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SAGC

Mr. Henry Kerner
U.S. Office of Special Counsel
1730 M Street, N.W. Suite 300
Washington, D.C. 20310-0101

22 JUL 2021

SUBJECT: Whistleblower Investigation—
Alleged violations of law, rule, or regulation;
gross mismanagement; gross waste of funds;
and a substantial and specific danger to public
safety at Presidio of Monterey Police
Department Counsel File Number DI-21-
000069)

Dear Mr. Kerner,

In accordance with Title 5, United States Code, Section 1213(c) and (d), the enclosed summary and report is submitted in response to your referral of information requesting an investigation of allegations, and a report of findings in the above referenced case.

The Secretary of the Army (SA) has delegated to me in writing his authority, as Agency head, to review, sign, and submit to you the statutorily required report.

The Department of the Army has provided a report that has been constructed to eliminate references to privacy protected information and is suitable for publication on your website as it omits references to witnesses' names and identifying information. We understand that, as required by law, you will provide a copy of this report to the whistleblower, the President of the United States, and the Senate and House Armed Services Committees for their review.

The Department of the Army takes very seriously its responsibility to address, in a timely and thorough fashion, matters referred by OSC. In this case, the Army conducted a thorough and comprehensive investigation in response to the OSC's referral of allegations submitted by the Whistleblower Complainant, that certain practices by the Presidio of Monterey Police Department (POMPD), Department of the Army Civilian Police (DACP) officers engaged in conduct that may constitute a violation of law, rule, or regulation; gross mismanagement; gross waste of funds; or a substantial and specific danger to public safety. Generally, she alleged that POMPD DACP lack sufficient authority to arrest civilian criminal suspects, and yet do so with regularity. The allegation deals with a subject matter that is, in this case, legally nuanced and complex.

The whistleblower was provided ample opportunity to provide evidence, both testimonial and documentary, in support of her allegations with the advice of legal counsel. The investigating officer (IO) assembled evidence, from witness interviews, email exchanges, Standard Operating Procedures (SOPs), training materials, and records generated by the State of California. However, in the end, the IO **did not** find evidence of conduct that constitutes a violation of law, rule, or regulation, gross mismanagement, a gross waste of funds, or a substantial and specific danger to public health and safety.

Rather, the interviews conducted, and evidence gathered by the IO demonstrate a culture and practice of compliance with laws, rules, and regulations, which give high confidence that appropriate internal management controls are in place and are effective, and they are being followed to reasonably assure that waste, fraud, and abuse can be detected and corrected.

Fundamental to the whistleblower's complaint is her belief that civilians are being unlawfully arrested on the concurrent jurisdiction of the Presidio of Monterey by POMPD DACP. The Whistleblower further alleges that when the Garrison Commander failed to request deputation of POMPD DACP, so that those officers may lawfully arrest civilians on the installation, the Whistleblower suffered an adverse employment determination, which resulted in reclassification of her position. The collateral consequence is that the Whistleblower is unable to carry a firearm or perform law enforcement functions, and, as a result, her retirement benefits may be adversely affected.

In her first allegation, the Complainant contends POMPD officials have not requested the authority, pursuant to Department of Defense Instruction (DoDI) 5525.13, to receive approval to use deputized law enforcement powers. DoDI 5525.13, paragraph 4, makes clear, however, that "It is DoD policy to NOT expand DoD law enforcement authorities by seeking deputized State or local law enforcement authorities."

The IO determined that this first allegation is true. The current Garrison Commander, along with several previous garrison commanders, have considered whether or not the four requirements under DoDI 5525.13, para. 4, were met in order to necessitate contravention of DoD policy by requesting deputation of POMPD DACP. Each garrison commander consulted with installation legal counsel, as well as Directorate of Emergency Services (DES) personnel, and concluded that without deputation the ability to perform essential command law enforcement functions within the jurisdiction was **not** significantly hindered by a lack of authority to enforce State or local laws, and the need for such law enforcement authority can be met effectively by assistance from law enforcement agencies with such authority. As a result, to date, no garrison commander has made the request for DoD approval to deputize under state law.

Under the provisions of Army Regulation 190-56, THE ARMY CIVILIAN POLICE AND SECURITY GUARD PROGRAM, para. 5-2, DACP "can apprehend any persons found on the installation or activity for offenses committed on post that are felonies, misdemeanors, breaches of the peace, a threat to property or welfare, or detrimental to good order and discipline." The authority to apprehend, however, is "limited to issuing citations and turning the subject over to the appropriate civilian or military authorities."

As several witnesses during the course of the investigation attest, the practice of POMPD officers, when they encounter a civilian offender, is to apprehend the individual only for so long as is

reasonably necessary to issue a citation and release the individual, or, if the situation dictates, transfer that individual to the custody of civilian law enforcement authorities. If the offense committed warrants an arrest, the POMPD officer provides the civilian law enforcement authorities at the Monterey County Detention Center with a probable cause statement that details the basis for the arrest. The civilian authorities, in conjunction with a review by a civilian judge, then decide to effect the arrest or detention by accepting the individual into the detention center, or reject the request and release the subject.

As a result, though POMPD officers cannot themselves effect an arrest, the ability to perform essential command law enforcement functions within the jurisdiction is not adversely affected. Rather, the Presidio's partnership with local law enforcement provides the assistance needed to maintain the safety and security of personnel and property under the jurisdiction, and to maintain good order and discipline on the installation while operating within the proper lawful authorities provided under AR 190-56.

In her second allegation, the Complainant contends that POMPD officials continue to direct POMPD DACP to arrest civilian criminal suspects without lawful authority, violating the rights of civilians and placing officers at risk of liability for their actions. Essentially, the Complainant asserts that despite the limited ability of POMPD officers to apprehend under federal law, the Complainant believes that POMPD officers are actually arresting civilians, as defined by state law.

The IO determined that this is not the case. POMPD officers are not state actors. Federal authorities recognize apprehension and arrest authorities as two distinct acts. California law, however, only recognizes the act of arrest. This conflict of authorities is the apparent source of confusion and concern with unlawful arrests, and coincides with the Complainant's personal position reclassification objection.

The investigation revealed that in October 2017, the Complainant was serving as a GS-1811 Criminal Investigator with law enforcement authorities and responsibilities. Installation Management Command (IMCOM), at the direction of the Assistant G1 for Civilian Personnel, performed a classification review of all GS-1811 positions. The review determined that IMCOM's GS-1811s were actually performing GS-0083 Detective work.

