



U.S. OFFICE OF SPECIAL COUNSEL

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The Special Counsel

June 19, 2002

The President
The White House
Washington, D.C. 20500

Re: OSC File No. DI-00-0324

Dear Mr. President:

In accordance with 5 U.S.C. § 1213(e)(3), I am transmitting a report from the Honorable John V. Cogbill, III, Chairman of the National Capital Planning Commission, sent to me pursuant to 5 U.S.C. §§ 1213(c) and (d). The report sets forth the findings and conclusions of the Chairman's review of disclosures of information allegedly evidencing violations of law, rule or regulation within the National Capital Planning Commission (NCPC), Washington, D.C.

The whistleblower, Ms. Cindy L. Snyder, is a former Administrative Assistant for Budget and Accounting. Ms. Snyder consented to the release of her name and provided comments on the agency report to this office pursuant to 5 U.S.C. § 1213(e)(1), which I am also transmitting.

The allegations were referred for investigation to NCPC's former Chairman, the Honorable Harvey Gantt, on March 16, 2000. NCPC conducted an investigation and sent a report to this office on November 27, 2000. OSC concluded that NCPC's original investigation was statutorily deficient. In order to be fully responsive to OSC's concerns, NCPC requested and received the assistance of the General Services Administration (GSA) which conducted an audit of the financial documentation relevant to these allegations. NCPC also contracted with a consulting firm, Clifton, Gunderson, L.L.P. (Clifton Gunderson) for an independent review of the allegations. The GSA audit was completed on July 23, 2001. Clifton Gunderson provided its report (Clifton report) to OSC on November 2, 2001 and included the GSA audit as part of that report.

We have carefully examined the original disclosures and reviewed the agency's response and Ms. Snyder's comments. Pursuant to 5 U.S.C. § 1213(e)(2), I have

determined that the findings in the agency's report contain all of the information required by statute.

I have also concluded, pursuant to 5 U.S.C. § 1213(e)(2) that the agency's findings appear reasonable, except with respect to the disciplinary action it imposed on the official deemed solely accountable for all but one of the violations. For the reasons set forth below, I have concluded that the 15-day suspension the agency imposed, and its method of imposing that suspension (in three-day increments, including weekend days), does not appear reasonable.

The whistleblower's disclosures, NCPC's reports and my findings are discussed more fully in the balance of this letter.

The Whistleblower's Disclosures

The NCPC was charged with investigating several allegations of violations of law, rule, or regulation by Ms. Connie M. Harshaw, NCPC's Executive Officer.¹ The allegations involved possible violations of the regulations governing the misuse of federal property, 41 C.F.R. § 101-35.201; the federal printing statute, 44 U.S.C. § 501; and the Anti-Deficiency Act, 31 U.S.C. §§ 1301, 1341(a), stemming from conduct that occurred between 1997 and 1999. The allegations and NCPC's response are discussed below.

The National Capital Planning Commission's Reports

The Clifton Gunderson investigation included a review of investigative reports prepared by NCPC, the GSA audit, an examination of NCPC records as well as interviews with current and former NCPC employees and contractors. Clifton Gunderson's general observation of NCPC is that the agency lacked effective internal controls over budget execution and financial reporting resulting in the mismanagement of agency funds.

1. Misuse of Federal Property

Ms. Snyder alleged that Ms. Harshaw misused federal property. Specifically, she alleged that Ms. Harshaw frequently made personal telephone calls and charged them to her government card in violation of 41 C.F.R. § 101-35.201. NCPC's initial report substantiated this allegation. That review concluded that on numerous occasions between October 1, 1997 and November 30, 1999, Ms. Harshaw misused her government telephone card. Ms. Harshaw admitted using her government card for personal telephone calls and reimbursed the government \$75.13 for the unauthorized calls.

¹ Ms. Harshaw's title was changed to Chief Operating Officer in August 2001.

