



DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
MANPOWER AND RESERVE AFFAIRS
111 ARMY PENTAGON
WASHINGTON, DC 20310-0111

20 SEP 2013

Special Counsel Carolyn N. Lerner
U.S. Office of Special Counsel
1730 M Street, N.W., Suite 300
Washington, D.C. 20036-4505

RE: Whistleblower Investigation -- Kenner Army
Health Clinic, Fort Lee, Virginia (Office of
Special Counsel File Number DI-13-1252)

Dear Ms. Lerner:

In accordance with Title 5, United States Code (USC), Section 1213(c) and (d), the enclosed 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 his authority to me, as agency head, to review, sign, and submit to you the report required by Title 5, USC, Section 1213(c) and (d) [TAB A].

The Department of the Army (DA) has enclosed two versions of its Report. The first version of the Report contains the names and duty titles of military service members and civilian employees of the DA. This first version is for your official use only, as specified in Title 5, USC, Section 1213(e); we understand that, as required by that law, you will provide a copy of this first version of the Report to the whistleblower, the President of the United States, and the Senate and House Armed Services Committees for their review. Other releases of the first version of the Report may result in violations of the Privacy Act¹ and breaches of personal privacy interests.

The second version of the Report has been constructed to eliminate privacy-protected information and is suitable for general release. We request that only the second version of the Report be made available on your web-site, in your public library, or in any other forum in which it will be accessible to persons not expressly entitled by law to a copy of the Report.

¹ The Privacy Act of 1974, Title 5, USC, Section 552a.

INFORMATION INITIATING THE INVESTIGATION

By letter dated April 11, 2013, the Office of Special Counsel (OSC) referred to the SA specific allegations made by the whistleblower against Kenner Army Health Clinic (KAHC), Fort Lee, Virginia, which form the basis of this investigation and Report. Generally, the Whistleblower made the following three allegations:

OSC Referred Allegation 1: KAHC management improperly created an employer-employee relationship between the government and the psychometrist currently assigned to KAHC, a contract employee.

OSC Referred Allegation 2: KAHC management has continued this improper relationship despite being informed several times of the psychometrist's status as a contract employee.

OSC Referred Allegation 3: The improper relationship between the government and the contract psychometrist may violate the Federal Acquisition Regulation, the Anti-Deficiency Act, and other procurement guidelines.

OSC concluded that there is a substantial likelihood that the information that the Whistleblower provided disclosed a violation of law, rule, or regulation, under Title 5, USC, Section 1213.

CONDUCT OF THE INVESTIGATION

On April 25, 2013, the SA forwarded the OSC referral to the Commander, U.S. Army Medical Command (MEDCOM), and directed her to conduct an investigation and undertake any corrective action deemed necessary. This referral was appropriate because MEDCOM provides healthcare oversight and control of all medical centers and medical treatment facilities and activities in the Army as provided in Army Regulation (AR) 40-1, *Composition, Mission, and Functions of the Army Medical Department*, retrievable at http://www.apd.army.mil/pdffiles/r40_1.pdf.

In addition, on April 25, 2013, the DA Office of General Counsel (OGC) forwarded the SA's directive to the MEDCOM Office of the Staff Judge Advocate (SJA)² to facilitate the Commander, MEDCOM's investigation and appropriate action in this case.

On May 13, 2013, the MEDCOM Chief of Staff, appointed an Investigating Officer (IO) [TAB 1], under the provisions of AR 15-6, *Procedures for Investigating Officers and Board of Officers*, retrievable at http://www.apd.army.mil/pdffiles/r15_6.pdf,³ with a mandate to investigate the allegations referred by the OSC. Specifically, the IO was directed to investigate and determine the following:

² A Staff Judge Advocate (SJA) is the senior military attorney for a command.

³ AR 15-6 promulgates the procedures for Army administrative investigations. Army organizations frequently appoint investigating officers under provisions of AR 15-6 to investigate all manner of allegations and concerns.

- a. Whether KAHC officials have improperly created an employer-employee relationship between the government and the current psychometrist at KAHC, who is allegedly a contract employee.
- b. Whether Contract Psychometrist has been inappropriately treated with respect to any matters related to her performance, training opportunities, or her supervision.
- c. Whether management at KAHC has continued this improper relationship despite being informed several times of the psychometrist's status as a contract employee.
- d. If an improper employee-relationship has been created at KAHC, does this relationship between the government and the contract psychometrist violate the Federal Acquisition Regulation, Anti-Deficiency Act, or any other procurement guidelines?
- e. Whether there are other instances at KAHC of similar contractual improprieties have occurred with respect to the Video-teleconferencing coordinator and the KAHC Pharmacy Department?

On August 30, 2013, the IO completed the AR 15-6 Report of Investigation (ROI). In the course of the investigation, the IO interviewed the whistleblower and nine other witnesses germane to the matters referred.

BACKGROUND

To facilitate a better understanding of the facts and circumstances associated with the whistleblower's allegations to the OSC, and to permit a more knowledgeable assessment of the testimonial and documentary evidence collected from all of the witnesses, it is important to understand MEDCOM's mission, its functional relationships with supporting organizations, and how it uses contractors to execute its mission.

MEDCOM Mission

The U.S. Army Surgeon General (TSG) is dual-hatted as the Commander, MEDCOM. MEDCOM provides medical, dental, and veterinary capabilities to the Army and designated Department of Defense (DoD) activities. TSG is responsible for the development, policy direction, organization, and overall management of an integrated Army-wide health services system. [See AR 40-1, paragraph 1-6]. Among its many functions, MEDCOM provides medical and dental care to authorized beneficiaries worldwide; coordinates Army health services for Army, civilian, and Federal health care resources in a given health service area; and conducts health care education, training, and studies [AR 10-87, *Army Commands, Army Service Component Commands, and Direct Reporting Units*, paragraphs 15-2d and 15-3d, retrievable at http://www.apd.army.mil/pdf/r10_87.pdf].

In her role as Commander, MEDCOM, TSG exercises oversight and control of all medical centers and medical treatment facilities and activities in the U.S. Army, with the

exception of units in the field. Directly subordinate to MEDCOM are the Regional Medical Commands, multi-state command and control headquarters that allocate resources, oversee day-to-day management, and promote readiness among military treatment facilities in their geographic areas of responsibility [See AR 10-87, Chapter 15]. KAHC⁴ is an Army Health Clinic and is funded by, and receives operational oversight and guidance from, MEDCOM through the Northern Regional Medical Command.

Kenner Army Health Clinic

KAHC is a Military Treatment Facility (MTF) currently staffed by 92 military personnel, 144 civilians, and 62 contract employees who provide primary care and ancillary services to meet the health care needs of the 30,000 Soldiers, family members, and retirees in the Fort Lee, Virginia and surrounding communities. KAHC has general radiology, laboratory, and pharmacy capabilities and offers certain specialty care. KAHC is fully accredited by the Joint Commission on Accreditation of Healthcare Organizations.

KAHC Mission and Utilization of the Tele-health Initiative

The Commander, KAHC, oversees three main branches: Nursing, Clinical Services, and Administration, each of which operates under the direct supervision of a separate Deputy Commander. Under these three branches, there are seven outpatient clinics, nine specialty services, and three ancillary services, as well as four Preventive Medicine Programs. The Director of Clinical Services is responsible for the health services provided by the Division of Behavioral Health, which is, in turn, responsible for the services provided by the Psychology Department, led by Chief of Psychology. The Psychology Department is comprised of several sections, including the Psychometry section at issue in the OSC referred allegations, and is manned by five military personnel, five civilians, five contractor employees; three authorized positions are currently vacant. The Psychometry section is composed of only two individuals: the Whistleblower, a GS-11 Behavioral Sciences Coordinator; and Contract Psychometrist, a psychometrist contracted through Eagle Applied Sciences [TAB 2, Statement of Chief of Psychology, dated July 1, 2013].

On September 30, 2009, the U.S. Army Medical Research Acquisition Activity, Fort Detrick, Maryland, and Eagle Applied Sciences of San Antonio, Texas, entered into Contract W81XWH-09-C-0168 for Eagle to provide personnel to assist KAHC in implementing a new Army “Tele-health” initiative. This initiative would allow “. . . the Army to offer clinical services across the largest geographic area of any tele-health system in the world.”⁵ The

⁴ On 16 April 1962, Kenner Army Hospital was dedicated in memory of Major General Albert W. Kenner, Medical Corps, a veteran of World Wars I and II.

⁵ As described in Annex A, OPOD 13-38, *the Army Medicine 2020 Campaign Plan Governance*, “a. Army Tele-health is a global leader in providing innovative and comprehensive tele-health services, offering clinical services across the largest geographic area of any tele-health system in the world. As of 01 May 13, outreach spans 19 time zones in over 30 countries and territories at over 70 sites across all five Regional Medical Commands (RMCs) and over 90 sites in the operational environment. More than 20 specialties in Army Medicine use tele-health for the provision of care to beneficiaries. b. Overall, Army Medicine can increase access to care, reduce cost, and alleviate quality and readiness challenges through the appropriate and selective use of tele-health. Further information on the Tele-health initiative is provided in two articles that discuss this innovative approach to providing medical care.” [TABs 24a and 24b].

Contract Performance Work Statement (PWS) explained the scope of the contract and described the performance required of the contractor, as follows:

"1. Scope: This award provides for services to support the Tele-Healthcare Program. This program will provide the personnel and management support for an Army Medical Department (AMEDD) global Tele-Healthcare Program. This personnel support will provide the necessary infrastructure, management oversight, clinical and technical consultation, and healthcare services to build and sustain a global AMEDD Tele-Healthcare Program.

2. Background: The Office of The Surgeon General (OTSG) and the Medical Command (MEDCOM) Headquarters, also known as One-Staff, is undertaking efforts to establish an AMEDD global personnel and hardware infrastructure required to conduct Tele-Healthcare Program operations. The Tele-Healthcare Program personnel in this document will work at a Regional Medical Command Headquarters or in a Medical Treatment Facility and will support designated specialties and related programs within and among the Regional Medical Commands.

3. Objectives: The objective of this [statement of work] is to secure services in order to implement Phase II of the Army Tele-health program in a geographically dispersed manner.

4. Personal and Non-Personal Services: This contract incorporates the use of personal and non-personal services... (emphasis added).

...

6. Tasks: The contractor shall provide personnel support for the AMEDD in program execution of its Global Tele-health initiative by coordinating the personnel resources for the program. Tele-health initiative is the use of technology in the scheduled interaction between a health care provider and patient (provider-patient) and/or the interaction between two or more health care providers (provider-provider). All policies, procedures and guidelines used in treatment as usual, face-to-face interactions between healthcare provider and patient were adopted for the Tele-Healthcare Program." [TAB 3, Excerpts from Contract W81XWH-09-C-0168, September 30, 2009 with modification P0001, December 10, 2009].

When the government awarded Contract W81XWH-09-C-0168 in September 2009, the contract listed the following positions/duties in the *personal services* category table/matrix: Physician, Clinical Advisor (RN), Clinical Coordinator (LPN), Neurologist, Neuropsychologist, Occupational Therapist, Psychiatric Nurse, Psychology Technician, *Psychometrist*, Research Psychologist, Speech and Language Pathologist, TBI [traumatic brain injury]-Physician Assistant, and Clinical Psychologist (emphasis added).

The contract listed the following positions/duties in the *non-personal services* category: Administrative Assistant, Appointing Clerks, Coder, Data (Analyst, QM, Research), Portal Manager and Tele-health Technician.

[TAB 3, pages 12-13].

As originally awarded in September 2009, the contract identified the psychometrist⁶ position in the *personal services* category of the matrix. The contract included a detailed description of the psychometrist's position/duties in paragraph 19, together with descriptions of all other positions/duties listed in the contract as falling in the personal services category (the positions/duties listed in the non-personal services portion of the contract were detailed in a similar format in paragraph 20 of the contract). The contract described the duties and responsibilities of a psychometrist as follows:

“A Psychometrist is responsible for the administration and scoring of psychological and neuropsychological tests under the supervision of a clinical psychologist or clinical neuropsychologist. Additionally, a Psychometrist will also make note of behavioral observations during the course of the assessment that may be used by the psychologist to aid in test interpretation. The Psychometrist may also be responsible for collecting demographic information from a patient. Will use Tele-health systems when possible.

19.9.1. Administer and score psychological tests as defined in competencies for a Psychometrist I.

19.9.2. Score tests administered, including objective personality tests administered by Psychologist.

19.9.3. Provide a written summary of the patient's behavior during testing, including any interactions with the patient's parents or peers that may be observed incidentally.

