U.S. OFFICE OF SPECIAL COUNSEL
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Washington, D.C. 20036-4505

The Special Counsel

November 17, 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:

I am referring to you for investigation a whistleblower disclosure 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. A report of your investigation of these allegations and any related matters is due to the Office of Special Counsel (OSC) on January 18, 2021.

[redacted], a physician in the CTVHCS Pain Management Clinic, who consented to the release of his name, disclosed that Dr. Edward Lee, CTVHCS Chief of Whole Health and Integrated Health Service (Whole Health), instituted organizational and policy changes that are detrimental to the delivery of patient care in the Pain Management Clinic. The allegations to be investigated include:

- Dr. Lee has sought to rescind the facility's standard operating procedures (SOP) for prescribing buprenorphine, an opioid used to treat opioid use disorder (OUD), acute pain, and chronic pain;
- Dr. Lee pressured providers to prescribe buprenorphine regardless of patient diagnosis and promoted incorrect guidance to providers that does not reflect the standard of care, placing patients at risk; and
- Dr. Lee has engaged in improperly documented "self-consults" with Pain Management Team (PMT) patients, prior to their initial appointments, leading to potential billing irregularities and inequitable care.

[redacted] explained that the CTVHCS Pain Management Clinic was recently reorganized under Whole Health.[1] Upon taking responsibility for the Pain Management Clinic, Dr. Lee has sought to rescind the facility's SOP for prescribing buprenorphine, which was issued by the CTVHCS Pain Oversight Committee to address provider confusion about the proper use of buprenorphine for OUD and chronic pain. Dr. Lee asserted that rescission of the SOP is necessary to remove barriers to the use of buprenorphine products. [redacted] alleged that this action denies providers essential information on the risks and acuity associated with OUD, threatens the clinical course for patients, and may increase harm for patients with potential or diagnosed OUD, or those without OUD, by hindering the delivery of information on the use of opioids. [redacted] is prepared to provide specific examples to investigators to illustrate this allegation.

[redacted] alleged that Dr. Lee's direction of the Pain Management Clinic appears to be predicated on an inaccurate understanding of the evaluation and treatment of OUD and chronic pain. Dr. Lee has repeatedly informed physicians, including in e-mails to staff dated October 15 and October 17, 2020, that their performance can be tied to their willingness to prescribe buprenorphine. Dr. Lee directed that PMT physicians must obtain X-waivers—Drug Enforcement Administration-issued waivers to prescribe buprenorphine—in order to treat patients manifesting criteria of OUD with buprenorphine. Dr. Lee also emphasized the financial incentives available to providers who prescribe buprenorphine, as described in VA's national buprenorphine guidance, which recommends providing incentive special pay for providers who obtain an X-waiver and prescribe buprenorphine to treat OUD.[2]

Dr. Lee has also repeatedly asserted to staff that a diagnosis of OUD or chronic pain is not required before prescribing buprenorphine. [redacted] explained that Dr. Lee's statements do not reflect the standard of care.[3,4] He noted that buprenorphine is a potent opioid associated with all known risks of opioids, including hepatic injury; respiratory depression and death; abuse, misuse, or diversion; and opioid withdrawal. Thus, the risk of prescribing buprenorphine to patients who do not have OUD likely outweighs the benefit, according to [redacted] argues that placing professional and financial pressure on providers to prescribe buprenorphine while lowering the standard of care for prescribing it, creates a dangerous

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[redacted] contends that the reorganization of the Pain Management Clinic under Whole Health is unprecedented and does not reflect the recommendations of a March 2020 Veterans Health Administration Executive Decision Memo regarding the integration of Whole Health Clinical Care into Primary Care and Mental Health Services. Dr. [redacted] alleged that the CTVHCS reorganization is a root cause of the allegations he has presented.

[2]VHA Notice 2020-30, *Buprenorphine Prescribing for Opioid Use Disorder,* para. 3.c. (September 22, 2020).

[3]*See* American Society of Interventional Pain Physicians, *Responsible, Safe, and Effective Prescription of Opioids for Chronic Non-Cancer Pain: American Society of Interventional Pain Physicians (ASIPP) Guidelines* (2017), Sec. 10.1.1. "A physical diagnosis must be established prior to initiating opioid therapy." *See also* American Society of Addiction Medicine, *National Practice Guideline: 2020 Focused Update*, p. 10. (2020) "Other clinicians may make a diagnosis of opioid use disorder; however, prescriber confirmation of the diagnosis is required before medications are prescribed."

[4]*See* Department of Health and Human Services, Pain Management Best Practices Inter-Agency Task Force Report, Sec. 2 (May 9, 2019). "Quality pain diagnosis and management can alter opioid prescribing both by offering alternatives to opioids and by clearly stating when they may be appropriate."

environment for patients, who may receive unnecessary opioid prescriptions that place their health at risk.

[redacted] further alleged that Dr. Lee insists on conducting self-initiated patient contact with PMT patients prior to their initial PMT appointments. [redacted] alleged that during these encounters Dr. Lee is taking patient histories, making patient assessments, identifying risk levels for patient presentation, and recommending the way to manage patients' treatment. Dr. Lee previously coded these contacts as "historical" non-billable encounters, but recently stopped coding or charting them at all. According to [redacted], these encounters potentially bias the PMT's patient assessments and the course of care for patients, while also being improperly billed or not billed at all. They also establish a process under which patients are receiving inconsistent evaluations, which, [redacted] contends, impedes the VA's mission to deliver appropriate, quality care to all veterans.

Pursuant to my authority under 5 U.S.C. § 1213(c), I have concluded that there is a substantial likelihood that the information provided to OSC discloses gross mismanagement, an abuse of authority, and a substantial and specific danger to public health. 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/Services/Pages/DU-Resources.aspx. If your investigators have questions regarding the statutory process or the report required under 5 U.S.C. §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,

Henry J. Kerner
Special Counsel

Enclosure
cc: The Honorable Michael J. Missal

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).