In response to additional information provided by Ms. Snyder, a second review of the telephone charges for the relevant time period was conducted. The Clifton report notes that the GSA audit identified \$316.50 in questionable calls. Thereafter, Ms. Harshaw reimbursed the agency for an additional \$242.37 for her misuse of her government calling card

Ms. Harshaw contended that NCPC policy permitted employees to reimburse the agency for expenditures such as personal telephone calls. Notwithstanding Ms. Harshaw's contention, the Clifton report concluded that the evidence supported a violation of 41 C.F.R. § 101-35.201. Finally, the Clifton report finds Ms. Harshaw accountable for this violation.

2. Violation of the Federal Printing Statute

Ms. Snyder alleged that on approximately 16 occasions between October 1997 and 1999, Ms. Harshaw violated the federal printing statute, 44 U.S.C. § 501, by procuring printing services from private vendors using appropriated funds. Clifton Gunderson's review of NCPC records found that the amounts paid for private printing services ranged from \$211 to \$184,185.

According to NCPC's initial report and the Clifton report, Ms. Harshaw maintained that General Counsel Sandra Shapiro advised her it was permissible to use commercial printers rather than the Government Printing Office (GPO) for certain printing requests over \$1,000. Ms. Shapiro denied this assertion and maintained that she consistently advised Ms. Harshaw that all printing requests over \$1,000 must be sent to the GPO pursuant to 44 U.S.C. § 501.

Both NCPC's initial report and the Clifton report concluded that 44 U.S.C. § 501, requiring that printing requests be sent to GPO, was violated. The reports find that Ms. Harshaw was one of three NCPC employees who signed purchase orders authorizing the procurement of printing services from private vendors.

The Clifton report also cited a memorandum from the Justice Department's Office of Legal Counsel that questions the constitutionality of the printing statute, as applied to Executive branch employees. The report concluded that this Opinion created some legal ambiguity regarding whether Executive Branch officials are required to follow the statute. There is no indication in the report, however, that Ms. Harshaw relied upon the DOJ Opinion in authorizing the use of commercial printers.

3. Violations of the Anti-Deficiency Act

Ms. Snyder alleged that Ms. Harshaw violated the Anti-Deficiency Act,

31 U.S.C. § 1301, in four instances. Under that Act, it is unlawful to authorize expenditures exceeding the amount available in an appropriation. 5 U.S.C. § 1341(a). Once there is a violation, 5 U.S.C. § 1351 requires that the President and Congress be notified of the deficiency. Criminal penalties apply when the violations of 31 U.S.C. § 1341(a) are knowing and willful. 31 U.S.C. § 1350.

In its investigation into these allegations, Clifton Gunderson interviewed Ms. Harshaw and other personnel involved in NCPC's budget process and financial recordkeeping. They also reviewed documentary evidence including Ms. Harshaw's position description.

a. The first allegation concerning the Anti-Deficiency Act was that Ms. Harshaw violated that Act by obligating payroll charges for pay periods 19 and 20 of fiscal year (FY) 1997 to FY 1998. Ms. Snyder alleged that NCPC's Undisbursed Appropriations Trial Balance (TFS-6654) for October 1997 showed a closing balance of negative \$138,023.87 for FY 1997. She stated that Ms. Harshaw requested in a letter to Mr. Howard Tamborella at the National Finance Center (NFC) that NFC transfer the payroll charges for pay periods 19 and 20 of FY 1997 to FY 1998 in order to avoid a negative balance.

The Clifton report verified that the TFS-6654 for October 1997 showed a negative balance and that a transfer of payroll funds for pay periods 19 and 20 was initiated and authorized by Ms. Harshaw in a memorandum to Mr. Tamborella dated December 17, 1997. Ms. Harshaw's memorandum specified that the transfer was to "prevent a possible violation of the Anti-Deficiency Act."

The Clifton report substantiated a violation of the Anti-Deficiency Act specifically, 31 U.S.C. §§ 1301, 1341, and 1351. The report also found that there was evidence to substantiate violations of 31 U.S.C. § 1501 and 1502. Section 1501 requires that obligations of the U.S. government be supported by documentary evidence of employment or services provided, and § 1501 limits the availability of funds to payments for expenses incurred during the period of availability or to complete contracts obligated consistent with the requirements of § 1501. Payroll funds are financial obligations that must be charged to the fiscal year in which they are incurred. 31 U.S.C. § 1501(a)(7). The financial obligation may not be properly transferred to other fiscal years. The report concluded that the amount of the violation was \$153,817. In addition, the Clifton report specifically identified a memorandum from Ms. Harshaw to NCPC Division Directors advising them that violations of the Anti-Deficiency Act must be reported to OMB and Congress and providing a sample letter to the President.