19.9.4. Write progress notes in the medical record to keep hospital personnel informed of the status of referrals.

19.9.15. Recommending and implementing modifications to standard procedures for individual patients.

19.9.16. Appropriately managing patients manifesting behavioral or emotional disturbances and communication and consultation with supervising licensed psychologists, attending psychiatrists, and nursing staff.

[TAB 3, pages 27-28].

⁶ The National Association of Psychometrists describes the duties of a psychometrist, stating: “[a] Psychometrist is responsible for the administration and scoring of psychological and neuropsychological tests under the supervision of a clinical psychologist or clinical neuropsychologist. Psychometrist training should have emphasis on accuracy, validity, and standardization in administration, as well as accurately scoring assessments with appropriate norms and providing detailed behavioral observation of the examinee that may be used by the psychologist to aid in test interpretation. The Psychometrist may also be responsible for collecting demographic information from a patient. . . . Psychometrists have been utilized by psychologists and neuropsychologists since the 1930s.” [TAB 23].

Modification P0001 to Contract W81XWH-09-C-0168 was executed on December 10, 2009 [TAB 3, page 1]. Among other matters,⁷ this modification changed the psychometrist position/duties to the non-personal services category [See TAB 3, page 7] “due to the fact that less than 45% of their time is in direct patient care.” [See TAB 3, page 33]. When interviewed by the AR 15-6 IO, the Contracting Officer’s Representative (COR) responsible for the Tele-health contract explained that the psychometrist positions were changed to the non-personal services category because the psychometrists were responsible for administering tests and procedures ordered by others, but were not themselves diagnosing patients or prescribing tests and/or procedures. However, although the P0001 contract modification category and matrix moved psychometrist positions/duties to the non-personal services category, no corresponding change was made to remove the detailed description of a psychometrist position and its duties and responsibilities from paragraph 19, the personal services section, of the original contract to paragraph 20, the non-personal services section of the original contract, where it properly belonged after the modification. Rather, the detailed description of psychometrist positions/duties remained in the section of the original contract in which personal services positions/duties were enumerated. In short, the base Tele-health contract was not conformed to the contract modification that had changed all psychometrist positions/duties to non-personal services contract employees.

It should be noted that the Whistleblower’s first assignment with the KAHC Psychology Department began in January 2010. The Whistleblower was then a contract employee of Eagle Applied Sciences [TAB 4, Statement of the Whistleblower, dated May 17, 2013; TAB 2, Statement of Chief of Psychology, dated July 1, 2013] assigned by Eagle to perform the duties associated with the Tele-health contract’s psychometrist position. Thus, the Whistleblower’s service at KAHC began **after** the 2009 modification to the Tele-health contract that changed all psychometrist positions/duties to non-personal services.

After the Whistleblower began her duties as the contractor employee hired for the KAHC psychometrist position under the Tele-health contract, the management of the KAHC Division of Behavioral Health created a DA civilian GS-0101-11 position, Behavioral Sciences Coordinator, to assist in properly managing the increased workload that now justified a requirement for two psychometrists at Kenner. A condition of employment associated with this position was that the incumbent was required to be a Certified Specialist of Psychometry (CSP) through the Board of Certified Psychometrists and to be a member in good standing of the National Association of Psychometrists [TAB 5, Position Description, Behavioral Sciences Coordinator].⁸ The

⁷ The contract modification included a new provision under paragraph 19 that addressed the differences between the performance of a personal services contract position and a non-personal services position, stating as follows: “PERSONAL SERVICES. This contract is in part a personal services contract and is intended to create an employer-employee relationship between the Government and the individual contract health care providers only to the extent necessary for providing the healthcare services required under this contract. The performance of healthcare services by the individual contract health care providers under a personal services contract are subject to day-to-day supervision and control by healthcare facility personnel comparable to that exercised over military and civil service health care providers engaged in comparable healthcare services. . . .The authority for this contract is 10 United States Code 1089 and 10 United States Code 1091.”

⁸ The Tele-health contract contained NO requirement that the contractor employee psychometrist be either a Certified Specialist of Psychometry (CSP) through the Board of Certified Psychometrists or a member in good standing of the National Association of Psychometrists.

Whistleblower was hired into the GS-11 civilian position in February 2012. Almost concurrently, Eagle Applied Sciences hired a new contractor employee, to perform the psychometrist duties and responsibilities required by the Tele-health contract [TAB 4, Statement of the Whistleblower, dated May 17, 2013; TAB 2, Statement of Chief of Psychology, dated July 1, 2013]. Like the Whistleblower, Contract Psychometrist served at all times under the terms of the modified Tele-health contract that defined the position/duties of the psychometrist as non-personal services.

As a GS-0101-11, Behavior Sciences Coordinator, the Whistleblower's duties and responsibilities included the following:

“The incumbent provides screening, psychological, and neurological testing, and psycho-diagnostic evaluation for service members and other qualified beneficiaries with a variety of problems that can affect the ability of patients to function competently at work, home, school and/or in other situations. Assignments include the initial screening and evaluation of patients with all degrees of severity, some of whom may be uncooperative or hostile, providing psycho-diagnostic services, making preliminary interpretations of the data, developing recommended courses of action, and consultation with other professionals and commands. . . . The incumbent functions as a relatively autonomous psychometrician in administering and scoring psychological and neurological test batteries, interprets validity and significance of data collected, prepares written reports as directed by the Chief of Psychology or positionally equivalent authority that integrate the patient's psychosocial history and test data; makes recommendations for and coordinates further actions. The incumbent is responsible for the development and operation of the psychology and neuropsychology testing labs. In this role, is responsible for using a standardized scheduling system, equitably and efficiently assigning neuropsychological assessment cases to staff psychologists, trainees and other psychometrists based on workload, difficulty of assignment, and capabilities of the personnel involved; conducting quality assurance reviews of the test administration, scoring, and data entry of Psychology staff, trainees, and other psychometrists, assisting in developing performance plans and quality assurance of other psychometrists; and assisting in the recruitment of other competent individuals for available psychometrist positions.” [TAB 5, Position Description, Behavioral Sciences Coordinator].

KAHC Awards, Recognition and Acknowledgements Program

Like many other Army activities, KAHC maintains an Awards, Recognition, and Acknowledgements (ARA) Program. “Recognizing the great efforts and accomplishments . . . [of KAHC staff is] . . . one of the best ways to demonstrate . . . appreciation and investment in the success of the members of [the] “team,” making the ARA Program an “essential component of leadership and personnel management.” [TAB 21, Commander's Awards, Recognition and

Acknowledgements (ARA) Program policy, dated August 23, 2012]. Kenner’s ARA Program comprises six different award categories.⁹

On October 18, 2011, at the request of then KAHC Commander, the KAHC Logistics Division, properly used a government purchase card to purchase 475 “Commander’s coins” at a total cost of \$2,731.25.¹⁰ Funds from the Army Operations and Maintenance appropriation were used to pay for the coins. When the coins were received, the Logistics Division issued them to both the Commander and to the KAHC Command Sergeant Major for their use as part of the KAHC ARA Program. The Commander maintained a Commander’s Coin Distribution Tracker log that, as of September 27, 2013, reflected that a total of 197 (of the 455 coins ordered) had been distributed by the KAHC Commander and Command Sergeant Major.¹¹ The Commander’s Coin Distribution Tracker reflects that on September 24, 2012, the Commander presented a KAHC Commander’s Coin to each of three contractor employees.

LAWS, REGULATIONS, AND CONTRACT AUTHORITIES GOVERNING PERSONAL SERVICES CONTRACTS RELATED TO HEALTH SERVICES

Generally, the Federal Government is required to recruit its employees either through hiring under competitive appointment or through procedures otherwise required by the civil service laws.¹² Federal employees are persons who are appointed, supervised by a federal officer, and perform federal functions pursuant to authorization from a congressional act or executive order.¹³ There is a “long-standing rule that persons performing purely personal services for the Government must be placed on Government payrolls and made subject to

⁹ The six categories include: (1) Patient Safety and Good Catch Awards; (2) Safety Awards; (3) Civilian Employee of the Month and Quarter (Clinical and Non-Clinical); (4) Informal Awards (including Private and Public thank you; Lunch with KAHC Commander; Certificate of Appreciation; 3- or 4-day Pass (for Soldiers); 59 minute rule (early release); Letter of Input (Contractors); Northern Regional Medical Command (NRMC) Commanding General's Star Note; NRMC Commanding General's Coin; and KAHC Commander's Coin)); (5) Incentive (Impact) Awards (including Time-off Award for Department of the Army Civilians (DACs)); On the Spot Cash Award (for DACs); Honorary Award (for DACs); and Military Awards (for Soldiers)); and (6) Performance (Annual or PCS) Awards (such as Time-off Award (for DACs)); Monetary Award (for DACs); and Quality Step Increase (for DACs)).

¹⁰ Each coin cost \$5.75.

¹¹ MEDCOM Regulation 672-7, paragraph 7b(4), requires appropriate recordkeeping with regard to the dissemination of coins purchased with appropriated funds. The KAHC’s Commander’s Coin Distribution Tracker includes a record of the date each coin was “awarded”, the name of each individual recipient, and any comments/justification associated with the award of the coin to the recipient.

¹² See Civil Service Act, Title 5, USC, Sections 3301-3397, 7301 (2006).

¹³ Title 5, USC, Section 2105(a).

[government] supervision.”¹⁴ Consequently, the Government may not enter a contract for personal services unless it has received explicit Congressional authorization.¹⁵

The most basic codified definition of a personal services contract comes from the Federal Acquisition Regulation (FAR): “Personal services contract means a contract that, by its express terms or as administered, makes the contractor personnel appear to be, in effect, Government Employees . . .”¹⁶ The extremely fact-specific nature of the determination as to whether a contractor employee is performing a personal services contract or a non-personal services contract makes the analysis both simple and complex. Indeed, in any given scenario, reasonable minds easily could differ about whether to characterize an employment situation as being executed or performed as a personal services or a non-personal services contract manner.

Over the years, however, the personal services contracts ban has become a relatively consistent and clear formulation: “In simple terms, this means that the [g]overnment cannot hire contractors to be used in the same manner as a government employee, nor can supervisors exercise similar control and management authority over contractor personnel as they may a government worker.”¹⁷ When determining whether such services contracts are proper, the FAR cautions that “[e]ach contract arrangement must be judged in the light of its own facts and circumstances . . .”¹⁸ Whether the Government “exercise[s] relatively continuous supervision and control over the contractor personnel performing the contract” becomes the determinative factor.¹⁹ A personal services contract can arise under the contracts terms or “in the manner of its administration during performance.”²⁰

One statutory exception to the general ban on personal services contracts is Title 10, USC, Section 1091, which allows the DoD, including the DA, to “enter into personal services contracts to carry out health care responsibilities in such facilities, as determined to be necessary by the Secretary.” Accordingly, Defense Federal Acquisition Regulation Supplement (DFARS) 237.104(b)(ii)(A) provides that the authority in Title 10, USC, Section 1091 may be used to acquire:

- (1) Direct health care services provided in medical treatment facilities;
- (2) Health care services at locations outside of medical treatment facilities (such as the provision of medical screening examinations at military entrance processing stations); and
- (3) Services of clinical counselors, family advocacy program staff, and victim’s services representatives to members of the Armed Forces and covered

¹⁴ Pers. Servs. Private Contract v. Gov’t Pers.-Statutory Emp’t Ceilings, 32 Comp. Gen. 427, at 430 (1953).

¹⁵ FAR 37.104(b).

¹⁶ FAR 2.101.

¹⁷ Glenn J. Voelz, *Contractors in the Government Workplace: Managing the Blended Workforce* 51 (Gov’t Inst. Press 2010).

¹⁸ FAR 37.104(b).

¹⁹ FAR 37.104(c)(2) (referring to that inquiry as “the key question”); see also *Consultant Servs., T.C. Assocs.*, B-193035, 79-1 CPD ¶ 260, at 1 (Comp. Gen. Apr. 12, 1979).

²⁰ FAR 37.104(c).

beneficiaries who require such services, provided in medical treatment facilities or elsewhere. Persons with whom a personal services contract may be entered into under this authority include clinical social workers, psychologists, psychiatrists, and other comparable professionals who have advanced degrees in counseling or related academic disciplines, and who meet all requirements for State licensure and board certification requirements, if any, within their fields of specialization.

