Applicant was consistent with general practice in the Trademark organization is troubling, considering that she is the head of the organization and her conduct sets its tone. At a minimum, Commissioner Cohn should have sought ethics-related guidance from authorized ethics officials and acted accordingly. Her failure to do so reflected poor judgment.

²²¹ 5 C.F.R. § 2635.502(a).

²²² See OIG IRF: *Cohn Interview II*, *supra*, at Tr. 73-74, 79-82.

4. Conclusions and Recommendations

I. Findings

As a result of the above analysis, the OIG found that Commissioner Cohn was involved in the hiring of the Applicant, and her involvement violated the following federal regulations and statutes: 5 C.F.R. § 2635.101 (enumerating obligations of public service), 5 C.F.R. § 501 (providing the process to follow when one's impartiality may be questioned), 5 C.F.R. § 2635.702 (prohibiting use of public office for private gain), and 5 U.S.C. § 2302 (prohibiting preferential treatment).²²³

II. Conclusions

Over the course of this inquiry, the OIG reached broader conclusions regarding hiring practices at the USPTO. Multiple USPTO employees who were involved with the hiring process told the OIG that USPTO employees, including commissioners, often provide recommendations for particular applicants during the hiring process and these recommendations allow candidates to obtain interviews, even if they otherwise would not have received interviews. Without a procedure defining how such recommendations will be accepted and weighed and who will view or hear such recommendations, such practices invite preferential treatment, favoritism, and unfair, unequal competition for USPTO employment; can unfairly influence and pressure employees in hiring; and can result in violations of federal regulations and statutes. At a minimum, the current practice creates the perception that such improper conditions exist.

III. Recommendations

A. Recommendation I

The USPTO should develop a process to ensure that all candidates are treated equally and that hiring decisions are based on merit, as required by federal law. For example, recommendations from USPTO personnel could be rejected unless requested by the hiring officials, just as Section

²²³ The OIG had not set out to determine whether the Applicant had committed any administrative or criminal violations. However, the Applicant's answer to the application question regarding his experience practicing trademark law raises concern. He responded that he had "less than 1 year" of experience, rather than the option "I do not have experience practicing Trademark Law." The Applicant admitted to the OIG that he had not practiced trademark law at any of his legal jobs prior to becoming an Attorney Advisor at the USPTO. See *OIG IRF: Applicant Interview I, supra*, at Tr. 162-164. Therefore, he should have selected the option for zero experience. We concluded, however, that the "less than 1 year" of practice theoretically includes zero years of experience, so he may not have technically misrepresented his experience level in choosing that response. Nevertheless, it would have been more appropriate for him to have selected the option indicating zero years of experience, which the Applicant recognized in his interview with the OIG.

2635.702 regulates written recommendations.²²⁴ Along these lines, any recommendations provided should be funneled to a particular hiring official, who should compile and distribute *all* of those recommendations to *all* of the hiring decisionmakers. Further, recommendations should be based exclusively on merit and should be accepted only from individuals who previously worked with the recommended candidates or at least from individuals who have firsthand knowledge of candidates' work qualifications. Recommendations for mere friends or acquaintances of USPTO employees should be discouraged and rejected.

B. Recommendation 2

If an employee and another individual have a relationship akin to a "covered relationship," as defined by 5 C.F.R. § 502(b)(1), the USPTO should require the employee to recuse himself or herself from any matters involving that individual, even if his or her participation in the matter would not be a technical violation of the ethical regulations, in order to comply with the spirit of these regulations. Such relationships should include any close, personal relationships.

C. Recommendation 3

The USPTO should ensure that commissioners and other employees are not permitted to require that any applicant be interviewed or advanced in the hiring process when he or she would not have been otherwise selected for an interview or advanced. Relatedly, a recommendation from any USPTO employee should not guarantee a candidate an interview.

D. Recommendation 4

USPTO should provide comprehensive training regarding the federal rules governing hiring to USPTO employees involved in its hiring.

E. Recommendation 5

The USPTO should take administrative action against Commissioner Cohn as it deems necessary and appropriate, keeping in mind the guidance of 5 C.F.R. § 2635.106(a) (that "a violation of this part or of supplemental agency regulations may be cause for appropriate corrective or disciplinary action to be taken under applicable Governmentwide regulations or agency procedures"). As Commissioner Cohn did not "engage[] in conduct in good-faith

²²⁴ 5 C.F.R. § 2635.702(b) ("[An employee] may sign a letter of recommendation using his official title only in response to a request for an employment recommendation or character reference based upon personal knowledge of the ability or character of an individual with whom he has dealt in the course of Federal employment or whom he is recommending for Federal employment.").

reliance upon the advice of an agency ethics official,” the agency is not restricted from taking “[d]isciplinary action for violating this part or any supplemental agency regulations.”²²⁵

F. Recommendation 6

The USPTO should reexamine its vacancy question requesting an applicant to identify how much, if any, experience he or she has practicing in trademark law. The question used for the vacancy at issue in this report arguably provided two options that included zero years of experience.

²²⁵ See 5 C.F.R. § 2635.107(b) (“Employees who have questions about the application of this part or any supplemental agency regulations to particular situations should seek advice from an agency ethics official. Disciplinary action for violating this part or any supplemental agency regulations will not be taken against an employee who has engaged in conduct in good faith reliance upon the advice of an agency ethics official, provided that the employee, in seeking such advice, has made full disclosure of all relevant circumstances.”)