In response to this allegation, Ms. Harshaw denied knowledge of the budget problem until December 1997. She provided a fiscal control report in support of her contention that payroll charges were in line with expenditures. However, the Clifton report notes that the fiscal control report did not include payroll obligations or commitments. Moreover, the

Clifton report states that in an e-mail discussing the possibility of transferring the payroll charges from FY 1997 to 1998, Ms. Snyder advised Ms. Harshaw and Deborah Bailey, Financial Management Specialist, that the agency could be accused of improper accounting. Based on the investigation, including a review of the duties and responsibilities set forth in Ms. Harshaw's position description, the Clifton report found Ms. Harshaw to be solely responsible for this violation. The report also stated that the violation was the result of funds management, not budget formulation.

b. Ms. Snyder's second allegation was that throughout FY 1997 the monthly SF-224s, Statements of Transactions, and the TFS-6653 Undisbursed Appropriation Account Ledgers showed charges against expired accounts for FY 1992 through 96 in very large sums and that those charges against prior fiscal years were improper. The Clifton report refers to the GSA audit on this allegation. Through its review of NCPC's financial records, GSA established that during FY 1997 the agency charged \$832,021.99 to accounts for FYs 1992 through 1996. GSA requested the financial documentation supporting those charges to verify that they were proper.

NCPC was unable to locate the TFS-6654 reports for July-September 1997 or the official SF-224 files for FY 1997. Pursuant to the rules regarding the retention of records, financial records are to be kept for a period of six years and three months after the period covered by the account.²

NCPC was unable to provide the supporting documentation necessary for GSA to determine whether funds were properly charged to prior fiscal years. NCPC informed GSA that they could locate the official SF-224s for other years, but not for 1997 because the file was missing.³ NCPC provided GSA with the SF-224 for December 1996, and the supporting documentation, that recorded \$126,597.25 in charges to prior fiscal years.

GSA's analysis of the December 1996 transactions led to the conclusion that there was insufficient documentation to determine the propriety of charging \$100,020.68 to prior fiscal years. GSA further concluded that due to the absence of financial documentation no determination could be made regarding the propriety of charging a total of \$705,424.74 in NCPC expenditures to prior fiscal years during 1997.

Clifton Gunderson was also unable to reach any conclusion regarding the propriety of the charges to prior fiscal years due to the lack of financial documentation. The Clifton report focused on one charge of \$69,295. Clifton Gunderson concluded that, based on the GSA audit, it appeared that the \$69,295 charged to FY 1992 should have been charged to FY 1996, the year the obligation for the contractor services appeared to have been incurred.

² National Records and Archives Administration, General Records Schedule 6.

³ NCPC's response is set forth on p. 7-8 of GSA's audit included as an attachment to the Clifton report.

Further, the report states that Ms. Harshaw signed the original 1996 purchase order for the \$69,295 charge. That purchase order was later manually altered to allocate the charge to FY 1992. Because Clifton Gunderson was unable to determine how or when the manual change occurred, however, they did not reach a conclusion regarding Ms. Harshaw's responsibility for improper allocation of these funds.

c. Ms. Snyder's third allegation regarding the Anti-Deficiency Act was that an NCPC contract with Photo Science, Inc., dated January 1996, was not obligated at the time of execution and that, during FY 1998, invoices for this contract were charged against expired accounts for prior FYs 1993, 1994 and 1997 and to WGIS no-year accounts. Ms. Harshaw was the NCPC official who initialed the transfer of funds incurred as a result of a contract modification in 1996 to other fiscal years.