Further effectuating the authority in Title 10, USC, Section 1091, DoD Instruction (DoDI) 6025.5, *Personal Services Contracts for Health Care Providers*, paragraph 4.1, retrievable at <http://www.dtic.mil/whs/directives/corres/pdf/602505p.pdf>, states,

When in-house sources are insufficient to support the medical mission of the Military Departments or in using sound business judgment it is more efficient to do so, PSCs (personal services contracts) may be executed for physicians and other HCPs (health care providers).

Whether the government's treatment of a non-personal service contract employee crosses the line and creates an impermissible employer-employee relationship must be judged in light of the particular circumstances. The key question is whether the government exercises relatively continuous supervision and control over the contractor personnel performing the contract at issue. Accordingly, FAR 37.104(c)(2) states, "The sporadic, unauthorized supervision of only one of a large number of contractor employees might reasonably be considered not relevant . . ."

To assist agencies in making the fact-specific determinations required for each circumstance, FAR 37.104(d) lists criteria to be applied when analyzing "whether or not a proposed contract is personal in nature." The criteria include:

- (1) Performance on site;
- (2) Principal tools and equipment furnished by the government;
- (3) Services are applied directly to the integral effort of agencies or an organizational subpart in furtherance of assigned function or mission;
- (4) Comparable services, meeting comparable needs, are performed in the same or similar agencies using civil service personnel;
- (5) The need for the type of service provided can reasonably be expected to last beyond 1 year;
- (6) The inherent nature of the service, or the manner in which it is provided, reasonably requires directly or indirectly, government direction or supervision of contractor employees in order to—
 - (a) Adequately protect the Government's interest;
 - (b) Retain control of the function involved; or
 - (c) Retain full personal responsibility for the function supported in a duly authorized Federal officer or employee.

The presence of *any or all* of the above elements in the performance of a contract intended to be for non-personal services could create an improper employee-employer

relationship, but as the Government Accountability Office (GAO) found in a 2008 study “[s]uch a finding can only be established based on a case-by-case analysis of the totality of the circumstances of each case.”²¹ The GAO did acknowledge that the primary consideration for determining whether a personal services contract exists is not whether such a contract exists by its terms, but rather nature of the relationship between the contractor and the Government in practice.

For instance, in *W.B. Joley*, B-234146, March 31, 1989, 89-1 CPD ¶ 339, the protester alleged that the proposed contract would lead to a personal services contract because—

among other things, the government provides the workplace and the tools to be used and establishes the workhours and the work to be done . . . [and] essentially, that the presence of certain elements listed in [FAR] 37.104(d) . . . as factors to be considered in assessing whether a proposed contract is personal in nature renders the contract a personal services contract. *Id* at 2.

The GAO disagreed and held that the

‘key question’ in determining whether a contract is for personal services is: ‘Will the government exercise relatively continuous supervision and control over contractor personnel performing the contract . . . we do not think the presence of these factors *per se* (emphasis in original) renders the contract a personal services contract. *Id* at 3.

The elements in FAR 37.104(d) are not the exclusive list of characteristics of an employer-employee relationship although they are “indicia of continuous supervision and control of contractor personnel by the government.” In the *Joley* case, the GAO stated, “[f]actors such as the contractor’s right to hire and fire employees, to grant or deny individual leave requests, and to reassign [contractor] employees negate the existence of a personal services contract as defined in the FAR.”

APPLICABLE FISCAL LAWS AND REGULATIONS

The Whistleblower alleges that the relationship between the government and the contract psychometrist at KAHC as well as presentation of Commander’s coins and “award” certificates to contractor employees may have violated the Anti-Deficiency Act and other procurement guidelines, namely the Purpose Statute.

The Purpose Statute is codified at Title 31, USC, Section 1301, and provides that “appropriations shall be applied only to the objects for which the appropriations were made, except as otherwise provided by law.” In each annual DoD Appropriations Act, Congress provides funds for specific “purposes,” including the necessary expenses of agency Operations and Maintenance, Research and Development, Procurement, and Military Construction, among others.

²¹ U.S. Government Accountability Office, GAO-08-360, *Defense Contracting: Army Case Study Delineates Concerns with Use of Contractors as Contract Specialists*, at 15 (2008).

Within the Department of Defense, DoD Financial Management Regulations (DoD FMR), Volume 14, principally Chapter 2, provides guidance on matters related to the Anti-Deficiency Act and related funding statutes, including the Purpose Statute, as follows:

020101. Governance. The Anti-Deficiency Act . . . and related funding statutes consist of certain provisions of law prescribed in Title 31, USC. The Anti-Deficiency Act, prescribed in Sections *1341*, *1342*, and *1517* of Title 31, USC, prohibits obligations and expenditures in excess of or before an appropriation . . . Noncompliance with Sections *1301*, *1502(a)*, and *3302(b)* of Title 31, USC, which are additional funding statutes, *may* lead to an Anti-Deficiency Act violation (emphasis added) . . .

A. Amount Limitation. Section *1341* of Title 31, USC, stipulates that any officer or employee of the United States Government . . . may not:

1. Make an obligation, expenditure, or authorize an obligation or expenditure of funds that exceeds the amount available in an appropriation or fund.

2. Involve the Government in any contract or obligation for the payment of money before an appropriation is made available, unless the law authorizes such contract or obligation.

B. Voluntary Services Limitation. Section *1342* of Title 31, USC stipulates that an officer or employee of the United States Government . . . may not accept voluntary services on behalf of the Government or employ personal services in excess of that authorized by law, except as it may be necessary in emergencies involving the safety of human life or the protection of property.

C. Administrative Control of Funds, Amount Limitation. Section *1517* of Title 31, USC stipulates that an officer or employee of the United States Government . . . may not make an obligation or expenditure or authorize an obligation or expenditure that exceeds an apportionment or amount permitted by a regulation prescribed for the administrative control of an appropriation, including any other formal administrative subdivision of funds designated by a DoD Component . . .

D. Purpose Statute. Section *1301* of Title 31, USC. stipulates that appropriations shall be applied only to the objects for which the appropriations were made, except as otherwise provided by law.

E. Time Limitation. Section *1502(a)* of Title 31, USC stipulates that the balance of a fixed-term appropriation is available only for payment of expenses properly incurred during the period of availability or to complete contracts properly made and obligated within that period.

F. Miscellaneous Receipts Statute. Section 3302(b) of Title 31, USC requires an official or agent of the Government to deposit money received for the Government from any source into the miscellaneous receipts account of the U.S. Treasury without deduction for any charge or claim if the retention of the money is not authorized or exceeds authorized levels . . .

. . . .

0202 VIOLATIONS

020201. Discovery

An ADA violation may occur from various circumstances. If a suspected ADA violation is discovered, then a preliminary ADA review must be initiated.

020202. General Violations

General ADA violations occur when:

A. Statutory limitation is exceeded for the amount authorized in an appropriation or fund, to include special and recurring statutory limitations or restrictions on the amounts for which an appropriation or fund may be used.

B. Statutory limitation on the purposes authorized in an appropriation or fund were violated and upon correction into the proper appropriation or fund, funds were not available at the time of the erroneous obligation or were not available when the obligation was recorded in the proper appropriation or fund.

[DoD FMR, Volume 14, Chapter 2].

Applying Fiscal Law Principles to the Use of Appropriated Funds to Purchase Commander's Coins

Typically, "Commander's coins" are about the size of half dollar coins and are usually custom minted and emblazoned with the unit insignia. Most Commander's coins are inscribed with words such as "presented for excellence" or "in recognition of outstanding performance." Commanders across all of the Armed Services use coins to instill unit pride, enhance *esprit de corps*, and reward service members and DoD civilian employees for outstanding performance and exceptional achievements pertinent to their official duties. Questions frequently arise, however, as to whether, from a fiscal law perspective, appropriated government funds may be used to purchase Commander's coins.²²

The basic tenets of fiscal law, provide that: government agencies may use appropriated funds only for the "purpose" for which Congress appropriated them, the obligation of funds must occur within the time limits applicable to that appropriation, and the amount of the obligation and expenditure must not exceed the amounts Congress has appropriated. All three elements: purpose, time, and amount, must be observed for an obligation or expenditure of appropriated funds to be lawful.

²² Many commanders choose to use their own personal funds to purchase coins. The use of personal funds does not present an issue of fiscal law and eliminates any constraint on the purpose for which the commander may use the coins or the types of persons to whom he or she may present them. Essentially, there are no restrictions on the use of coins purchased from personal funds.

The Whistleblower alleges that the Purpose Statute, which underlies the first element in this three-part test, was violated when Commander's coins were given to several contractor employees at KAHC.

Simply stated, the Purpose Statute provides that appropriated funds may be used only for the purpose or purposes for which they were appropriated. It prohibits charging authorized items to the wrong appropriation, and prohibits the purchase of unauthorized items from any appropriation. The GAO has established a three-part test to determine whether a particular expense to be charged against appropriated funds is for a "proper purpose": (1) Is there a specific statutory basis for the expenditure, or is the expenditure necessary and incident to proper execution of the general purpose of the appropriation?; (2) Is the expenditure prohibited by law?; and (3) Is the expenditure otherwise provided for?

The Army's rationale for permitting the use of appropriated funds to purchase Commander's coins is premised on the concept that these coins are presented by commanders as on-the-spot awards to *military personnel or DA civilian employees* for outstanding duty performance. The presentation of Commander's coins to Soldiers is authorized by Title 10, USC, Section 1125.²³ The presentation of Commander's coins to civilian employees of the DA is authorized by Title 5, USC, Section 4503.²⁴ These specific statutory bases, reinforced by Army Regulations establishing agency award programs for both military personnel and civilian employees, meet the first prong of the GAO test.²⁵ There is no express prohibition on the use of

²³ Title 10, USC, Section 1125 grants to the Secretary of Defense authority to "award medals, trophies, badges, and similar devices to members, units, or agencies of an armed force . . . for excellence in accomplishments or competitions related to that Armed Force, and [to] provide badges or buttons in recognition of special service, good conduct, and discharge under conditions other than dishonorable." AR 600-8-22, *Military Awards*, implements this statute and specifically permits the presentation of a Commander's coin to a Soldier for "excellence in accomplishments or competitions which clearly contribute to the increased effectiveness or efficiency of the military unit [See AR 600-8-22, paragraphs 11-1 to 11-3, retrievable at http://www.apd.army.mil/pdffiles/r600_8_22.pdf].

²⁴ Title 5, USC, Section 4503 states that an agency head may "incur necessary expense for the honorary recognition of, a [civilian] employee who—(1) by his suggestion, invention, superior accomplishment, or other personal effort contributes to the efficiency, economy, or other improvement of Government operations or achieves a significant reduction in paper work; or (2) performs a special act or service in the public interest in connection with or related to his official employment." For the Army, this statute is implemented in AR 672-20, *Incentive Awards*, retrievable at http://www.apd.army.mil/pdffiles/r672_20.pdf, which establishes an extensive incentive awards program for DA civilian employees.

²⁵ It is important to note that there exists no similar statutory authority to permit the use of appropriated funds to purchase Commander's coins for contractor personnel. Although contractor employees are an important component of the total DoD force, they are *not* Government employees. In fact, although AR 672-20 references so-called "Public Service Awards" that may be presented to certain non-government persons, under certain conditions, the regulation *expressly prohibits* making any award, including a certificate of appreciation, to Army contractor personnel [See e.g., AR 672-20, paragraphs, 9-2, 9-2.1, and 9-5]. This prohibition is consistent with the restrictions imposed in Department of Defense (DoD) 1400.25-M, *Department of Defense Civilian Personnel Management System*, Subchapter 451, *Awards*, retrievable at http://www.dtic.mil/whs/directives/corres/pdf/1400.25_SC451.pdf. Although the DoD Manual permits the grant of honorary awards to private citizens, groups, or organizations that significantly assist or support DoD functions, services, or operations, with a view to "demonstrating the interest of DoD management in improving efficiency and effectiveness, and to encourage citizens and organizations in their efforts to assist in the accomplishment of DoD missions," it specifically precludes granting any such recognition to "persons or organizations having a commercial or profit-making relationship with DoD . . . unless the contribution is

appropriated funds for these purposes, nor is the expenditure of appropriated funds for the purchase of Commander's coins to be used as awards otherwise addressed in the law. Accordingly, prongs two and three of the GAO test are not implicated.