Following that decision, the Complaint requested that the Inspector General (IG) assist with a request to have the Office of the Provost Marshall General come to the Presidio to reassess the work performed by the Complainant. In November 2017, the POM IG replied that such a request was not properly within their purview, and referred the request to the IMCOM IG. Later that month, IMCOM IG similarly asserted that the issue was not properly within their purview, and noted that in June 2016 they conducted a staff assistance visit with POMPD and "found no violation of law, regulation or policy" and concurred with the decision to reclassify GS-1811 positions to GS-0083.

In July 2020, the Defense Civilian Personnel Advisory Service (DCPAS) issued a classification appeal decision in the Complainant's case. After careful review, DCPAS found that rather than reclassification from GS-1811 to GS-0083, the Complainant's position should instead be reclassified to GS-1802, with the title at the discretion of the agency.¹ This was because DCPAS found that the Complainant's investigatory duties were relatively short in duration, and not consistent with criminal

¹ The agency has titled the Complainant's position as Supervisory Investigative Support Technician.

investigative work or the investigation of major offenses against the United States. Notably, DCPAS determined that the position should not be classified GS-0083, Detective, because the complainant lacked arrest authority, which includes the authority to "incarcerate individuals pending the completion of formal charges (booking)."

POMPD officers only have apprehension authority under AR 190-56. When incarceration is required, POMPD must seek the assistance of civilian law enforcement authorities. As a result, securing arrest authority through deputation became a focus of the Complainant. If the Garrison Commander requested deputation of POMPD DACP, the Complainant could potentially regain her position as either a GS-1811 or GS-0083. A collateral argument of the Complainant was to assert that POMPD officers already arrest civilians, and were being ordered to so do in violation of the law.

However, as many witnesses attested to in the investigation, that is not the case. Most of the officers and staff interviewed properly understood the limits of their authority as well as the process for turning a civilian offender over to local law enforcement if arrest or continued detention beyond apprehension was appropriate. None of those officers or staff that understood their authorities stated that POMPD DACP were ordered to unlawfully arrest civilians.

I am satisfied that the IO's conclusions and implementation of the associated recommendations constitute an appropriate outcome in this matter. Accordingly, the Army has made no referral of alleged criminal violation to the Attorney General pursuant to Title 5, U.S.C., §1213(d)(5)(d). This report, with enclosures, is submitted in satisfaction of my responsibilities under Title 5, U.S.C., §§1213(c) and (d). Please direct any further questions you may have concerning this matter to Mr. Michael Black, at 703-614-5711.

Sincerely,



Mark Lewis
Senior Official Performing the Duties of the
Assistant Secretary of the Army (Manpower and
Reserve Affairs)

Enclosure

SUMMARY OF THE REPORT OF INVESTIGATION

I. INFORMATION INITIATING THE INVESTIGATION

By correspondence dated December 7, 2020, the Office of Special Counsel (OSC) forwarded to the Secretary of the Army allegations from a Whistleblower, [REDACTED] employee of the Presidio of Monterey Police Department (POMPD), Monterey, CA, that employees engaged in conduct that may constitute a violation of law, rule, or regulation; gross mismanagement; gross waste of funds; or a substantial and specific danger to public safety.

The Whistleblower alleged that POMPD officials have not requested the authority, pursuant to Department of Defense Instruction (DoDI) 5525.13, to receive approval to use deputized law enforcement powers, and that POMPD officials continue to direct POMPD officers to arrest civilian criminal suspects without authority, violating the rights of civilians and placing officers at risk of liability for their actions.

II. CONDUCT OF THE INVESTIGATION

On December 9, 2020, the Army General Counsel forwarded the OSC referral to the POM Office of the Staff Judge Advocate (OSJA) for appropriate action, including the initiation of an investigation into the allegations and appointment of an Investigating Officer (IO) pursuant to Army Regulation (AR) 15-6, PROCEDURES FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS, and taking appropriate corrective actions. Based on the investigation, an Army report would be prepared for submission to OSC as required by 5 USC § 1213 for the above captioned OSC case.

On December 23, 2020, the Deputy Garrison Commander, U.S. Army Garrison (USAG) POM, appointed an Investigating Officer (IO) to conduct the AR 15-6 investigation and to prepare the draft Army report addressing the allegations made by the Complainant to the OSC. The purpose of the investigation was to determine the validity of the allegations and to make findings concerning whether any wrongdoing occurred, and if so, by whom, and whether adequate policies and procedures are in place to preclude any recurrence of any improprieties, irregularities, or misconduct.

The IO met with a legal advisor from the POM OSJA on December 23, 2020 to receive his legal briefing and gain a better understanding of the scope of the investigation and procedures involved prior to initiation of the investigation or meeting any witnesses. In addition to the Complainant, the IO interviewed ten other witnesses. Of the ten witnesses interviewed aside from the Complainant, one was the Director of Emergency Services (DES), one was the Chief of Police (COP), one was the Deputy Chief of Police (Deputy COP), two were former COPs, four were current POMPD DACPs, and one was a CID agent stationed elsewhere. Two witnesses

suggested by the Complainant declined to participate. These witnesses were no longer federal employees and could not be compelled to participate.

All of the interviews were conducted in person, by phone, or via Microsoft Teams. Initial contact was made with each potential witness by e-mail or phone and each was requested to participate in an AR 15-6 administrative investigation based on the understanding that they had relevant information or evidence relevant to the subject investigation, and that they must not discuss the investigation with anyone other than a properly detailed investigator.

Initiation of the interviews was delayed significantly after the legal brief due to holidays, the Complainant's sick leave, and the inability to coordinate a time and date that worked for both the Complainant and her attorney. Due to the short suspense for the investigation, the IO interviewed the current COP on January 6, 2021, and the Deputy COP on January 7, 2021 before interviewing the Complainant. On January 9, 2021, the IO was able to interview the Complainant with her attorney present and interviews with the subsequent eight witnesses followed.

In total, the IO interviewed eleven witnesses [TAB 31] and collected and analyzed approximately 250 pages of documentation. The IO signed his Report of Investigation on January 25, 2021. On February 17, 2021, once a legal review was complete, the Approving Official, the Deputy Garrison Commander, USAG, approved the IO's report and accepted all of his findings and recommendations, with one modification.