The contract with Photo Science, Inc., now known as Earthdata International, is a multi-year, indefinite delivery, indefinite quantity contract jointly funded with the District of Columbia. According to the Clifton report, the original contract obligation was for \$330,000.⁴ Contract modification No. 1 in the amount of \$164,048, an increase in the price of Task 2, was signed by Ms. Harshaw on February 5, 1996. The September 1997 Undisbursed Appropriation Trial Balance (TFS 6654) showed a closing balance of \$1,087.32 for FY 1996. Because charging the cost of the modification would have resulted in an Anti-Deficiency Act violation, the charges were distributed among other fiscal years as follows: FY 1993, \$35,000; FY 1994, \$20,000; FY 1997, \$25,000; and \$39,877.64 to a WGIS account. No determination could be made as to how the remaining \$44,170.40 was charged.

According to the Clifton report and the GSA audit, Ms. Harshaw contended that there was documentation supporting the charges to prior fiscal years. However, both Clifton Gunderson and GSA note that no supporting documentation was ever provided. In addition, Mr. Krucoff, the Contracting Officer's Technical Representative, stated that he did not know where the money was obligated. With respect to the WGIS charges, NCPC's General Counsel explained, in a letter dated November 30, 2001, that the \$39,877.64 charged to the WGIS no-year account appeared to be proper because it was for on-going work undertaken in FY 1998.

Based on the information gathered as a result of the investigation, the Clifton report substantiated the allegation and concluded that the evidence supported a violation of 31 U.S.C. §§ 1301, 1341, 1351, 1501 and 1502 in the amount of \$55,000. The Clifton

⁴ Because GSA was unable to identify the amount of the funding obligated for the project, the year in which the funding was obligated, the propriety of the charges to the prior year accounts or to the no-year account and how the total costs were handled, it was unable to reach any conclusion regarding the validity of NCPC's actions spreading the costs of the task order. See, GSA audit, p. 12.

report also concluded that Ms. Harshaw was the NCPC official responsible for this violation because she signed the contract modification and authorized the payments to the prior fiscal years without supporting documentation.⁵

~~d. Ms. Snyder's fourth allegation was that at least 34 obligations and expenditures, totaling approximately \$300,000, were obligated to FY 1998 for commitments made in FY 1997, in order to avoid deficiency in FY 1997. The GSA audit stated that 28 of the 34 purchase orders, representing \$266,407.02, should have been paid with FY 1997 appropriations. Instead, those purchase orders were deobligated and paid with FY 1998 funds. Indeed, the GSA audit states that NCPC acted intentionally to deobligate funds and charge FY 1997 expenditures to FY 1998 appropriations. Again, due to the absence of supporting documentation, no conclusion could be reached with respect to the remaining six purchase orders.~~

In response to this allegation, Ms. Harshaw stated that she instructed Division Directors to review outstanding purchase orders and rescind those that could be delayed or avoided. She contends that the Division Directors misunderstood her instructions and deobligated purchase orders where the goods or services had already been provided. The Clifton report notes, however, that the 28 purchase orders were paid with FY 1998 funds and that Ms. Harshaw is the NCPC official who authorized all of them as FY 1998 obligations. In addition, the report states that the supporting documents to the purchase orders and, in many instances, the face of the purchase orders themselves clearly indicated that they were FY 1997 expenditures.

Based on the investigation, the Clifton report substantiated the allegation that 28 of the purchase orders were improperly charged to FY 1998 thereby violating 31 U.S.C. §§ 1301, 1341, 1351, 1501 and 1502. The amount of the violation was \$266,407. The report also concluded that based on Ms. Harshaw's professional responsibilities as outlined in her position description and that she personally signed all 28 of the purchase orders authorizing payment of FY 1998 funds for FY 1997 expenditures, she was the NCPC official responsible for these violations.

Despite its own investigation and the information contained in the GSA audit, identifying, among other things, violations of the Anti-Deficiency Act totaling approximately \$475,000 and approximately \$750,000 in unexplained charges, the Clifton report found that there was insufficient evidence to conclude that Ms. Harshaw acted willfully and knowingly in violation of the Anti-Deficiency Act. Thus, Clifton Gunderson

⁵ As noted, the Clifton report found the amount to be \$55,000. However, no explanation is provided by the Clifton report or GSA regarding the propriety of the \$25,000 charge to FY 1997. Further, because NCPC appears to be unable to explain how the remaining \$44,170.40 was charged, no determination can be made as to whether those funds were spent properly.

was unable to substantiate any violation pursuant to 31 U.S.C. § 1350 setting forth the criminal penalty for a knowing and willful violation of 31 U.S.C. § 1341(a) of the Anti-Deficiency Act.