In the case of KAHC, the purchase of Commander's Coins was obligated against the annual appropriation for Operations and Maintenance, Army. This is the specific appropriation from which the operations of the Army—which encompass the Army's programs for awards and recognition to be provided to Soldiers and DA civilian employees—are properly funded. Accordingly, there is no Purpose Statute violation when Commander's coins are purchased from Operations and Maintenance appropriations in furtherance of a duly established agency awards program, as in this case.

Given that in the instant case, the purchase of Commander's coins was properly undertaken pursuant to an established agency award program (and that, thus, there was no violation of the Purpose Statute), by extension, there is no Anti-Deficiency Act violation under these circumstances. The DoD FMR provides as follows:

General ADA violations occur when:

B. Statutory limitation on the purposes authorized in an appropriation or fund were violated and upon correction into the proper appropriation or fund, funds were not available *at the time of* the erroneous obligation or were not available *when the obligation was recorded* in the proper appropriation or fund.”
[emphasis added].

[DoD FMR, Chapter 2, paragraph 020202B].

As set forth above, no violation of the Purpose Statute occurred in this case and adequate funds were available at the time the cost of the Commander's coins was obligated against KAHC Operations and Maintenance, Army accounts.

Applicable Policies on Commander's Coins

There is no Army-wide regulation or policy specific to Commander's coins. Army commanders are authorized by law and Army Regulations to establish their own awards programs, however. In practice, many of these programs include provisions for the presentation of Commander's coins. Applicable to the purchase and presentation of Commander's coins at KAHC are policies issued by MEDCOM and the Northern Regional Medical Command, both higher headquarters of KAHC.

MEDCOM Regulation 672-7, *Military Coins*, retrievable at http://www.samhouston.army.mil/sja/pdf_files/2009/MEDCOM%20Reg%20672-7%20-%20Military%20Coins.pdf, prescribes policies and procedures for the purchase and award of military coins by its subordinate commands and activities and authorizes

substantially beyond that specified or implied within the terms of the contract establishing the relationship, or the recognition is clearly in the public interest.” [DoD 1400.25-M, Subchapter 451, paragraph 451.15].

subordinate organizations to publish their own coin policies, provided they are not inconsistent with that of MEDCOM. Pursuant to this regulation, no subordinate command may expend more than \$5,000 in appropriated funds in any single fiscal year for the purchase of such coins and the value of an individual coin may not exceed \$25. Further, the MEDCOM Regulation prescribes that units and organizations that purchase military coins with appropriated funds must maintain a formal record to track coin expenditures and report such expenditures annually, through their chain of command, to MEDCOM. MEDCOM Regulation 672-7 echoes AR 600-8-2 and AR 672-20 in setting forth the purposes for which Commander's coins may be presented and in delineating authorized recipients. In addition, MEDCOM Regulation 672-7 expressly prohibits the presentation of military coins purchased with appropriated funds to contractor personnel.²⁶

As authorized by MEDCOM, the North Atlantic Regional Medical Command published its own coin policy, *North Atlantic Regional Medical Command (NARMC) Delegation of Authority for Military Coins*, dated August 31, 2009 [TAB 26].²⁷ In every material respect, including limitations on the amount of appropriated funds that may be expended for Commander's coins, as well as annual cost tracking and reporting requirements, the Northern Regional Medical Command policy simply reiterates MEDCOM Regulation 672-7. The Northern Regional Medical Command policy delegates to Commanders in the grade of Colonel (garrison, military treatment facility, and brigade commanders), the authority to approve the purchase of, and disseminate, military coins specially minted for their command. Further, the Northern Regional Medical Command policy provides that any such coin must be inscribed with the words "'for a job well done" or "for achieving excellence."

As provided for under the MEDCOM and Northern Regional Medical Command policies, the KAHC Commander, issued his *Awards, Recognition and Acknowledgement (ARA) Program* policy on August 23, 2012.²⁸ This policy was in effect during time period associated with the whistleblower's allegations to OSC.

²⁶ MEDCOM Regulation 672-7, paragraph 7c, provides—"Military coins may be presented to Department of the Army (DA) personnel to:

- (a) Recognize excellence in an Army competition or similar activity (in accordance with ARs 600-8-22 and 672-20);
 - (b) Recognize a unique accomplishment that furthers the efficiency and effectiveness of the Army's mission (in accordance with ARs 600-8-22 and 672-20); or
 - (c) Further recruitment of personnel.
- (2) Military coins may be presented to Army volunteers as honorary awards for services or accomplishment that significantly assist or support Army functions, services, or operations (in accordance with 10 U.S.C. §1588).
- (3) Military coins shall not be given away as mementos and shall not be presented merely for an individual's normal performance of regularly assigned duties.
- (4) *Military coins purchased with appropriated funds shall not be presented to contractor personnel.*" (emphasis added).

²⁷ On 1, 2009, as part of MEDCOM's realignment, MEDCOM changed the name of the North Atlantic Regional Medical Command to the Northern Regional Medical Command (NRMC).

²⁸ TAB 21, Commander's *Awards, Recognition and Acknowledgement (ARA) Program* policy, dated August 23, 2012. The introduction to the KAHC ARA Program policy provides:

As to contractor employees, Commander's ARA Program policy provides that contractor employees may receive an informal "Letter of Input," but goes no further in describing what such a letter may entail. As to the "Civilian Employee of the Month Award," the policy specifically provides that "[n]ominations can be made by and for any member of the Kenner AHC staff (including contractors)." [See TAB 21, Commander's Awards, Recognition and Acknowledgements (ARA) Program policy, dated August 23, 2013, page 3, paragraph 5c]. The ARA Program policy refers generally to the "NRMC Commanding General's Coin" and the "KAHC Commander's Coin" as authorized "Informal awards," but never addresses who is authorized, or more importantly, perhaps, who is NOT authorized, to receive such a coin.²⁹

Authorized Recognition of Contractor Employees

Because of DoD's critical reliance on contractor support in executing the Department's missions, and given the large expenditures involved, contract surveillance is vital to ensuring that contractors provide quality services and supplies in a timely manner; to mitigating contractor performance problems; and to ensuring that the Federal Government receives best value.³⁰

Under the FAR, the Contracting Officer is responsible for all contracting actions, ensuring compliance with the terms of the contract, and safeguarding the interests of the U.S. Government in its contractual relationships. Contract quality surveillance is an essential duty of every Contracting Officer. The requiring organization—the organization most familiar with the technical complexities and nuances of the requirements associated with the contract—also bears a heavy share of the contract quality surveillance burden. As experts on the contract requirements, members of the requiring organization may be granted specific authority by the Contracting Officer to conduct contract surveillance as a Contracting Officer's Representative (COR). A COR serves as the on-site "eyes and ears" of the Contracting Officer, verifying that the contractor is fulfilling the contract requirements and documenting that performance.

It is axiomatic that government contractors receive their awards and recognition whenever the government pays their bills for having completed the terms and conditions of the contract. Some forms of government contract provide incentive "fees" or "awards" for certain performance milestones or accomplishments, such as completing a project ahead of schedule or

"The effective use of Awards, Recognition and Acknowledgements (ARA) is an essential component of leadership and personnel management. ARAs can range from a verbal thank-you (daily) to high-level honorary or military awards (periodically). Our Kenner AHC Line of Effort #3 focuses on investing in our people and developing leaders. Recognizing the great efforts and accomplishments of our staff is one of the best ways to demonstrate our appreciation and investment in their success."

²⁹ As stated in the Corrective Action portion of this Report, *infra* pages 43-45, the MEDCOM SJA will take affirmative action to ensure that the KAHC ARA Program policy is revised to comply strictly with law, regulation, and the policies of its superior commands, MEDCOM and Northern Regional Medical Command. In particular, the KAHC policy will be revised to state specifically the prohibitions on presenting awards, recognition, and acknowledgments to contractor employees.

³⁰ A more expansive discussion of the roles and responsibilities of the Contracting Officer and the COR are contained in the *DoD COR Handbook*, dated March 22, 2012, issued by the Director, Defense Procurement and Acquisition Policy, Office of the Under Secretary of Defense (Acquisition, Technology and Logistics), Department of Defense, dated March 22, 2012, retrievable at http://www.acq.osd.mil/dpap/cpic/cp/docs/USA001390-12_DoD_COR_Handbook_Signed.pdf.

under budget. Nevertheless, personnel within government often desire to provide some sort of recognition to individual contractors for the contributions they may have made towards mission accomplishment. As discussed above, however, agency award programs are based on statutes. Specific statutes authorize the establishment of awards programs for military and civilian personnel of the Army, and the expenditure of appropriated funds in furtherance of such award programs. In contrast, there exists no statutory authority permitting the award of Commander's coins, certificates of appreciation, or similar nonmonetary incentives to contractors. Rather, DoD and Army manuals, regulations, and policies expressly prohibit such awards. The *DoD COR Handbook* goes so far as to caution that the Government “cannot use certificates to recognize a contractor or individual contractor employees, because doing so could complicate the source selection process on future contracts” by . . . leading to allegations of bias, protest to the GAO, and delay. The *DoD COR Handbook* does allow that:

“Contractors may be recognized through a letter of commendation from the Government to the contractor organization, which may choose to, in turn, recognize an individual contractor employee. In no event should a letter of commendation or any other recognition be given to a contractor or contractor employee without first coordinating such commendation or recognition with the Contracting Officer.”³¹ [*DoD COR Handbook, Chapter 3*].

Even though individual awards and recognition of contractors are prohibited, the Contracting Officer, COR, and the requiring activity have a myriad ways in which to document and acknowledge contractor performance, whether it be negative feedback or “kudos”. Documenting how well a contractor performs on a contract is an essential part of the performance assessment process on which other Contracting Officers depend when evaluating a particular contractor’s submissions on future competitions. DoD policy directs CORs to provide regular performance comments to the Contracting Officer and notes that such comments should be “contractually based and professional; applicable to the monthly reporting period; performance based; specific, fully detailed, and stand alone; based on information gathered during audits, when possible, and fully supported.”

Contracting Officers may use the information received from CORs to document contractor performance in performance assessment databases. Section 872 of the Duncan Hunter National Defense Authorization Act of 2009 (Public Law 110-417), enacted on October 14, 2008, required the development and maintenance of an information system that contains specific information on the integrity and performance of covered federal agency contractors. The Federal Awardee Performance and Integrity Information System (FAPIIS) was developed to address these requirements. FAPIIS provides users with access to integrity and performance information consolidated from other systems such as the Contractor Performance Assessment Reporting System (CPARS), proceedings information from the Entity Management section of the System for Award Management (SAM) database, past performance information from the Past Performance Information Retrieval System; and suspension/debarment information from the Performance Information section of SAM. It is through these systems, and the government’s

³¹ We think it possible that this is the sort of letter to which Commander’s ARA Program policy intended to refer in citing to contractor employee eligibility for an “Informal Award” of a “Letter of Input.”

regular payment of a contractor's bills, that contractors and contractor employees are authorized to receive acknowledgment of their performance.

Ethics Issues Associated with Contractors in the Workplace

The presentation of Commander's coins and certificates of appreciation to contractor personnel are not only prohibited by Army Regulations governing departmental award programs, but are contrary to the principles of ethics and integrity that govern the Federal workplace. The *Standards of Ethical Conduct for Employees of the Executive Branch*, codified at Title 5, Code of Federal Regulations (CFR) and DoD (DoD) 5500.07-R, *Joint Ethics Regulation* (JER), retrievable at <http://www.dtic.mil/whs/directives/corres/pdf/550007r.pdf>, specify the ethics standards governing interaction by DoD military personnel and civilian employees with contractors and contractor employees. It is primarily the ethics issue of prohibited "endorsements" that impacts on the appropriate arms length working relationship that must be observed in the Federal workplace between Federal employees and contractor employees.

The general rule on endorsements is provided at Title 5, CFR 2635.702(c)), which states:

"Endorsements. An employee shall not use or permit the use of his Government position or title or any authority associated with his public office to endorse any product, service or enterprise except: (1) In furtherance of statutory authority to promote products, services or enterprises; or (2) As a result of documentation of compliance with agency requirements or standards or as the result of recognition for achievement given under an agency program of recognition for accomplishment in support of the agency's mission."

The JER, paragraph 3-209, in turn, states:

"Endorsement of a non-Federal entity, event, product, service, or enterprise may be neither stated nor implied by DoD or DoD employees in their official capacities and titles, positions, or organization names may not be used to suggest official endorsement or preferential treatment of any non-Federal entity . . ."