III. BACKGROUND

The Investigating Officer (IO) began his investigation on December 23, 2020. The IO started by reviewing the OSC memorandum referring the Whistleblower allegations and AR 15-6 in order to develop an Investigation Plan. As provided for in the IO's Appointing Order, the purpose of the IO's investigation was to ascertain answers to the following questions:

(1) Do POM PD police officers apprehend civilians, under the jurisdiction of USAG POM, IAW AR 190-56, para. 5-2a and 10 U.S.C. § 807?

(2) If POM PD police officers apprehend civilians under jurisdiction of USAG POM, does the apprehension continue for longer than is reasonably necessary to issue citations or turn the "subject over to the appropriate civilian or military authorities"?

(3) Do POM PD police officers arrest civilians, as defined by 10 U.S.C. § 809?

(4) Describe the process POM PD police officers use to transfer subjects to the custody of other law enforcement agencies, or the Monterey County Detention Center.

(5) Have the supervisors at POM PD requested that their officers be deputized under DoDI 5525.13?

Because AR 190-56, THE ARMY CIVILIAN POLICE AND SECURITY GUARD PROGRAM, does not define the terms apprehension or arrest, 10 U.S.C. §§ 807, 809 were provided only as references. These terms were not provided to imply that civilians are always covered by the U.C.M.J. though, admittedly, this caused some confusion for some witnesses during the course of the investigation.

At the conclusion of the witness interviews and review of documentary evidence, the IO provided findings and recommendation for all of the above questions. The testimonial and documentary evidence gathered during the AR 15-6 investigation resulted in a Report of Investigation (ROI) that served as the basis for the Army Narrative Report.

To facilitate a better understanding of the facts and circumstances associated with the Whistleblower's allegations to the OSC, and to permit a more informed assessment of the testimonial and documentary evidence collected in this matter, it is important to understand the relevant organizations' mission and functions as well as their roles and responsibilities. Additionally, a working knowledge of the laws, rules, and regulations that govern Army law enforcement under federal and state authorities is also essential to analyzing the merits of the Whistleblower's allegation. A summary of those relevant authorities is provided below.

IV. ORGANIZATION ROLES AND RESPONSIBILITIES

A. Command Structure on the Presidio of Monterey (POM).

1. POM is a closed installation that houses both the USAG POM and Defense Foreign Language Institute Foreign Language Center (DLIFLC) Headquarters, as well as the language schoolhouses, support facilities, and barracks for multiple services (Army, Air Force, Navy, and Marines).

2. The Garrison Commander, USAG POM, is responsible for providing law enforcement support to POM, while the Commander, DLIFLC, exercises General Court Martial Convening Authority (GCMCA) over U.S. Army soldiers stationed on POM and under his geographic jurisdiction. The Senior Commander for POM is the Commanding General, Combined Arms Center, Fort Leavenworth, KS.

3. Ord Military Community (OMC) is an open ungated community that primarily consists of Residential Community Initiative (RCI) housing and military support facilities (*e.g.*, Commissary, PX, AAFES Fuel Station, ACS, etc.). Unaffiliated civilians, DoD civilians, and military members occupy the housing on OMC. Additionally, OMC has several main thoroughfares used to traverse the peninsula by both residents and non-residents.

B. Jurisdiction for the POM.

1. The jurisdiction on both OMC and POM is concurrent, meaning it is subject to both federal and state jurisdiction. In the case of OMC, law enforcement responsibility is handled primarily by the POMPD DACPs, while certain offenses fall under the purview of CID or the FBI.

2. The City of Seaside Police Department (Seaside PD) may, on occasion, supplement POMPD's law enforcement activities on OMC. Responsibility for the prosecution of criminal conduct may fall to the military, the U.S. Attorney's Office (USAO), or the Monterey County District Attorney's Office (MCDA).

3. POMPD does not have facilities suitable for detaining personnel for anything more than a short duration in order to facilitate citation and transfer of that person to another law enforcement agency. Usually, it is the Monterey County Detention Center that effects arrest and long-term detention. However, for certain federal offenses, a subject could be transferred to U.S. Marshals who could then effect an arrest.

V. RULES AND REGULATIONS GOVERNING ARREST AND APPREHENSION AUTHORITY OF DACPs

Under DoDI 5525.13 [TAB 15], DACP are prohibited from arresting individuals on a military installation under state or local law enforcement authority. Though DACP are generally prohibited from executing an arrest, neither Federal law nor DoD policy prohibit DACP from apprehending civilians for violations committed on a military installation for the purpose of issuing a citation or transferring the individual to an appropriate Federal, state, or local law enforcement agency.

DoDI 5523.13, makes clear that "It is DoD policy to NOT expand DoD law enforcement authorities by seeking deputized State or local law enforcement authorities" (emphasis in original). This is consistent with the strictures of AR 190-56, para. 5-2a [TAB 13], which provides DACPs "performing law enforcement and security duties authorized by the installation or activity commander . . . can apprehend any persons found on the installation or activity for offenses committed on post that are felonies, misdemeanors, breaches of the peace, a threat to property or welfare, or detrimental to good order and discipline. Such apprehension authority is limited to issuing citations and turning the subject over to the appropriate civilian or military authorities."

AR 190-56 goes even further in support the DoD position on deputation and outlines the rationale for the prohibition. In para. 5-4 of that same regulation it states "Because of potential conflicts of interest and issues with 18 USC 1385 (The Posse Comitatus Act), it is Army policy that DACP/SGs will not be deputized or exercise any additional authority or jurisdiction granted by local, state, or Federal Governments to perform law enforcement duties on or off a military installation or facility while wearing the duty uniform and / or badge" (emphasis added). As a result, DoDI 5523.13 establishes four threshold requirements that must be met prior to a request for exception to policy.²

² Commanders seeking an exception to the prohibition must first show that "The ability to perform an essential command law enforcement function within the jurisdiction is significantly hindered by a lack of authority to enforce State or local laws; ... The need for such law enforcement authority cannot be met effectively by assistance from law enforcement agencies with such authority; ... Adequate internal safeguards and management controls exist to ensure proper exercise of the authority; and ... The advantages to possessing the authority can reasonably be

Unfortunately, no Army regulation defines apprehension or arrest. Though the UCMJ does not generally apply to civilians, 10 U.S.C. § 809(a) is instructive in that it defines *arrest* as “the restraint of a person by an order, not imposed as punishment for an offense, directing him to remain within certain specified limits.” *Apprehension*, on the other hand, is defined as “the taking of a person into custody.” 10 U.S.C. § 807(a). Although the RULES FOR COURTS-MARTIAL (R.C.M) acknowledge that apprehension “is the ‘equivalent’ of arrest in civilian terminology,” military law distinguishes apprehension from arrest as a separate and distinct act. *See* R.C.M. 302, DISCUSSION.