Actions taken by the National Capital Planning Commission

In response to these allegations and the results of the investigations and audit that followed, NCPC has taken a number of actions. A letter from Chairman Cogbill that accompanied the Clifton report described those actions.

1. The Chairman notified the President and Congress of the violations of the Anti-Deficiency Act pursuant to 31 U.S.C. § 1351. NCPC has also implemented new procedures to ensure that printing services are obtained through GPO unless: 1) GPO or the Congressional Joint Committee on Printing provide a waiver or 2) the Executive Director approves a specific request for private printing services that has the prior approval of the General Counsel.

2. Additionally, NCPC has taken steps to improve financial and budgetary controls in response to these investigations. A summary of those actions follows:

- Internal and external accounting reports will be generated on a monthly basis and reviewed by the Administrative Officer, the Chief Operating Officer and the Executive Director.
- Payroll reports are generated on a bi-weekly basis and circulated within 24 hours for review and the estimated payroll for the following pay period is posted immediately as a commitment.
- Purchase orders are assigned according to an accounting system and acceptance of the purchase order is determined by the availability of funds. The fund availability is verified; the purchase order is signed and forwarded electronically to be obligated. Once the purchase order is obligated, it cannot be deobligated.
- NCPC has discontinued its policy of allowing employees to reimburse the agency for personal telephone calls.
- The General Counsel is now required to review and concur with all requests for printing or duplication services over \$1,000.
- As of August 1, 2001, all contracts for goods and services over \$25,000 must be reviewed by the Chairman and the General Counsel.
- All Statements of Transactions, SF-224s and Reports on Budget Execution, SF-133s must be reviewed and approved by the Administrative Officer, the Chief Operating Officer, and the Executive Director.

3. Clifton Gunderson also provided NCPC with twelve recommendations designed to improve the agency's internal budget control and financial management. In particular, Clifton Gunderson identified the lack of clearly written procedures as a

contributing factor to NCPC's financial management problems. Toward that end, the recommendations focused on developing policies and procedures consistent with Office of Management and Budget (OMB) and Department of the Treasury Financial Manual, for documenting evidence and financial recordkeeping, recording and tracking financial commitments to ensure obligations are consistent with NCPC's authority and for handling violations of the Anti-Deficiency Act.

Other recommendations involved developing a system for administrative control of funds, developing a system of accountability to identify the person responsible for any obligation exceeding the amount available, instituting an accounting system that supports NCPC's fund control systems and instituting automated controls in NCPC's financial management to ensure adherence to the OMB Apportionment Schedule and NCPC's approved budget. According to Chairman Cogbill, NCPC's Executive Director has been directed to implement the recommendations.

4. The law requires NCPC to provide a description of any disciplinary actions taken in response to its investigation. 5 U.S.C. § 1213(d)(5)(C). NCPC, accordingly, provided a copy of a "Notice of Adverse Action Decision" which stated that Ms. Harshaw would be suspended "from duty and pay for fifteen calendar days" for misconduct in connection with the matters described above. Under regulations issued by the Office of Personnel Management, this is the minimum period of time that an agency may choose to suspend a member of the Senior Executive Service for misconduct. Ms. Harshaw did not appeal the suspension.

Shortly after providing OSC with a copy of the Notice, in response to an inquiry from this office, NCPC advised us that Ms. Harshaw would be serving the 15-day suspension in three-day increments. NCPC stated that it would be imposing the suspension incrementally, because Ms. Harshaw filled a position critical to the agency's mission.

On May 30, 2002, in response to another inquiry from this office (based upon information provided to us by the whistleblower) we were informed that the suspension had been served in three-day increments, and that those increments had consisted of five weekends, including Friday, Saturday, and Sunday. Because Ms. Harshaw is not on duty on Saturday or Sunday the original suspension of 15 calendar days "from duty and pay" ultimately resulted in a five-day suspension from duty and pay. Ms. Harshaw continues to hold the position of Chief Operating Officer at the agency.