The "endorsements" concern supports the general prohibition against awarding Commander's coins and certificates of appreciation to contractor employees. In essence, these items, as indicia of a job well done or of outstanding performance, could be viewed by the public as conveying a special token of appreciation to those private sector contractors who "enjoy" or are "fortunate" to have a business relationship with the Federal Government.

Additional cautionary pronouncements with respect to what a Commander's coin or certificate of appreciation represents are found in the Office of Government Ethics' (OGE) August 29 2006 DAEO-Gram DO-06-023 entitled "*Ethics and Working with Contractors—Questions and Answers*". Attached to DAEO-Gram DO-06-023 is a 29-page "questions and answers" document. The following is a question and answer relevant to the instant discussion excerpted from page 29.

Question: May an employee provide a letter or other statement discussing the quality of a particular contractor's performance?

Answer: Maybe. The OGE rule on endorsements, 5 C.F.R. § 2635.702(c), generally prohibits an employee from using his official position, title or authority to endorse any product, service or enterprise. Therefore, statements commending the performance of a contractor or a contractor's products generally are not permissible. However, the rule does not prohibit an employee from making a simple factual statement that the contractor's work satisfied the Government's requirements. . . . In addition to section 2635.702, there may be other policies or procedures, such as agency procurement or public affairs policies, that limit the situations in which an employee may make statements about a contractor's performance.

Example: A contractor asks an employee for a letter stating that the contractor performed all its work under a particular contract. After consulting with the contracting officer, the employee provides a statement indicating that the contractor met all benchmarks, submitted all reports, and delivered a fully operational product to the agency. This would not be a prohibited endorsement, even if it is anticipated that the contractor will share the letter with prospective customers.

While none of the above references specifically concern the presentation of Commander's coins to contractor employees, they do embody instructive ethics principles relevant in justifying the prohibition against presenting any such "endorsements" to contractor employees.

SUMMARY OF THE EVIDENCE OBTAINED FROM THE INVESTIGATION, AND AGENCY DISCUSSION

Summary of the Evidence Obtained from the Investigation

The AR 15-6 IO conducted an exhaustive investigation of the three allegations referred by OSC to the Army. All of the witnesses germane to the allegations were interviewed by the IO. Each witness interviewed in the context of the AR 15-6 investigation was asked to respond to a set of questions developed by the IO to solicit specific information relevant to the Whistleblower's allegations. When required for completeness or clarity, some of the witnesses were interviewed several times. A summary of the testimony provided by the two key witness relevant to the three OSC-referred allegations, a summary of the facts as determined by the AR 15-6 investigation, and a discussion of each of the three OSC-referred allegations in light of the testimonial and documentary evidence follow.

Key Witnesses' Testimony

The Whistleblower, GS-11 Behavioral Sciences Coordinator, KAHC.

The IO afforded the Whistleblower multiple opportunities to provide both testimonial and documentary evidence in support of her allegations.³² The IO included all of the evidence provided by the Whistleblower in the investigative record.

In her first statement [TAB 4], the Whistleblower described her work activities at KAHC, serving first as a contractor employee with Eagle Applied Sciences performing psychometrist work in support of the Tele-health contract at KAHC, beginning in January 2010. KAHC was one of the several pilot sites of military medical institutions utilizing the Tele-health program. Subsequently, she was selected to fill a GS civilian position created at KAHC as a Behavioral Sciences Coordinator, entering on duty as a DA civilian employee in February 2012. Her duties as the Kenner Behavioral Sciences Coordinator “included the responsibility for coordination of work assignments, [and] training and quality controls within the testing lab.” Subsequently, Eagle Applied Sciences hired a new contractor employee, to perform the same contract psychometrist duties that the Whistleblower had previously performed while serving as a contractor employee for Eagle. The Whistleblower testified as follows:

“[o]ver the next month as I worked with Contract Psychometrist I noted problems in her patient evaluations/testing and general office skills. I began to feel that she was not competent, and that she did not possess the full scope of competencies listed as a requirement for employment and necessary for psychometrist duties at KAHC and Tele-health. I also felt that she should not see patients autonomously. I voiced my concerns to Chief of Psychology on several occasions. . . .I requested guidance from her [Chief of Psychology] on what could be done in light of Contract Psychometrist’s position as a contractor. I believed that Eagle Applied Sciences was responsible for her competency and for her psychometrist skills training or remediation but was unclear as to any specific limitations placed upon me as a government employee responsible for the supervision and operation of the testing lab. Nevertheless, Chief of Psychology and I coordinated to develop corrective measures to raise Contract Psychometrist competency.

On June 19, 2012 Chief of Psychology and I spoke with Contract Psychometrist regarding a plan to improve her skills as a psychometrist. The plan (“30 day expectations”) included psychometrist training, and practical exercises for specific assessments and the skills necessary to support the psychometrist role and KAHC/Tele-health mission. This plan included a 30-day reevaluation to ascertain her progress towards becoming autonomous for core assessment requirements.”

The Whistleblower further testified that she “ensured” that Contract Psychometrist received additional training and provided Contract Psychometrist with feedback throughout the

³² the Whistleblower made two sworn statements: one on May 17, 2013 [TAB 4] and one on August 22, 2013 [TAB 6]. Additionally, the Whistleblower provided the AR 15-6 IO with several documents in support of her complaints against the KAHC. These documents are attached to the Whistleblower’s statements at TABs 4 and 6.

entire process but continued “to feel uncomfortable in the role of supervisor for remediation on a contract employee,” and voiced her concerns on this matter. The Whistleblower testified that, in early July, Contract Psychometrist’s progress had “not significantly improved” and that she [the Whistleblower] again expressed her concerns regarding these issues to Chief of Psychology. In turn, Chief of Psychology requested guidance from the Chief of the Department of Tele-health, Northern Regional Medical Command, as to “how to proceed with Contract Psychometrist’s supervision and remediation.” Subsequently, Chief of Psychology informed the Whistleblower that she [Chief of Psychology] had discussed these matters with her technical chain of supervision. This resulted in a multi-site meeting/conference between several members of KAHC leadership, representatives of Eagle Applied Sciences, personnel from associated medical facilities such as the Walter Reed National Military Medical Center (WRNMMC), and Contract Psychometrist, to discuss the proposed 30-day performance improvement plan for Contract Psychometrist. According to at that meeting, she “expressed concern over apparent ‘dumbing down’ of testing protocols to overcome Contract Psychometrist’s deficiencies, thus not supporting command and department missions as well as raising ethical concerns.” Again, the Whistleblower requested guidance on the “role of contractors and what government supervisory responsibilities are.” The Whistleblower further testified that shortly thereafter, the following occurred:

“The decision was made by the Chief, Department of Tele-health, Northern Regional Medical Command, that Contract Psychometrist would be sent to WRNMMC for a week of assessment and training under the supervision of their psychologists. Because my relationship had become very strained (“hostile”) with Contract Psychometrist, the decision was that I would no longer be involved with supervision of her psychometry competencies/products and this would be done by different psychology staff from Tele-health for a week. In addition, the decision was made that we would have to tailor patient testing batteries based upon her [Contract Psychometrist’s] “familiarity and comfort”. My concern remained that this was not in line with our Mission and Vision Statements regarding “Excellent” patient care.

The Tele-health leadership assessment, after her week at WRNMMC, was that Contract Psychometrist’s skills were now adequate. However, I was no longer responsible for her testing oversight and quality controls; a DA civilian employee physician at KAHC was assigned as her supervisor. Suddenly, that physician was also then assigning workload distribution, a job that entailed assigning the testing referrals to each of the two psychometrists (Contract Psychometrist and myself). Although this function is in my position description and I had been doing it for months, it changed when the physician became Contract Psychometrist supervisor. I tried to get an understanding of the processes but could find no resolution for my concerns. The physician seemed to “cherry pick” which assessment batteries would be provided to the contractor Contract Psychometrist in order to assure what he termed “meaningful employment.” I advised the physician supervising Contract Psychometrist that I had serious ethical concerns with this approach and that I questioned the legality related to the government-contractor relationship and workload distribution.

I felt that I had capacity for work but was given less than my prior workload. In addition, another one of my previous responsibilities was to screen walk-ins on Tuesdays, a sole KAHC function. Instead of me performing this function, it was now “shared” with Contract Psychometrist. I was still very concerned with her performance because on those days, sometimes patients would be left alone in the waiting and testing rooms and would start looking in offices seeking assistance. I again sought guidance regarding what government vs. contract workers could do, how workload was supposed to be distributed and whether there were policy guidelines in these areas. I elevated these issues, using my chain of command . . . (copy to Chief of Psychology still on maternity leave) via an e-mail on August 22, 2012. I outlined my concerns regarding the legal issues of distributing workload when there are both GS and contract employees performing like duties and potential violations of the Federal Acquisition Regulations (the government-contractor relationship related to Personal Services). I was told that Chief of Psychology would resolve the issues upon her return in early September [from her maternity leave].

When Chief of Psychology returned from maternity leave, she changed my duties. She relieved me from most of my behavioral sciences responsibilities including: performing QA (quality assurance), maintaining supplies inventory, teaching interns and other personnel, performing workload distribution and scheduling of lab resources. This resulted in my remaining duties primarily as a psychometrist. Her explanation was that this action would allow her to “get a handle” on the testing lab and reassess Contract Psychometrist’s competency, but no end state or time line for resumption of duties (nor any feedback on performance) was provided. After several weeks in this state of limbo, I specifically asked if there were any concerns related to my performance and was proactive in seeking input in to means by which I could return to these duties (i.e., training, mentoring, etc.). I was informed by Chief of Psychology that she had no issues with my performance and she was still evaluating the way ahead for the testing lab.”

The Whistleblower continued to express her dissatisfaction with the assignment of work between Contract Psychometrist and her, and expressed frustration over the new workload assignment process. Additionally, the Whistleblower became concerned with the following new matters regarding the proper relationship between contractor employees and government personnel:

“I was becoming more aware that Contract Psychometrist, a contract employee, was being given awards (time off allowances) and other benefits that are usually reserved for government employees. However, this practice was common for other contractors as well. I again sought guidance and concluded that Contract Psychometrist was being treated more like she had a personal services contract rather than having been hired by a contracting company which had certain contractual agreements with the government regarding time worked, awards, and supervision. I requested a meeting with [the Chief of the Behavioral Health

Department, KAHC] and Chief of Psychology to ascertain the command/Army position on the rules/requirements for government-contractor relationships as well as an escalating tension/hostility related to loss of duties.

On 4 December 2012 Chief of Psychology, [the Chief of the Behavioral Health Department, KAHC] and I had a meeting. I again inquired about the distinctions of a personal services contract, asked again about the distribution of workload, why Contract Psychometrist was being treated more like a government employee rather than a contractor, why she received 59-minute off rewards when my understanding, as a former contract employee myself, was that those awards are not to be given or taken, and why the Behavioral Health Department was assigning Contract Psychometrist tasks outside of her contractual job description, especially when some of the assignments/responsibilities were in my position description. I also sought guidance on what the commands administrative grievance procedures were. With regard to the contractor relationship, [the Chief of the Behavioral Health Department, KAHC] stated that “we have had contractors here for years and we have always done it this way.” [the Chief of the Behavioral Health Department, KAHC] acknowledged not knowing that there are differences between contracts based on “personal services” and “non-personal services.” This resulted in [the Chief of the Behavioral Health Department, KAHC] calling the KAHC COR for assistance. The COR came up to [the Chief of the Behavioral Health Department, KAHC’s] office and during the discussion indicated that in the past, instances had occurred where contractors who had previously received inappropriate “perks” and later when the rules were enforced and they did not receive similar (government) benefits, formal complaints had been filed. She specifically, mentioned an incident I believe involved the Pharmacy but offered few details other than the similarity with our discussion. I believe this indicates that KAHC has been inappropriately giving contract employees benefits that they should not, over a period of time.”

The Whistleblower continued to address to her supervisory chain the assignment of work responsibility and the caseload distribution process, which she was not managing at that point in time. In December 2012, she requested a meeting with her supervisory chain, to discuss these matters. The meeting occurred, but the Whistleblower felt that devolved into a—

“‘counseling session’ directed at me. The Deputy Commander for Clinical Services, KAHC stated early in the session that ‘we aren’t here to discuss contracts, personal or otherwise; we treat all employees the same.’ He admonished me that I need to recognize there is no ‘I’ in ‘TEAM’ and needed to work collaboratively to improve communications. I was informed that they wanted Contract Psychometrist to perform more of my duties, and to allow her to sign for equipment when my understanding is that only government employees are supposed to sign for equipment and supplies. They took away my inventory job and made it a community proposition, directing me to ‘just order two of everything’ instead of taking a measured approach to ordering and spending money. Again, my perception was that they were trying to force me to treat

Contract Psychometrist as a peer in all aspects with no regard for rules/regulations which might limit the extent of that relationship. At the December meeting I was informed that everyone is treated equally at KAHC, whether contractor or GS.”