When a military service member is apprehended by military law enforcement officials for an offense triable by court-martial, the service member is retained in custody until the individual’s commander is notified. R.C.M. 302. Upon notification, the commander may impose a variety of restrictions upon the individual ranging from conditions on liberty³ to confinement⁴ while disposition of an offense is pending. *See generally* R.C.M. 304 and 305. If a commander orders a service member to physically remain within certain specified limits, either within the installation or in a confinement facility, the directive is tantamount to arrest within the Federal definition.⁵

When a civilian is apprehended by military law enforcement officials for an offense that is punishable under state or Federal law, the military commander and law enforcement officials generally do not have authority to place the individual “under arrest” within the meaning of 10 U.S.C. § 809(a). Instead, Federal law authorizes military police and DACPs to place individuals into custody for a limited period of time in order to issue a citation or transfer the individual to an appropriate state, local, or Federal law enforcement agency for disposition of the offense under the appropriate forum. Although the provisions of 10 U.S.C. § 807 *et seq.* largely apply to the commander’s authority to apprehend or arrest personnel subject to the UCMJ, 10 U.S.C. § 809(e) clearly states that “[n]othing in this article limits the authority of persons authorized to apprehend offenders to secure the custody of an alleged offender until proper authority may be notified.”

Federal courts agree that law enforcement authorities acting on behalf of a military commander may apprehend civilians for offenses committed on post. *See, e.g., United States v. Griley*, 814 F.2d 967, 976 (4th Cir. 1987) (military investigators may look into violations of civil law that occur on military bases); *United States v. Banks*, 539 F.2d 14, 16 (9th Cir. 1976)

expected to exceed the disadvantages likely involved in exercising the authority.” If these threshold requirements are satisfied, the commander must then comply with the additional guidelines in sections 6 and 7 of that same instruction.

³ “Conditions of liberty are imposed by order directing a person to do or refrain from doing specified acts. Such conditions may be imposed in conjunction with other forms of restraint or separately.” R.C.M. 304(a)(1).

⁴ “Pretrial confinement is physical restraint, imposed by order of competent authority, depriving a person of freedom pending disposition of offenses.” R.C.M. 304(a)(4) and 305.

⁵ R.C.M. 304(a)(3) states that “Arrest is the restraint of a person by oral or written order not imposed as punishment, directing the person to remain within specified limits; a person in the status of arrest may not be required to perform full military duties such as commanding or supervising personnel, serving as guard, or bearing arms. The status of arrest automatically ends when the person is placed, by the authority who ordered the arrest or a superior authority, on duty inconsistent with the status of arrest, but this shall not prevent requiring the person arrested to do ordinary cleaning or policing, or take part in routine training and duties.”

(military personnel are authorized by statute to detain civilians for on-base violations of civil law); *Applewhite v. United States Air Force*, 995 F.2d 997, 998 (10th Cir. 1993) (military law enforcement agents can detain a civilian suspected of possessing contraband long enough “to inquire as to whether civilian authorities had any interest in taking over any prosecution.”); *United States v. Rogers*, 388 F. Supp. 298, 301 (E.D. Va. 1975) (finding that “as long as the military respects the rights guaranteed by the Fourth Amendment’s prohibition against unreasonable searches and seizures, the military need not be bound by all of the procedural formalities that are imposed upon civilian law enforcement agencies.”).

Although AR 190-56 does not define apprehension, the definitions above seem reasonably contemplated within all Army Regulations that relate to apprehension of subjects. *See* AR 190-30, MILITARY POLICE INVESTIGATIONS, para. 4-11 (authorizing military police and DAC investigators to apprehend and detain civilians committing offenses on U.S. Army installations until they can be released to an appropriate Federal, state, or local law enforcement agency); AR 195-2, CRIMINAL INVESTIGATION ACTIVITIES, para. 3-23 (authorizing CID agents to apprehend civilian personnel on military installations until they can be released to an appropriate Federal, State, or local law enforcement agency).

Based on the unique environment in which military authorities operate, the apprehension and arrest distinctions makes sense. Military commanders are specifically tasked with maintaining the safety, health, welfare, good order and discipline of a military community. If an individual (military or civilian) is suspected of engaging in conduct that constitutes a violation of law, or poses a danger to the military community, the commander, by operation of military law enforcement officials, may apprehend the individual in order to (1) ascertain whether a threat or violation has occurred, (2) issue a citation, or (3) transfer the individual to the appropriate authority for disposition of the offense. While a military commander may direct the arrest of a service member for an offense triable by court-martial, Federal law augments the military commander’s lack of authority over civilian personnel by permitting apprehension for a period no longer than is reasonably necessary to issue a citation or turn the subject over to the civilian law enforcement agency for further action.

State laws generally do not provide for a similar arrest and apprehension distinction. Under CALIFORNIA PENAL CODE § 834, arrest is defined as “taking a person into custody, in a case and in a manner authorized by law.” Although the State definition of arrest is functionally synonymous with the Federal definition of apprehension under 10 U.S.C. § 807(a), state law does not alter the scope of authority under which military law enforcement officials operate. U.S. CONST. art. VI, § 2. Critically, military law enforcement officials may place an individual suspected of criminal misconduct in custody; complete state law enforcement reports; tender evidence or other investigative materials to state or Federal law enforcement agencies; and offer testimony as witnesses in state or Federal trials without expanding the Federal government’s authorization.

VI. DISCUSSION

The Office of Special Counsel (OSC) requested that the Army investigate the following allegations:

OSC Referred Allegation 1: POMPD officials have not requested the authority, pursuant to Department of Defense Instruction (DoDI) 5525.13, to receive approval to use deputized law enforcement powers.

OSC Referred Allegation 2: POMPD officials continue to direct POMPD officers to arrest civilian criminal suspects without authority, violating the rights of civilians and placing officers at risk of liability for their actions.