The Whistleblower's Comments

Ms. Snyder submitted her comments on NCPC's initial report to OSC as well as supplemental supporting documentation. The additional documentation she provided resulted in further inquiry being made into the allegations involving the use of the government calling card and the Anti-Deficiency Act violations.

Ms. Snyder states that the financial documentation regarding the charges made to prior fiscal years during 1997, including detailed listings of individual charges and copies of purchase orders and invoices, were in NCPC's financial files as of the date of her resignation, June 3, 2000. Further, she notes that the financial files are under Ms. Harshaw's control and finds it troubling that only the financial files for 1997, the relevant time period for her allegations, are missing.

With respect to the investigations, Ms. Snyder noted that the Department of the Treasury may have electronic versions of the FY 1997 financial documents with the names and addresses of vendors. Those vendors may be able to provide copies of documents that would show whether the charges to prior fiscal years were proper.

In addition, based on the facts and circumstances, Ms. Snyder disagrees with the conclusion that Ms. Harshaw's conduct was not intentional. Given the position of public trust and fiduciary responsibility Ms. Harshaw holds, and the serious nature of these violations, Ms. Snyder believes that according to the provisions of the NCPC Table of Actions for Correcting Employee Misconduct, the only appropriate response to her misconduct is removal from federal service.

Ms. Snyder also cites other financial management concerns. Finally, due to NCPC's significant financial management problems, Ms. Snyder urges that GAO conduct a complete audit of the agency.

Conclusion

The investigative reports and GSA audit conducted in this case substantiate the allegations and find Ms. Harshaw accountable for the majority of those violations. The agency's findings and its response to the allegations appear reasonable with the exception of the nature of the disciplinary action taken against Ms. Harshaw.

The penalty NCPC imposed upon Ms. Harshaw (a fifteen calendar day suspension) seems unusually lenient in light of the misconduct substantiated (including the several instances where crucial records appear to be missing with no explanation) and her position of trust and authority. NCPC's decision to permit Ms. Harshaw to serve her suspension in three day increments, including weekends, further weakens the penalty, making it the equivalent of a five-day suspension without pay. As noted, NCPC did not advise OSC that it intended to include weekends in the suspension until OSC specifically inquired about the terms of the suspension, at the suggestion of the whistleblower.

NCPC's explanation for its actions is that Ms. Harshaw was so critical to the mission of the agency it was necessary to minimize her absence from the office to the greatest extent possible. This explanation does not appear to provide a reasonable

justification for NCPC's actions. In fact, in response to our request, the agency supplied OSC with leave records which show that Ms. Harshaw took 80 hours of annual leave in pay periods 4 and 5 of this year (February 24 to March 23, 2002). Further, in December of 2001 she took 48 hours of annual leave, and during the week of January 9, 2002, she took 8 hours of leave.

It is unclear how the agency justifies the dilution of the penalty because of Ms. Harshaw's critical importance, in light of the fact that it has granted her 136 hours of annual leave since November of 2001, when it imposed the suspension. In fact, NCPC granted Ms. Harshaw annual leave during two of the pay periods in which she served her suspension; in one of the pay periods, she was granted 48 hours of annual leave.

In addition, NCPC was less than forthright with this office in advising us of the manner in which the suspension was to be served. The agency only advised OSC of its actions in response to our specific inquiries, further undermining the credibility of the explanation that they have provided for the unusual method they chose for implementing the suspension.

Finally, we note that Ms. Harshaw remains the agency's Chief Operating Officer and continues to have significant authority over NCPC's financial management. Given Ms. Harshaw's position of authority and public trust, the misconduct described above, and the mismanagement that occurred under her stewardship, NCPC's decision to maintain her in her position does not appear reasonable to this office.

As required by section 1213(e)(3), a copy of the report and Ms. Snyder's comments has been sent to the Chairmen of the Senate Committee on Governmental Affairs and the House Committee on Government Reform and Oversight. We have also filed copies of the report and Ms. Snyder's comments in our public file and closed the matter.

Respectfully,



Elaine Kaplan

Enclosures