At the end of this testimony to the AR 15-6 IO, the Whistleblower expressed her “two biggest ongoing concerns”: (1) She still has yet to be informed as to the appropriate grievance procedures for addressing her above stated concerns, especially regarding her assignment of work to her versus assignment of work to the contractor employee, Contract Psychometrist, and that she “never felt comfortable being placed in the position of having to remediate a contract employee, whose hiring company should have been the ones to assure she was competent to do the job for which she was hired and the government was paying for;” and (2) That the Federal Acquisition Regulations have been violated with respect to how Contract Psychometrist has been treated as a contract employee in both how she executes her duties and with respect to the following matters:

“contractors are routinely recognized and awarded directly by command leadership with verbal and written praise as well as with tokens of appreciation such as Commanders' coins and recognition as “employee of the month/quarter”.

- Contractors are routinely awarded time off in the form of 59-minute rule.
- In e-mail communications, differences between contractor and GS are not apparent (“KAHC civilians and KAHC military” are group names, with contractors grouped together with GS and no clear identification in signature blocks and other formal means of communication.
- Daily supervision and direction of contracted employees is provided by government employees, on site, with all equipment and tools provided by the government, comparable services being performed by GS personnel, and the work has lasted more than a year.
- Government employees have been required to determine competency and qualifications of contracted employees (including in my case).”

The Whistleblower provided another statement and supporting documentation to the AR 15-6 IO on August 21, 2013 [TAB 6, Statement of the Whistleblower, dated August 22, 2013]. In this statement, citing to specific contracting rules and principles, the Whistleblower testified that although she has never been a contracting officer or specialist, she had a “general knowledge of acquisition rules” based on training she had received from the following courses: Fundamentals Government Ethics Training (online/in-person); the Fundamentals of Systems Acquisition Management (Defense Acquisition University (DAU)); Army Civilian Leadership Basic Course (online); and Army Supervisory Development Course (online). Additionally, she stated that she had not previously been a supervisor before her current position as the Kenner Behavioral Sciences Coordinator.

The Whistleblower stated that she believed Contract Psychometrist was treated as a personal services contractor because she met the six factors listed in FAR section 37.104. Additionally, the KAHC “institutional processes” and “command climate” were inappropriate concerning government- contractor relationships, and the enforcement of the rules varied depending on the Commander of KAHC. As examples of issues related to the inappropriate relationship with contractors, she cited the day-to-day supervision of contractors and allowing

contractors to receive awards, 59 minute off with pay, and to participate in organizational day activities. When she was a contracted psychometrist, she was instructed on her duties by [the Chief, Department of Tele-health, Northern Regional Medical Command], the government Tele-health lead. She stated that when she was the contractor psychometrist, she was able to “operate fairly autonomously” and “did not require day-to-day supervision.” However, she believes Contract Psychometrist required significantly more supervision than she [the Whistleblower] had required. Regarding her point that, as a contractor, she had been able to perform those duties “fairly autonomously”, the Whistleblower testified as follows:

“I did not require day-to-day supervision, rather I was able to take a test regimen and execute my tasks and provide a report/test results to the government (KAHC or Tele-health) without the level of supervision that was being required by Contract Psychometrist. Neither the government nor the contract house ever reported any concerns with performance during my tenure as a contract psychometrist. While I am not privy to all the details of the contract, I am and have been certified as a “Certified Specialist in Psychometry (CSP)” which is the commercial standard for ensuring competency in the Psychometry field. When I was hired by Eagle Applied Sciences, this certification was a requirement of my employment and it is a requirement of my PD (position description) as a GS employee. Contract Psychometrist does not have this nor did she meet the requirements for certification at the time she came onboard.”

Further, when the Whistleblower was questioned about whether she ever received an award or other benefit specifically reserved for government employees when she worked for Eagle, she stated that she had not received any benefits reserved for government employees such as 59 minutes or other time off, awards, or participation in organizational days. Further, when asked by the AR 15-6 IO if she had any direct knowledge that Contract Psychometrist took 59 minutes off when government employees in her work group were given such a “time off” award, she replied “no”, though she asserted that “the “Commander e-mail” was just one of several instances in which this occurred (awarding of time off to Contract Psychometrist and other contractors). Many of these instances occurred at the supervisor- and/or department head-level rather than at the level of the KAHC command. These were typically announced at staff meetings and/or staff functions rather than by e-mail or other traceable means. Additionally, she testified that she was aware of several instances when the Commander, KAHC, had given coins and certificates to contractor employees, and had sent out e-mails authorizing 59 minutes off without distinction between contractors and DA civilian employees. Regarding her first-hand knowledge of instances in which “contractors [had been] recognized by the command leadership with awards of verbal and written praise, as well as with tokens of appreciation such as Commanders' coins and recognition as Employee of the Month/Quarter, the Whistleblower provided documentation that included: an e-mail sent by the Commander authorizing winners of a Halloween costume contest a 59 minute time-off award; a January 17, 2013 e-mail from the Commander authorizing 59 minutes off due to inclement weather; a picture of the Commander recognizing three contractors with “Employee of the Month” awards; one picture in which the Commander presented a contractor employee with a Commander’s coin; and a picture of the Commander presenting certificates to two individuals in the maintenance section, also believed to be contractor employees [TAB 6, Statement of the Whistleblower, dated August 22, 2013].

The Whistleblower concluded her August 2013 statement by stating that it was her perception that the “command behavior” regarding contractors in the workplace changed after the [OSC generated AR 15-6] investigation started, including drawing distinctions with respect to command recognition e-mails” granting 59 minutes and/or other recognition with respect to contractors and civilian employees. She noted too that “clear guidance” now was being provided concerning the distinction between contractors and civilian employees for command functions, and the attendance/participation/leave status of DA civilian employees as contrasted with that of contractor employees.

Contractor Psychometrist.

Contract Psychometrist was interviewed twice by the AR 15-6 IO and provided statements dated May 17, 2013 [TAB 7, Statement of Contract Psychometrist, dated May 17, 2013] and August 19, 2013 [TAB 8, Statement of Contract Psychometrist, dated August 19, 2013]. Contract Psychometrist testified that when she started working at KAHC as a contractor psychometrist employed by Eagle Applied Sciences, her supervisor was the Eagle Applied Sciences Program Manager the Tele-health contract. However, the on-site KAHC management team provided oversight as well. She testified that when she started to work at KAHC, the Whistleblower raised issues almost immediately to the KAHC management team regarding her (Contract Psychometrist’s) competency to perform her assigned duties/caseload. Contract Psychometrist described the following steps taken by KAHC and her contractor employer, Eagle Applied Sciences, to address the Whistleblower’s concerns: “The Whistleblower informed me that she was to be my immediate supervisor for orientation and training. Shortly after my hiring, she created a 30-day performance improvement plan that I was not aware of. She asked Chief of Psychology to review the plan and then for me to sign it in a meeting, which was a surprise to me. Then the Whistleblower was designated to observe me administering tests and my daily performance. Among other comments, she expressed herself on how long I spent at the copy machine and how I scanned documents. Since this was my first time as a government contractor I agreed to sign the document (the 30-day performance improvement plan), but I was confused because when I was hired, the vendor/contract agency and Tele-health had all checked my references and they were satisfactory.

Before the 30 days were up, the Whistleblower compiled a list of complaints and items that she said I could not perform. She sent them to Chief of Psychology who forwarded them to [the Chief of the Department of Tele-health, Northern Regional Medical Command], who was the head of Tele-health at that time. We had a meeting between [the Chief of the Department of Tele-health, Northern Regional Medical Command; the Chief, Department Behavioral Health, KAHC; the Whistleblower; and the Eagle Applied Sciences Program Manager for the Tele-health contract], and myself and a couple other individuals. It was

determined that my supervision would change (see copy of e-mail reference)³³. The other outcome of the teleconference was that I would go to Rosslyn³⁴ to the Tele-health managers for them to observe me as I administered tests to mock patients. This was so that they could ascertain my abilities.

I worked with a neuropsychologist at WRNMMC who was also a contractor employee. She gave me several mock patient interviews. She trained me on some measures that she performed in her job as a neuropsychologist in order to familiarize me with more tests and also to expand my repertoire. I spent approximately one week in Rosslyn. This was paid for by my company. [The Chief of the Department of Tele-health, Northern Regional Medical Command] notified the vendor that my performance was satisfactory and I returned to work.” [TAB 8, Statement of Contract Psychometrist, dated August 19, 2013].

Contract Psychometrist testified that while at training in Rosslyn, her “mentor” was a neuropsychologist at WRNMMC who was also a contractor employee. However, there were others at Rosslyn who assisted her and participated in an assessment of her competency. Contract Psychometrist then testified as to the results of her Rosslyn training sessions and the circumstances that ensued on her subsequent return to KAHC.

“The Whistleblower's questions about my abilities culminated in my trip to [The Chief of the Department of Tele-health, Northern Regional Medical Command] (head of Tele-health at the time) where I was observed administering assessments by several Tele-health providers and my ability to do my job was confirmed. I returned back to Kenner where the situation was the following: Chief of Psychology was on maternity leave, another DA civilian employee physician was the Acting Chief of Psychology, and the Whistleblower was still in charge of the testing referrals and their distribution to me as the other psychometrist. At the time, the workload was so that both the Whistleblower and myself could be busy with testing. Despite proving my competence, I was still not getting testing referrals. I decided to inform all my superiors both at Kenner . . . at Tele-health . . . and at Eagle Applied Sciences (the Eagle Program Manager of the Tele-health contract) of the lack of referrals I was experiencing. The Acting Chief of Psychology provided me with testing cases directly rather than going to the Whistleblower. With regard to the referrals from Tele-health, I received them directly from Tele-health providers whether by phone or via encrypted e-mails.” [TAB 8, Statement of Contract Psychometrist, dated August 19, 2013].

Additionally, Contract Psychometrist testified that in short order additional issues arose regarding her ability to perform her assigned tasks, and she once again turned to her Eagle Applied Sciences supervisory chain to address the matter:

³³ Contract Psychometrist made two sworn statements: one on May 17, 2013 [TAB 7] and one on August 19, 2013 [TAB 8]. Additionally, Contract Psychometrist provided the AR 15-6 IO with numerous e-mail records in support of her statements. These e-mails are attached to Contract Psychometrist’s statements at TABs 7 and 8.

³⁴ Some of the Eagle Applied Sciences contractor employees supporting the Tele-Health contract for KAHC were based at its Rosslyn, Virginia location.

“At that time I started to experience difficulties with being given test referrals since the Whistleblower was withholding consults and referrals from me. In addition, I could not access testing supplies and equipment because they were locked in the Whistleblower's office, or the rooms were booked by her for extensive periods of time, significantly limiting my ability to see and evaluate patients. I understand that the majority of these supplies are provided (paid by) WRNMMC Tele-health. My time was not filled with patients but I wanted to be busier and I feared for my job. I discussed this situation and my concerns with [management at KAHC and with the Eagle Applied Sciences Program Manager for the Tele-health contract]. I submitted monthly patient counts to document my workload to Eagle Applied Sciences Program Manager and the Tele-health administrators.

During this time my supervision regarding all neuropsychology referrals fell to [the neuropsychologist at WRNMMC, who was also a contractor employee], who approved the consults and with whom I maintained ongoing discussions regarding each patient until testing was completed. She is also my mentor for questions regarding testing in general. In addition to those patients, when I see local patients, my supervision is directed by the psychologist who has referred the patient to me.” [TAB 8, Statement of Contract Psychometrist, dated August 19, 2013].

