



**U.S. OFFICE OF SPECIAL COUNSEL**  
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**The Special Counsel**

December 14, 2020

The Honorable Robert L. Wilkie  
Secretary  
Department of Veterans Affairs  
810 Vermont Avenue, N.W.  
Washington, D.C. 20420

Re: OSC File No. DI-21-000033  
Referral for Investigation--5 U.S.C. § 1213(c)

Dear Mr. Secretary:

This letter serves to amend OSC's initial referral sent on November 17, 2020.<sup>1</sup> At that time, I referred to you a whistleblower disclosure alleging that officials at the Department of Veterans Affairs (VA), Central Texas VA Healthcare System (CTVHCS), Temple, Texas, engaged in actions that constitute gross mismanagement; an abuse of authority, and a substantial and specific danger to public health.<sup>2</sup> Following this referral for investigation, the whistleblower, CTVHCS Pain Management Clinic physician [REDACTED], who consented to the release of his name, disclosed additional allegations related to patient entry into the CTVHCS Whole Health and Integrated Health Service (Whole Health). I write again to alert you to their seriousness.

[REDACTED] disclosed that on November 30, 2020, Whole Health Chief Dr. Edward Lee informed staff via e-mail that all referrals to the Pain Management Clinic will now be reviewed solely by Whole Health "coaches," who are not physicians or pain management providers. If the Whole Health coach approves the referral, the patient will be required to complete a Veterans Health Administration (VHA) course titled "Intro to Whole Health." Patients will be directed to initiate a Personal Health Inventory and complete "individual coaching" or a second course, "Taking Charge of My Life and Health." After these steps are completed, patients may select only one care "pathway": acupuncture, chiropractic care, or pain clinic. They may not select more than one of these pathways at the same time.

[REDACTED] explained that previously, if a primary care or other physician referred a patient to the Pain Management Clinic, a pain physician reviewed the patient's chart information and determined what next steps would be taken to provide appropriate care. Under Dr. Lee's new

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<sup>1</sup>I have attached my November 17, 2020 referral letter in this matter for your reference.

<sup>2</sup>See OSC File No. DI-21-000033.

directive, physicians and pain experts are removed from the review process and patients do not receive an initial clinical diagnosis. As a result, patients may receive inappropriate care without the oversight of a pain physician. In addition, patients are required to complete coursework before being permitted access to the Pain Management Clinic, potentially delaying the delivery of appropriate physician-based clinical care.

██████████ noted that it is VHA policy that complementary and integrative health may not be used as an alternative to conventional medicine.<sup>3</sup> Dr. Lee's directive appears to violate this national policy by permitting the replacement of conventional pain care with complementary care, such as acupuncture. Additionally, federal regulations state that VA patients are entitled to receive prompt and appropriate treatment and have the right to the least restrictive conditions necessary to achieve treatment purposes.<sup>4</sup> ██████████ alleged that Dr. Lee's actions—which are a direct consequence of the problematic reorganization of the Pain Management Clinic that we highlighted in Footnote 1 of our November 17, 2020 letter—violate both of these patient rights and have a significant negative impact on the delivery of patient care.

Pursuant to my authority under 5 U.S.C. § 1213(c), I have concluded that there is a substantial likelihood that the allegations provided to OSC a violation of law, rule, or regulation; gross mismanagement; an abuse of authority, and a substantial and specific danger to public health. I am requesting that you incorporate these new allegations into your pending investigation in OSC File No. DI-21-000033 and provide one report to OSC that addresses all the allegations.

Please note that specific allegations and references to specific violations of law, rule or regulation are not intended to be exclusive. If, in the course of your investigation, you discover additional violations, please include your findings on these additional matters in the report to OSC. As previously noted, your agency must conduct an investigation of these matters and produce a report, which must be reviewed and signed by you. Per statutory requirements, I will review the report for sufficiency and reasonableness before sending copies of the agency report along with the whistleblower's comments and any comments or recommendations I may have, to the President and congressional oversight committees and making these documents publicly available.

Additional important requirements and guidance on the agency report are included in the attached Appendix, which can also be accessed at <https://osc.gov/Pages/DOW.aspx>. If your investigators have questions regarding the statutory process or the report required under 5 U.S.C.

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<sup>3</sup>Veterans Health Administration Directive 1137, para. 4, *Provision of Complementary and Integrative Health*, (May 18, 2017). Directive 1137, para. 3.d. defines complementary and integrative health as “a group of diverse medical and health care approaches and practices that are not considered to be part of conventional or allopathic medicine.” The Directive further notes at paragraph 2.h. that acupuncture, along with other treatment such as meditation and yoga, are complementary and integrative health practices that are widely used by VHA patients.

<sup>4</sup>38 C.F.R. § 17.33(a)(2) and (3).

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§1213, please contact Catherine A. McMullen, Chief, Disclosure Unit, at (202) 804-7088 for assistance. I am also available for any questions you may have.

Sincerely,

A handwritten signature in black ink, appearing to read "Henry J. Kerner". The signature is fluid and cursive, with a long horizontal stroke at the end.

Henry J. Kerner  
*Special Counsel*

Enclosure  
cc: The Honorable Michael J. Missal, Inspector General

## **APPENDIX**

### **AGENCY REPORTS UNDER 5 U.S.C. § 1213**

#### **GUIDANCE ON 1213 REPORT**

- OSC requires that your investigators interview the whistleblower at the beginning of the agency investigation when the whistleblower consents to the disclosure of his or her name.
- Should the agency head delegate the authority to review and sign the report, the delegation must be specifically stated and include the authority to take the actions necessary under 5 U.S.C. § 1213(d)(5).
- OSC will consider extension requests in 60-day increments when an agency evidences that it is conducting a good faith investigation that will require more time to complete.
- Identify agency employees by position title in the report and attach a key identifying the employees by both name and position. The key identifying employees will be used by OSC in its review and evaluation of the report. OSC will place the report without the employee identification key in its public file.
- Do not include in the report personally identifiable information, such as social security numbers, home addresses and telephone numbers, personal e-mails, dates and places of birth, and personal financial information.
- Include information about actual or projected financial savings as a result of the investigation as well as any policy changes related to the financial savings.
- Reports previously provided to OSC may be reviewed through OSC's public file, which is available here: <https://osc.gov/Pages/Resources-PublicFiles.aspx>. Please refer to our file number in any correspondence on this matter.

#### **RETALIATION AGAINST WHISTLEBLOWERS**

In some cases, whistleblowers who have made disclosures to OSC that are referred for investigation pursuant to 5 U.S.C. § 1213 also allege retaliation for whistleblowing once the agency is on notice of their allegations. The Special Counsel strongly recommends the agency take all appropriate measures to protect individuals from retaliation and other prohibited personnel practices.

#### **EXCEPTIONS TO PUBLIC FILE REQUIREMENT**

OSC will place a copy of the agency report in its public file unless it is classified or prohibited from release by law or by Executive Order requiring that information be kept secret in the interest of national defense or the conduct of foreign affairs. 5 U.S.C. § 1219(a).

#### **EVIDENCE OF CRIMINAL CONDUCT**

If the agency discovers evidence of a criminal violation during the course of its investigation and refers the evidence to the Attorney General, the agency must notify the Office of Personnel Management and the Office of Management and Budget. 5 U.S.C. § 1213(f). In such cases, the agency must still submit its report to OSC, but OSC must not share the report with the whistleblower or make it publicly available. See 5 U.S.C. §§ 1213(f), 1219(a)(1).