The facts and findings described herein directly address the aforementioned allegations:

a. Summary of Key Facts and Findings

OSC Referred Allegation 1:

The IO found that POMPD officials have not requested the authority, pursuant to DoDI 5525.13, to receive approval to use deputized law enforcement powers.

- Witnesses with years of experience in law enforcement and emergency services, as well as multiple Garrison Commanders, and legal advisors, assessed the circumstances of law enforcement on the Presidio, and none determined that the circumstances merited divergence from DoD policy and Army Regulation to NOT seek deputation. [TAB 2 – Statement of Former DES; TAB 4 – Statement of Deputy COP; TAB 5 – Former COP; TAB 6 – Former COP and DES].
- Each relevant witness notes that the idea of a deputation request was floated during each of their tenures, and each time it was deemed that such a request was not required, or did not meet the threshold requirements of DoDI 5525.13.
 - “This topic was brought to the attention of [the former Garrison Commander] He discussed the topic of deputization with [the SJA] and myself. Neither [the SJA] nor I believed that there was a need for deputization. [The former Garrison Commander] agreed with our assessment.” [TAB 2]
 - “The idea has been floated a number of times, but has never been supported by the Director of Emergency Services, Staff Judge Advocate or the Garrison Commander.” [TAB 4]
 - “While I was the Police Chief from 1 July 2013 until on/or about 27 October 2015, no.” [TAB 5]
 - “Consideration of deputizing POM PD police officers was raised and briefly considered during my tenure as Chief of Police but rejected as it was determined to be unnecessary and unjustified overreach of authority.” [TAB 6]

OSC Referred Allegation 2:

The IO found that the preponderance of the evidence made clear that POMPD officers only use their authority to apprehend civilian suspects for such time as is reasonable necessary to either cite and release or transfer to the custody of a competent civilian law enforcement authority for continued detention or arrest. The IO found that POMPD DACP are not ordered to arrest civilians in violation of their lawful authorities.

- Most witnesses interviewed clearly understood that POMPD only has the authority to apprehend civilians on the installation.
 - “Yes, POM PD Officers apprehend civilians IAW AR 190-56” [TAB 2]
 - “POM Police Officers apprehend civilians” [TAB 4]
 - “POM DACP police officers have the authority, in the course of normal duties, to apprehend civilian or military personnel on the installation for criminal offenses.” [TAB 6]
 - “The authority of POM PD police officers is limited to apprehension.” [TAB 6]
 - “Yes we apprehend a civilian suspect and turn him/her over to the proper authorities I.E. Monterey County Sheriff’s Department.” [TAB 7]
 - “All POM Police Officers and Supervisory Police Officers have been given direction on this matter; we have been instructed that POM Police Officers are only authorized to apprehend offenders.” [TAB 8]
 - See also [TABs 3, 9, 11]
- Most POMPD and DES personnel, current and former, stated that the duration of the apprehension of civilian subjects persisted no longer than reasonably necessary to cite and release, or transport to competent civilian authorities for further processing.
 - “No, the apprehension continues only until they can be turned over to the Monterey County Jail.” [TAB 2]
 - “No. The apprehension and custody are for the minimum amount of time necessary to process required paperwork and either cite and release or transport to the County Detention Facility to turn over to the Sheriff’s Office. Some incidents may require more time than others, but none is considered unreasonable.” [TAB 4]
 - “Apprehension authority requires that subject(s) be turned over to the appropriate authority (civilian or military) for custody as soon as practical.” [TAB 6]

- “No we apprehend an individual for the time it takes to complete an investigation or to issue a citation to the individual.” [TAB 7]
- Does the apprehension continue longer than is reasonable necessary? “No. Absolutely not.” [TAB 8]
- “Officers from what I have observed temporarily detain individuals long enough to conduct their criminal investigation and determine if they have probable cause to issue a citation, transport to the station for processing and release to the appropriate military unit or civilian authorities.” [TAB 11]
- POM PD SOPs clearly define the authority of POM police officers to apprehend, cite and release, or transfer civilian subjects to the custody of the Monterey County Detention Center.
 - SOP 1.05 Authority and Jurisdiction (25 April 2018) para. 5c provides “The authority of POM police officers performing law enforcement duties derives from the Senior Commander of Presidio of Monterey and from AR 190-56. The POM police have the authority to apprehend persons subject to the UCMJ and release them to their chain of command, detain civilians and issue them citations; or release them to the appropriate civilian or federal authorities for disposition.” [TAB 21]
 - SOP 1.05 further provides “Enforcement is accomplished through apprehensions of suspected violators and the subsequent rendering of written reports to Commanders, Federal Magistrate and the Superior Court of California, County of Monterey, California.” [TAB 21]
 - Finally SOP 1.05 makes clear “In the performance of duties, POM police officers have the power of apprehension and detention within their jurisdiction. ... If a felony is observed to be in progress, POM police officers may take immediate actions to neutralize the situation and detain subjects for the civil authorities.” [TAB 21]
 - SOP 2.04 Processing of Offenders (29 April 2011) para. 5 describes the procedures for “Apprehension of Offender.” It provides, “ In cases where the offender is a civilian being cited for a misdemeanor they will be cited ... and a court date will be given to the offender Any civilian being cited who does not have a valid reason for being on the installation will be escorted to the nearest gate.” [TAB 22]
 - SOP 2.04 further provides “Detained civilian(s) will be courteously treated, processed as quickly as possible, and either released or transported to the post boundaries and released, when appropriate, or transported to Monterey County Jail.” [TAB 22]