With a view to addressing the issues Contract Psychometrist raised to Eagle, and which Eagle, in turn, raised to KAHC, the Deputy Commander for Clinical Services, KAHC became directly involved in facilitating Contract Psychometrist's efforts to perform her assigned caseload. Contract Psychometrist testified that this occurred after she visited the Kenner Human Resources office and was advised that it “could not mediate this issue and referred me to my vendor.” [The Deputy Commander's] efforts to facilitate a smoother management of the patient load requiring a psychometrist's input included shifting the case load assignment responsibility for this area away from the Whistleblower, who had been making those assignments as the Kenner Behavioral Sciences Coordinator, and vesting case assignment responsibility in Chief of Psychology and himself. Further, [the Deputy Commander] recommended that the psychometrist section staff have daily huddles together with Chief of Psychology “to maintain open communication between us, and gave specific directives on how to equitably manage supplies and equipment.” Additionally, Contract Psychometrist stated that Chief of Psychology sent a memorandum that “spells out how referrals are managed. The Whistleblower gets walk-in patients and all patients that she can accommodate within a week. I see all Tele-health referrals and those patients whom she [the Whistleblower] cannot fit in within a week.”

In support of her testimony, Contract Psychometrist provided extensive e-mail documentation dated throughout the months of July 2012 through January 2013. These e-mails, between Contract Psychometrist; the Program Manager, Department of Tele-health, Northern Regional Medical Command; and the Eagle Applied Sciences Program Manager for the Tele-health contract at KAHC, detailed various workplace related matters of concern to Contract Psychometrist regarding her utilization at KAHC, including: (1) expressing her concerns that she was looking to them as her points of contact to help her address the various issues she was

encountering; (2) that the Acting Chief of the Psychology Department at KAHC had advised her about the change in her on-site, day-to-day “supervision,” so that “I will be supervised by whatever provider assigns me a referral to test” (referrals are assigned on a weekly basis at the psychology staff meeting); that the Acting Chief of the Psychology Department at KAHC had made arrangements that would be “guaranteeing access/use” for her to the computer room . . . as well as storing the testing supplies in a neutral environment”; that the neuropsychologist at WRNMMC who was also a contractor employee, was to be her mentor and provide her with any required training; (3) describing how satisfied the Chief of the Department of Tele-health, Northern Regional Medical Command and his team were with her training and capabilities as assessed during the Rosslyn training period; and that (4) her assignments (at that time) were still coming from the Whistleblower and that the intervention of the Eagle Applied Sciences Program Manager for the Tele-health contract at KAHC still was needed to improve this situation for her (Contract Psychometrist). Contract Psychometrist concluded one of her e-mails to the Eagle Program Manager, dated August 10, 2012, by saying “[p]lease let me know if any detail is not clear or if additional information is needed from me. Again, thank you for your support during this situation. Today I am eager to do the job I have been hired for just as much as I was on my first day and I look forward to the opportunity to do just that.”

Another e-mail exchange is worth noting. In an e-mail dated September 1, 2012, the Eagle Applied Sciences Program Manager for the Tele-health contract at KAHC wrote to Contract Psychometrist:

“[A contract physician] and I had the opportunity to brief the [Chief of the Department of Tele-health, Northern Regional Medical Command] on our site visit and our concerns. . . . the [Chief of the Department of Tele-health, Northern Regional Medical Command] was further advised of the contractual obligations of the contractor and government regarding this position and the tasks performed. He acknowledges our concerns and a plan to take immediate corrective actions. Finally, we did advise him of our concerns. . . . Hopefully we will begin to see immediate improvements I will be checking in with you on a periodic basis and expect you to contact me anytime you have work related concerns. So that we can monitor your work performance, I would like to see each month your patient count and a copy of your schedule for that month.” [TAB 8, Statement of Contract Psychometrist, dated August 19, 2013].

Contract Psychometrist also addressed the allegations made by the Whistleblower concerning Contract Psychometrist’s taking “inappropriate time off.” Contract Psychometrist testified that “I always document my actual hours worked each day, which is usually 8 hours. I submit my daily worked hours directly to my vendor. I have no recollection of taking off for 59 minutes, and I did not participate in any other command sponsored hours off (e.g., Organization Day) since I was hired.” [TAB 8, Statement of Contract Psychometrist, dated August 19, 2013].

Summary of the Evidence Obtained from the Investigation

The Whistleblower alleged that KAHC management created an improper employer-employee relationship between the government and a contract psychometrist, at KAHC. The

Whistleblower further asserted that KAHC failed to correct this impropriety despite efforts to make them aware of these concerns throughout 2012. As evidence of this allegedly improper employment relationship, the Whistleblower testified that she and other government employees were placed in direct supervision of a contract psychometrist, whose performance and competence were deemed to be unsatisfactory. The Whistleblower charges that the improper relationship violated the Federal Acquisition Regulation, the Anti-Deficiency Act, and other procurement guidelines.

As originally awarded on September 30, 2009, KAHC Tele-health Contract W81XWH-09-C-0168 identified the psychometrist position in the personal services contract category. A December 2009 modification of the base contract changed the psychometrist position/duties to the non-personal services category, due to the fact that less than 45% of the psychometrist's time was spent in direct patient care.

In April 2012, a newly hired contract psychometrist, Contract Psychometrist, was assigned by her employer, Eagle Applied Services, to work at KAHC. The Whistleblower, then a GS-0101-11 Behavioral Sciences Coordinator, responsible for the development and operation of the psychology and neuropsychology testing labs, and for equitably and efficiently assigning cases to the contract psychometrist, soon noted problems with Contract Psychometrist's duty performance, including her skill in conducting patient evaluations, her ability to administer the breadth of tests required for psychometric evaluation, and other deficiencies in her work documentation and office skills [TAB 4, Statement of the Whistleblower, dated May 17, 2013, pages 1-2]. The Whistleblower approached her supervisor, Chief of Psychology, the Chief of the Psychology Department at KAHC, who listened to the Whistleblower's concerns.

The Whistleblower's position description stated that she was responsible for "instructing . . . newly hired . . . psychometrists in the administration and scoring of psychological and neuropsychological test batteries . . . and in making recommendations for corrective action." The Whistleblower's assigned duties also required her to "assist in developing performance plans and quality assurance of other psychometrists." [TAB 5, Position Description, Behavioral Sciences Coordinator, pages 2-3]. However, the Whistleblower informed Chief of Psychology that she was uncomfortable supervising or remediating Contract Psychometrist's competency due to Contract Psychometrist's status as a contractor. [TAB 4, Statement of the Whistleblower, dated May 17, 2013, page 2]. The Whistleblower stated that her concerns about supervising Contract Psychometrist also came to the fore "when minor direction to the contractor was not sufficient and day-to-day supervision was being required to effectively manage lab tasking." [See TAB 6, Statement of the Whistleblower, dated August 22, 2013, page 2].

In June 2012, the Whistleblower and Chief of Psychology developed a 30-day performance improvement plan for Contract Psychometrist that included evaluations of her skills by the Behavioral Health Coordinator (the Whistleblower) or Chief of Psychology (Chief of Psychology). [See TAB 9, 30-day Performance Improvement Plan]. Chief of Psychology expressed that the reason for the 30-day plan was "to have a record of items that they discussed [regarding Contract Psychometrist's duty performance] and a means to follow up on the concerns that the Whistleblower reported." [See TAB 10, Statement of Chief of Psychology, dated August 16, 2013, page 1]. The Whistleblower states that she was expected to review and

co-sign Contract Psychometrist's patient encounter notes, had provided Contract Psychometrist with additional training on several testing lab procedures, and had demonstrated proper procedures for Contract Psychometrist to model. The Whistleblower again expressed to Chief of Psychology her concerns about supervising the remediation of a contract employee, Contract Psychometrist. [See TAB 4, Statement of the Whistleblower, page 2 and TAB 6, Statement of the Whistleblower, page 2].

In early July 2012, Chief of Psychology communicated with her technical supervisory chain at KAHC and with the Whistleblower regarding concerns about Contract Psychometrist's duty performance during the 30-day performance improvement period. Chief of Psychology outlined several concerns of which she wanted to make her superiors, particularly the Chief of the Department of Tele-health, Northern Regional Medical Command, aware; Chief of Psychology's belief was that "as the Chief of Tele-health, he could ensure that any needed follow-up could occur through him and/or Contract Psychometrist's contractor." [See TAB 10, Statement of Chief of Psychology, dated August 16, 2013, page 1]. In response to Chief of Psychology's outreach, the Chief of Tele-health requested specifics about Contract Psychometrist's performance and promised to discuss the matter with the vendor, Eagle Applied Sciences. Shortly thereafter Chief of Psychology departed on maternity leave.

Contract Psychometrist stated that shortly after she reported to KAHC for duty as a contract psychometrist, the Whistleblower had told her that she (the Whistleblower) was to be her immediate supervisor for orientation and training. [See TAB 7, Statement of Contract Psychometrist, dated May 17, 2013, page 1]. She also stated that "the Whistleblower sat in my test administrations and started to observe me." Contract Psychometrist was not sure if the Whistleblower "was asked to do so or took on that role herself." [See TAB 8, Statement of Contract Psychometrist, dated August 19, 2013, page 1]. When the Whistleblower raised issues regarding her performance, Contract Psychometrist signed the 30-day performance improvement plan presented to her on June 19, 2012 by Chief of Psychology and the Whistleblower. [TAB 9]. This prompted Contract Psychometrist to contact a DA civilian employee who served as the Tele-health Program Manager at the Northern Regional Medical Command, for guidance. In early July 2012, prior to the end of Contract Psychometrist's 30-day performance improvement period, the Chief of the Department of Tele-health, Northern Regional Medical Command; the Chief of the Department of Behavioral Health, KAHC; the Whistleblower; the Eagle Applied Sciences Program Manager for the KAHC Tele-health contract; and others, participated in a teleconference about Contract Psychometrist progress. [See TAB 7, Statement of Contract Psychometrist, dated May 17, 2013].

Following the teleconference, on 13 July, the Tele-health Program Manager for the Northern Regional Medical Command (NRMC) e-mailed numerous members of KAHC management and the Eagle Applied Sciences Program Manager for the Tele-health contract, advising that Contract Psychometrist's supervision was to change to a "floating" provider model; essentially Contract Psychometrist was to be supervised for purposes of each individual patient assignment, by the individual psychologist who had referred that particular case to her. The e-mail also referenced that training for Contract Psychometrist would be facilitated, conducted, and managed by the Tele-health team located in Rosslyn, Virginia. A neuropsychologist at WRNMMC, who was also a contractor employee, would serve as Contract Psychometrist's

mentor. [See TAB 7 and TAB 11, E-mail from Tele-health Program Manager for NRMC, dated July 13, 2013].

Contract Psychometrist traveled to Rosslyn, Virginia for a week of training, as requested by the Chief of the Department of Tele-health, Northern Regional Medical Command. Contract Psychometrist states that all training was paid for by her contract vendor (Eagle), under the supervision of the WRNMMC contract neuropsychologist who served as Contract Psychometrist's mentor. [See TAB 7, Statement of Contract Psychometrist, dated May 17, 2013; and TAB 2, Statement of Chief of Psychology, dated July 1, 2013]. After the week of training, it was determined that Contract Psychometrist was competent to perform psychometric testing as required by the Tele-health project, and she returned to KAHC. The Acting Chief of Psychology, KAHC, was assigned as Contract Psychometrist's primary local supervisor while Chief of Psychology was absent for maternity leave. [TAB 8, Statement of Contract Psychometrist, dated August 19, 2013, page 1]. During the period that the Acting Chief of Psychology, was assigning Contract Psychometrist's workload, the Whistleblower questioned "the legality related to the government-contractor relationship and workload distribution" pertaining to Contract Psychometrist. [TAB 4, Statement of the Whistleblower, dated May 17, 2013, page 3].

In August 2012, the Whistleblower wrote a lengthy e-mail to the Chief of the Department of Behavioral Health, KAHC. In this e-mail, the Whistleblower again expressed concerns about adherence to proper relationships between government and contractor employees, specifically citing concerns about favoritism being granted (in the form of workload distribution assignments) in order to provide "meaningful employment" to Contract Psychometrist, a contractor employee. The Whistleblower noted that explicit direction had been given by Tele-health Program Manager for NRMC to KAHC providers to supervise Contract Psychometrist, a contractor employee. The Whistleblower recommended that the Department of Behavioral Health Chief verify that the contract for which Contract Psychometrist was employed is not a "personal services" contract. [TAB 12, E-Mail from the Whistleblower to Chief of Psychology, et al., dated August 22, 2012]. The Department of Behavioral Health Chief found the Whistleblower's concerns difficult to understand because, as far as she knew, Contract Psychometrist's treatment was wholly consistent with her knowledge and prior experience regarding interactions with contractor personnel.