- Multiple legal reviews have been rendered throughout the years that make clear POMPD only has the authority to apprehend, not arrest, civilian criminal offenders. [TABs 17-19]
- Many officers describe the training they receive on the Posse Comitatus Act (PCA), regularly provided by attorneys in the Office of the Staff Judge Advocate, as well as the DACP Academy. Those materials make clear that POMPD officers only have the authority to apprehend civilians, and that violations of the PCA may result in personal criminal and civil liability. [TAB 16]
- The majority of law enforcement professionals interviewed made clear that POMPD officers do not arrest civilians, but rather apprehend IAW AR 190-56. Rather it is the civilian law enforcement authorities that effect an arrest if warranted.
 - “POM PD officers do not arrest civilians, they apprehend civilians IAW AR 190-56” [TAB 2]
 - “Civilian persons apprehended by POMPD are taken to the county jail and turned over to the appropriate civilian authority there. The person is provided with a court date by county jail personnel.” [TAB 3]
 - “Once a subject is apprehended, they are processed. Depending on the crime, subject is either cited and released, turned over to the subject’s unit ... or transported to the County Jail.” [TAB 4]
 - “Per direction of the IMCOM (formerly IMA) Provost Marshal at the time, on apprehension of a civilian, a request was made of the appropriate LE agency to pick-up a subject from the POM PD station. In cases where the civilian agency was unable/unwilling to provide transportation, that fact was documented and POM PD transported the individual to the appropriate agency. In instances of minor infractions, the subject would either be cited and released or escorted outside the installation boundaries.” [TAB 6]
 - “Do POM PD officers arrest civilians ... ?” “No. POM Police Officers apprehend civilians, when appropriate.” [TAB 8]
 - “No. We apprehend [civilians] and turn over to appropriate authority.” [TAB 9]
 - “We apprehend and turn the subject over to Monterey County. Monterey determines what their confinement will be, if any.” [TAB 9]
 - “No, as I understand the code, under authority of the Garrison Commander we apprehend.” [TAB 10]
- Nearly every law enforcement professional interviewed stated that they are not ordered to arrest civilian criminal suspects without authority.

- “POM PD supervisors have not and do not direct POM PD officers to arrest civilians.” [TAB 2]
- “Have you ever directed a POMPD to arrest?” “No.” [TAB 3]
- “Are you aware of any occasions where Supervisors directed, and continue to direct, an Officer(s) to arrest civilians?” “No.” [TAB 6]
- “We are not ordered to arrest anyone while on-scene we notify our Watch Commander of what we have and give our input. The Watch Commander determines if the criminal offense warrants us to cite and release the suspect or if the suspect needs to be transported to Monterey County Sheriff’s Department to be turned over.” [TAB 7]
- “Are you aware of any occasions where Supervisors directed, and continue to direct, an Officer(s) to arrest civilians without authority?” “No. Absolutely not.” [TAB 8]
- “Are you aware of any occasions where Supervisors directed, and continue to direct, an Officer(s) to arrest civilians without authority?” “No, I am not.” [TAB 9]
- “All department police officers are trained and aware that their authority to apprehend comes under the authority of the Garrison Commander. I am not aware of any actions by other supervisors as described.” [TAB 10]
- For a detailed description of the process of apprehension, citation and release or transfer see [TAB 8].
- Contrary to the overwhelming majority of statements and evidence gathered in the investigation, there are three statements in the investigation that imply unlawful arrests of civilians are taking place on POM. One was the Complainant. Another was a former Chief of Police who misunderstood an MOU between USAG POM and the local DA. The last was a CID agent from another installation who reviewed a case long ago and had concerns about the process.
 - “While I was Police Chief ... POM Police officers arrested and processed civilians” [TAB 5]. According to this witness, this happened pursuant to an expired MOU with the DA’s office [TAB 20]. However, this witness was misreading the provision of the MOU as explained below. This characterization by the witness is a misuse of the term arrest.
 - As one former COP and DES describes, “This policy was drafted to give POM PD lead responsibility for coordinating the efforts of civilian law enforcement personnel in the lawful execution of their duties on the installation. This was intended to preclude civilian enforcement actions

on the installation without prior coordination through PD, legal or command channels as had happened in the past.” [TAB 6]

- The language of the expired MOU is clear. As it pertains to the arrest of civilians on POM or OMC, “The presentation of a valid warrant of arrest, indictment or information, together with sufficient information to identify the person sought as the person who allegedly committed the offense(s) charged and a statement of the maximum sentence which may be imposed upon conviction will be made to the POM PD” (emphasis added) [TAB 20]. The MOU goes on to detail procedures for arrest that require, by reference to another paragraph, “a determination of legal sufficiency from the OSJA” which then follows with “assist[ance] in the execution of valid arrest warrants, indictments, presentments and information on behalf of civilian authorities as appropriate” (emphasis added). It goes on to make clear, “If exigent circumstances prevent prior notification of POMPD in the arrest of a civilian or SM on the installation, the agency shall contact PM PD immediately after making the arrest” The civilian arrest provisions of the MOU outline a notification procedure whereby civilian law enforcement professional effect the arrest, at times with assistance by POM PD. There are no provision in the MOU that provide that POM PD will effect an arrest on the installation.
- One CID agent at another installation reviewed a case file from POM “many years ago” and “noted in the case file the Presidio of Monterey Department of the Army Police arrested the suspect in the case, transported the suspect to the local county jail for booking and then completed the felony arrest documents for the arrest.” [TAB 10] The agent told the Complainant that “they may be in possible violation of DoD and Army policy ... Shortly after this I believe the Installation Command Provost Marshal also looked into this.” [TAB 10]
- The Complainant’s statement and exhibits focus on the reclassification decision and the impact that a lack of arrest authority had on her situation. [TAB 1]
 - “My classification appeal decision [TAB 28] I received on 24 July 2020, from the Department of Defense, Defense Civilian Personnel Advisory Service (DCPAS), states, I do not have statutory arrest authority deriving through delegation or deputization. The decision, indicates my position cannot be classified to the GS-0083 series. Thus, I was reclassified. This affects my pay, as I was limited form overtime. ... My badge and gun were also taken away, which is humiliating to me, I am no longer considered a first responder so consider covid protocols for vaccination I am no longer eligible to receive such with my new job description from the classification or considered an essential worker which could have an adverse effect on me if furloughs are in place during budget issues.”
 - “I have struggled to understand why action was not taken on this issue, when there is a simple, no cost solution. I can only guess, outside of some political issue that I am not privy to, it may relate to the fact that retirement may be affected as

there is a category of special law enforcement retirement that POMPD officers are not being offered, despite performing law enforcement duties.”

- “Obviously, not being provided special law enforcement retirement has a fiscal effect on me.”
- “I feel this type of treatment is not fair or equal, it does not treat me with dignity or respect, and it appears retaliatory.”
- “I asserted my right to appeal which the decision was returned to me on 24 July 2020, indicated I could no longer be a 0083-detective supervisor due to ‘no statutory arrest authority’ or ‘deputation.’ The decision is requiring the agency to place me in a Supervisory position as an 1802, including being stripped of my weapon and credentials. This is after 16 years as a federal civilian Law Enforcement Officer.”

VII. INVESTIGATING OFFICER’S FINDINGS AND CONCLUSIONS

With respect to the Whistleblower allegations that the IO was asked to address by in the appointment order, the following are the IOs findings:

(1) Do POM PD police officers apprehend civilians, under the jurisdiction of USAG POM, IAW AR 190-56, para. 5-2a and 10 U.S.C. § 807?

A preponderance of the evidence supports the investigating officer’s (IO) conclusion that POM PD officers do apprehend civilians suspected of engaging in violations of state or Federal law on POM. The IO correctly applies the Federal definition of *apprehension* to the period of custody in which civilian personnel are detained by POM PD, and correctly determines that apprehension is conducted IAW AR 190-56, para. 5-2.

(2) If POM PD police officers apprehend civilians under jurisdiction of USAG POM, does the apprehension continue for longer than is reasonably necessary to issue citations or turn the “subject over to the appropriate civilian or military authorities”?

A preponderance of the evidence supports the IO’s conclusion that apprehension, when lawfully permitted, does not continue for longer than is reasonably necessary to issue citations or turn the subject over to appropriate civilian or military authorities. This finding is supported by numerous witness statements and SOPs clearly delineating POM PD’s temporary apprehension authority.

(3) Do POM PD police officers arrest civilians, as defined by 10 U.S.C. § 809?

The IO found that nine persons interviewed stated that POMPD officers do not arrest civilians. One person from a different installation expressed concern about an investigation he reviewed and advised it may have, without actually concluding, violated DoD and Army policy.

Another witness, a former COP, misunderstood the terms of an expired MOU and believed that POMPD officers could lawfully arrest civilians under that agreement. The IO found that the Complainant uses the term “arrest in lieu of apprehension, contrary to POM SJA’s explanation and clarification.” Finally, the IO found that because California only uses the term arrest, including in its systems and databases, this may contribute to the confusion between the terms at issue.

(a) In her sworn statement, the Complainant claims that the arrest / apprehension distinction does not apply to civilian personnel, and that individuals apprehended by POM PD are, by operation of state law, necessarily arrested within the meaning of CAL. PENAL CODE § 834. The Complainant’s arguments fail to find support in law and in fact.

(b) The Complainant’s argument overlooks the fact that DACP are not state actors. Although the Complainant correctly notes that POM PD are authorized by the State of California to arrest individuals for violations of state law and to testify as witnesses in state criminal proceedings, DACP performing law enforcement functions on a military installation operate under federal authority for purposes of enforcing federal law, or state law by assimilation. Accordingly, federal rules and definitions apply.

(c) As previously stated, 10 U.S.C. § 809(e) specifically authorizes military law enforcement officials to “secure the custody of an alleged offender until they can be released to the appropriate Federal, state, or local law enforcement agency.” Federal courts have found that this authority applies to civilian and military personnel alike. Looking to the definition of apprehension under 10 U.S.C. § 807, the act of placing an individual in custody is legally distinct from the act of placing an individual under arrest when the apprehension occurs under federal jurisdiction.

(d) In support of her argument, the Complainant provides arrest logs, billing reports, and State probable cause reports purporting to show that POM PD has arrested nearly 600 civilians on POM over a period of approximately 16 years. [TABs 23-25] Here, the IO correctly notes that POM PD may be adopting state terminology in law enforcement reports to effectuate the transfer of individuals to appropriate state law enforcement agencies. Regardless of the nomenclature used by POM PD, or state law enforcement agencies, the act of taking civilian personnel into custody on a military installation by DACP does not meet the Federal definition of arrest when individuals are temporarily detained and ultimately released to State or local law enforcement agencies where an individual may be lawfully released, arrested, booked, and subject to prosecution by state or local authorities.

(e) In his sworn statement, one witness states that during his tenure as the former Chief, POM PD, personnel did arrest civilians suspected of criminal misconduct on POM pursuant to an expired Memorandum of Understanding (MOU) between POM and various state and local law enforcement partners. [TABs 5, 20]. Although this witness contends that POM PD was authorized to effectuate arrests under this authority, his assertion also fails to find support in law and fact.

(f) Based on the evidence at issue, the witness above appears to misapprehend the terms stated in the MOU. The MOU (expired 1 January 2013) contemplates an understanding between local, state, and military law enforcement authorities relating to the investigation and prosecution of offenses pursuant to the Assimilative Crimes Act under 18 U.S.C. § 13. Here, the IO correctly determined that the MOU does not purport to give POM PD authority to arrest civilians on post. Rather, the MOU merely articulates an understanding that local law enforcement officials will coordinate with POM PD prior to arresting any civilian or military personnel on POM in order to “reduce the possibility of conflict and confusion.”

(g) This witness also appears to conflate the Federal definition of arrest and apprehension throughout his statement. Although the witness asserts that “[t]he term ‘arrest’ with regards to military personnel is different than that of the arrest of a civilian, as described in [10 U.S.C. Section] 809,” he indicates that it was well understood by supervisors and personnel alike that civilians apprehended for violations of law should be transferred to local law enforcement authorities “as soon as possible.” [TAB 5]

(h) These statements are strong evidence that the distinction between Federal and state definitions of arrest can be confusing for some personnel, and illustrate the need for further training and clarification on official POM PD documents and reports.

(4) Describe the process POM PD police officers use to transfer subjects to the custody of other law enforcement agencies, or the Monterey County Detention Center (MCDC).

The IO found consistency in what each witness reported in terms of procedures for handling civilian criminal offenders on the installation. Essentially, if, after consultation with the Watch Commander, an officer determines there is sufficient evidence to warrant transfer to MCDC, the subject is taken to the POMPD station and searched for officer safety. Personal property is secured and inventoried. Fingerprints and photos are then taken. If an interview of a suspect is appropriate, a rights advisement is first given. Misdemeanor violators are cited and released. For serious offenses, coordination with local law enforcement takes place. Those offenders are transferred to the custody of local law enforcement or the MCDC. There the officer may render a probable cause statement relating the details of the offense then known to the officer. That statement is then reviewed by MCDC personnel or a civilian judge. If, upon review, arrest is deemed appropriate, MCDC personnel take the subject into custody for continued detention or arrest. [TABs 3-4, 6-9, 22-23]

(5) Have the supervisors at POM PD requested that their officers be deputized under DoDI 5525.13?

The IO found that there is a long history of discussion and consideration of the issue of deputation at the Presidio. One witness recalled the discussion going as far back as 1989/1990 when the POMPD COP requested arrest authority. Another COP requested the authority in 1994-95. Most recently, the Complainant engaged a former Garrison Commander in October 2017 (when she received notice of her position reclassification). In September 2018, the Complainant engaged the next Garrison Commander, after she filed an IG complainant and

engaged the Provost Marshal General, and her local Congressman, all to no avail. In July of 2020, the complainant most recently engaged the current Garrison Commander on the matter. Each of these commanders, in consultation with DES leadership and POM legal advisors, determined that there was insufficient evidence to warrant a request for departure from DoD and Army policy on deputation of DACPs.

The IO further found that POMPD has successfully performed its mission without the requirement and use of deputized law enforcement powers. Noting that state deputation should only pursued under specific conditions, the IO found that interviews and evidence make clear those conditions have not been met, and that “POM PD using apprehension authority, and not arrest authority, has always acted in compliance with Army Regulation and DoD Instruction.”

(6) Additional Finding of the IO

Though not a question asked of the IO, the IO found that the Complainant “has been adversely affected professionally and personally” by the lack of arrest authority. Because of that, she could no longer retain her position and grade as a Detective Supervisor GS-0083, and upon appeal of this reclassification, was further changed in series. These changes resulted in a loss of ability to have a badge, carry a firearm, and a potentially adverse effect on her retirement.

VIII. CONCLUSIONS FOR REFERRED OSC ALLEGATIONS

Based on the facts and findings at Parts VI & VII of this report, the conclusions for the referred OSC allegations are as follows:

OSC Referred Allegation 1: POMPD officials have not requested the authority, pursuant to Department of Defense Instruction (DoDI) 5525.13, to receive approval to use deputized law enforcement powers.

The IO found that POMPD officials have not requested the authority, pursuant to DoDI 5525.13, to receive approval to use deputized law enforcement powers.

OSC Referred Allegation 2: POMPD officials continue to direct POMPD officers to arrest civilian criminal suspects without authority, violating the rights of civilians and placing officers at risk of liability for their actions.

The IO found that the preponderance of the evidence made clear that POMPD officers only use their authority to apprehend civilian suspects for such time as is reasonable necessary to either cite and release or transfer to the custody of a competent civilian law enforcement authority for detention or arrest. POMPD officers are not ordered to arrest civilians in violation of their lawful authorities.

IX. INVESTIGATING OFFICER’S RECOMMENDATIONS

The IO recommended that the current Garrison Commander undertake a reassessment of the need, or lack thereof, to request deputation in contravention of DoD and Army policy. The IO

further recommended that the OSJA review POMPD SOP provisions relevant to apprehension and jurisdiction to ensure they remain in compliance with authorities and clearly understandable. The IO also recommended that all POM PD officers receive and annual training on regulations, definitions, and practice of apprehension authority, though this is already a practice within POMPD. Additionally, the IO recommended collaboration with non-military law enforcement authorities to ensure that POM PD's use of apprehension is understood. Finally, the IO recommended that all law enforcement reports and paperwork are reviewed to ensure that the apprehension / arrest distinction is clear.

X. APPROVING AUTHORITY'S ACTIONS

The Approving Authority approved the IO's findings and recommendations, with the exception of the first recommendation. The Approving Authority modified that recommendation to provide "The Garrison Commander (GC) should not request deputized state or local law enforcement authority for DA Civilian Police Officers, as such authority is not required under DODI 5525.13."

Presidio of Monterey Police Department

Apprehension versus Arrest

Monterey, CA

Office of Special Counsel File Number DI-21-000069

<u>Tab</u>	<u>Description</u>
TAB 1	DA Form 2823, Sworn Statement, [REDACTED], Complainant
TAB 2	DA Form 2823, Sworn Statement, [REDACTED], Director of Emergency Services
TAB 3	DA Form 2823, Sworn Statement, [REDACTED], Chief of Police (COP)
TAB 4	DA Form 2823, Sworn Statement, [REDACTED], Deputy COP
TAB 5	DA Form 2823, Sworn Statement, [REDACTED], Former COP
TAB 6	DA Form 2823, Sworn Statement, [REDACTED], Former COP
TAB 7	DA Form 2823, Sworn Statement, [REDACTED], Traffic Collision Investigator
TAB 8	DA Form 2823, Sworn Statement, [REDACTED], Police Officer
TAB 9	DA Form 2823, Sworn Statement, [REDACTED], Watch Commander
TAB 10	DA Form 2823, Sworn Statement, [REDACTED], CID Agent
TAB 11	DA Form 2823, Sworn Statement, [REDACTED], Operations Officer
TAB 12	MFR Witness Declination, [REDACTED], David Wishart
TAB 13	AR 190-56, The Army Civilian Police and Security Guard Program Extract
TAB 14	10 U.S.C. §§ 807, 809 (Reference Definitions Only)
TAB 15	Dept of Defense Instruction (DoDI) 5525.13, Limitation of Authority to Deputize DoD Uniformed Law Enforcement Personnel by State and Local Governments
TAB 16	Posse Comitatus Act (PCA) Training Decks
TAB 17	OSJA PCA Information Paper, dtd. 1 SEP 08
TAB 18	OSJA Arrest versus Apprehension Information Paper, dtd. 20 APR 20
TAB 19	SJA MFR Arrest versus Apprehension, dtd. 13 DEC 20
TAB 20	Expired Law Enforcement Protocols MOU
TAB 21	POM PD SOP 1.05 Authority and Jurisdiction, dtd. 25 APR 18
TAB 22	POM PD SOP 2.04 Processing of Offenders, dtd. 29 APR 11
TAB 23	Probable Cause Statements, Superior Court of California, County of Monterey
TAB 24	Booking Ledger, County of Monterey

TAB 25	Billing Report, County of Monterey
TAB 26	Reclassification Decision Memo, dtd. 12 OCT 17
TAB 27	Complainant's IG Complaint, dtd. 31 OCT 17
TAB 28	DCPAS Classification Appeal Decision, dtd. 24 JUL 20
TAB 29	Management Assistance Report, dtd. 21 AUG 18
TAB 30	Various Emails Provided by Complainant
TAB 31	Witness List (only in Unredacted version)