In September, the Whistleblower noted that a 59-minute time-off award was to be granted by KAHC commander, to employees of any treatment facility service that had a 90% completion rate on the Army Readiness Assessment Program survey. Commander's e-mail was addressed to "KAHC Military" and "KAHC Civilians." [TAB 13, E-mail from the Commander, dated September 19, 2013]. The Whistleblower interpreted this e-mail as being inclusive of contractors because it did not distinguish between GS DA civilian employees and contractor employees.

In October, Chief of Psychology sent the Whistleblower an e-mail stating that the "whole department was granted a 59-minute rule" and soliciting the Whistleblower's preference as to the timing of her 59 minutes off. The Whistleblower interpreted this e-mail as likely including all employees of the Behavioral Health Department, including contractors. [TAB 14, Chief of

Psychology's e-mail to the Whistleblower, dated October 11, 2012]. Later that same month, the KAHC Public Affairs Officer and the Commander publicly recognized several winners of the KAHC Halloween costume contest, including Contract Psychometrist. Commander's e-mail regarding the contest granted all winners, including Contract Psychometrist, a 59-minute time-off award. [TAB 15, E-mail from the Commander, dated October 31, 2012]. There is no evidence that Contract Psychometrist ever utilized this 59-minute time-off award, however.

Chief of Psychology, and other members of her technical supervisory chain each individually testified to the AR 15-6 IO that they were not aware of any contractor employee having taken 59 minutes off or receiving any other rewards inappropriate for a contractor employee. In her testimony, Contract Psychometrist stated that she had no recollection of having taken 59 minutes off, nor did she recall having participated in any other command-sponsored "hours off" from duty (e.g., Organization Day) since she had begun working at KAHC. [See TAB 7, Statement of Contract Psychometrist, dated May 17, 2013, page 2].

On December 4, 2012, Chief of Psychology and the KAHC Chief of Behavioral Health met with the Whistleblower to address her ongoing concerns about government employee and contractor relationship roles and rules. The Whistleblower again raised concerns about appropriate contractor relationships, workload distribution, and that rewards (e.g., time off) were being granted improperly to contractor employees. The Whistleblower also indicated that she wished to seek outside arbitration of her concerns and a desire to notify the Commander of her intent. [TAB 16, Statement of Chief of Psychology, dated May 16, 2013; Memorandum for Record--Timeline of Events within Psychometry, dated December 5, 2012, with attachments; Memorandum for Record—Meeting with the Whistleblower and Chief of Psychology Regarding the Whistleblower's Relationship with a Contract Employee, dated December 4, 2012]. Chief of Psychology stated that she had attempted over several occasions to assuage the Whistleblower's concerns about appropriate supervisory relationships with contract employees. However, Chief of Psychology also believed, mistakenly, that the psychometrist's position under the Tele-health contract involved the performance of personal services. [See TAB 2, Statement of Chief of Psychology, dated July 1, 2013].

The KAHC COR had been invited to the December 4, 2012 meeting, where she was queried about, and proceeded to explain, the differences between personal services and non-personal services contracts. The COR also explained that she was not the COR for Contract Psychometrist's contract, but advised that she could provide the name of that individual. In a subsequent e-mail dated December 12, 2012, the KAHC COR provided documentation clarifying the definitions of personal and non-personal services contracts. In addition, she addressed the specific psychometrist contract in question (the KAHC Tele-health contract), highlighting the statement that "when not in direct Tele-health care, they [the psychometrists] can be utilized by on-site psychologists or designated personnel."

The KAHC COR also included in her December 12, 2012 e-mail the statement that "Since the Tele-health contract is a personal services contract for the Psychometrist . . . its contractor personnel are subject to the continuous supervision and control of a government officer or employee." [See TAB 2, Statement of Chief of Psychology, dated July 1, 2013]. This statement is in error. When it was awarded on September 30, 2009, the contract listed the

psychometrist position in the personal services category. On December 10, 2009, the government modified the contract to change the position to the non-personal services category. But relevant portions of the base contract were never conformed to reflect this contract modification. [See TAB 3, pages 19 and 71]. It is likely that this statement by the COR contributed to a continued misunderstanding of the nature of the KAHC contract psychometrist position.

Additionally, the Whistleblower had expressed a desire to meet with the KAHC Commanding Officer, in order to notify him that she would seek outside arbitration because she continued to perceive that a personal services contractual relationship had been established in the administration of a contract that was not designated as such. A meeting between the Whistleblower and Commander's deputy was scheduled for December 12, 2012. At this meeting, the Deputy Commander advised the Whistleblower that issues with Contract Psychometrist's competency seemed to be resolved and that an evaluation of Contract Psychometrist's contract was unnecessary. Under the belief that he was being asked to facilitate teamwork in the Psychology Department, the Deputy Commander addressed three issues: workload, supplies, and communication with the Whistleblower. To that end, the Deputy Commander emphasized that the KAHC command did not condone unfair treatment or favoritism.

The Whistleblower was dissatisfied with the meeting's outcome, felt that her concerns remained unaddressed, and perceived that she had been handled unfairly in view of her concerns that Contract Psychometrist's contract was being administered as if it were a personal services contract. In the Whistleblower's May 2013 statement to the AR 15-6 IO, she also elaborated that she had "first-hand knowledge" of FAR violations, including contractors having been awarded tokens of appreciation such as Commanders' coins, recognition as Employee of the Month/Quarter, and time off pursuant to the 59-minute rule. [See TAB 4, Statement of the Whistleblower, dated May 17, 2013, page 5]. At that time the Whistleblower provided copies of three e-mails authorizing the supervisors to apply the 59-minute rule to permit the early departure of "KAHC civilians." [See TAB 2, Statement of Chief of Psychology, dated July 1, 2013; TAB 17, E-mail from the Commander, dated January 17, 2013]. The Whistleblower stated her certainty that Contract Psychometrist took the time off because the Whistleblower recalled that on one such occasion, the two of them had left the workplace early together, but the Whistleblower did not know whether Contract Psychometrist had been charged leave for this time. In contrast, Contract Psychometrist had previously affirmed that she had no recollection of taking off for 59 minutes. [See TAB 7, Statement of Contract Psychometrist, dated May 17, 2013, page 2]. The AR 15-6 investigation was unable to determine that any contract employees at KAHC had actually taken 59 minutes off without being on official leave documented through their contractor employer/vendor..

The Commander was unaware of the December 12, 2012 meeting between the Whistleblower and his Deputy Commander. When interviewed by the AR 15-6 IO, however, the Commander stated that he understood and adhered to the rules regarding appropriate relationships between government and contractor personnel, including the fact that he held regular meetings with his department and section chiefs that would have presented opportunities for sharing and disseminating information about contractor relationship rules. He created an

“Employee of the Quarter” recognition that did provide government-funded rewards, such as coins and cash, to GS civilian employees, but he specifically excluded contractor employees from eligibility for the Commander’s coin and on-the-spot cash awards [TAB 18, Statement of the Commander, dated May 20, 2013]. the Commander emphasized to his staff that the 59-minute rule was intended as a reward for military and government civilian employees only, and that in order to take time off, a contract employee must take leave through his/her contractor employer. [TAB 18, Statement of the Commander, dated May 20, 2013, page 1; TAB 19, Statement of the Commander, dated June 27, 2013].

The Whistleblower also stated that the Chief of Behavioral Health at KAHC had granted a 59-minutes time-off award to two contact employees for achieving a high level of chart closures. [See TAB 6, Statement of the Whistleblower, dated August 22, 2013, page 4]. When interviewed by the AR 15-6 IO, the Behavioral Health Chief vaguely remembered—about one year ago—having congratulated contractor and GS personnel who completed their charts in timely fashion during a meeting, and she recalled possibly having discussed what sort of award might be provided. She went on to say that she did not believe that this discussion ever resulted in any award other than individual recognition at the staff meeting. Further, the Chief of Behavioral Health stated that she did not recall ever having granted a 59-minute time-off award to contractors. She reinforced to the AR 15-6 IO that she understood that such time off is not allowed for contractors, and that if she had pursued an award of that sort, she would have been required to have sought permission to do so.

The Whistleblower stated that the Chief of Behavioral Health and the Commander awarded three contract employees from within the Behavioral Health unit with “Employee of the Month” awards. The Whistleblower provided pictures of the three contract employees during the ceremony with the Commander, including one picture of a contractor employee holding a coin that had apparently just been presented by the Commander. This is consistent with the Commander’s Coin Distribution Tracker, which reflects that on September 24, 2012, the Commander presented a KAHC Commander’s Coin to each of three contractor employees. The Whistleblower also provided a copy of e-mail correspondence between herself and a KAHC contractor employee (who had later converted to a job at KAHC as a GS civilian employee) confirming that she had received a Commander’s coin as part of recognition as the “Employee of the Month”. [TAB 20, E-mail from the Whistleblower to a KAHC Contractor Employee who had been selected for a GS civilian position, dated August 22, 2013, page 2]. Additionally, the Whistleblower provided copies of pictures showing the Commander awarding two contractor maintenance employees with certificates of recognition. Contract Psychometrist did not appear in any of the pictures provided by the Whistleblower.

The Commander acknowledged that he had authorized the use of appropriated funds to purchase his Commander’s coins, and believed that he had given coins to the women who appeared in the pictures provided by the Whistleblower. He recalled that the Chief of Behavioral Health had nominated certain employees for awards in accordance with his awards policy. [TAB 21, Commander’s Awards, Recognition and Acknowledgements (ARA) Program policy, dated August 23, 2013]. He also stated that he was not aware that any of the three women in the pictures were contractor employees at the time, and re-affirmed his understanding that

Commander's coins should not be awarded to contractors [TAB 22, Statement of the Commander, dated August 29, 2013].

The Commander also confirmed that he had given certificates to two maintenance men who had been nominated for recognition by their supervisor, as reflected in the pictures provided by the Whistleblower. [See TAB 22, Statement of the Commander, dated August 29, 2013, page 3].

Finally, the Whistleblower provided copies of another female contractor employee and a GS employee who had received recognition in the KAHC Bulletin and on the KAHC Facebook page that included mention that they had been awarded Commander's coins. Although it was determined that this presentation had not been made by KAHC management, but by representatives of the U.S. Army Installation Management Command, the Whistleblower wanted to ensure that these events were made a part of the record of the AR 15-6 investigation to illustrate KAHC's involvement in the process, and the "lack of distinction/command climate towards this relationship" (referring to the government employee-contractor employee relationship).

OVERVIEW OF THE ALLEGATIONS

Agency Discussion

OSC Referred Allegation 1:

KAHC management improperly created an employer-employee relationship between the government and the psychometrist currently assigned to KAHC, a contract employee.

Army Findings as to Allegation 1:

This allegation is unsubstantiated.

As originally awarded on September 30, 2009, KAHC Tele-health contract W81XWH-09-C-0168 identified the psychometrist position/duties in the personal services category. Contract Modification P0001, dated December 10, 2009, changed the psychometrist position/duties to the non-personal services category due to the fact that less than 45% of the psychometrist's time was spent in direct patient care and because psychometrists were used to administer tests and procedures ordered by others; psychometrists were not involved in patient diagnosis or in prescribing tests and/or procedures.

It is clear that certain KAHC employees directed Contract Psychometrist, a contractor employee of Eagle Allied Sciences, in the performance of her psychometrist duties under the Tele-health contract. But, it seems clear that Contract Psychometrist did not require continuous detailed instruction or robust supervision to perform her contract duties to standard. While the terms "supervise" and "supervision" were often applied to describe the relationships between KAHC government employees and Contract Psychometrist, the misuse of those terms, standing alone, does not establish an improper employer-employee relationship. The evidence shows that although Chief of Psychology believed Contract Psychometrist was in a personal services

contract position, her actions in regard to Contract Psychometrist were not beyond those required for oversight of a non-personal services contract employee.

FAR 37.104(d) lists six descriptive elements to be used as a guide in assessing whether or not a contract is in the nature of personal services. Five of the six elements could be used to describe Contract Psychometrist's position. The contract requires her to: (1) perform on site at a government facility; (2) use government tools and equipment in the employment of her contracted duties; (3) perform her duties in furtherance of Kenner's health care mission; and (4) perform her contracted duties alongside a government employee performing the same duties. Further, (5) Contract Psychometrist's period of contract performance could reasonably be expected to last beyond one year. The Whistleblower also quoted these elements in rendering her opinion that Contract Psychometrist was being managed as a personal services contract employee. [See TAB 4, Statement of the Whistleblower, dated May 17, 2013, page 6; TAB 6, Statement of the Whistleblower, dated August 22, 2013, pages 2-3]. However, the sixth element cited in the FAR, the level of supervision, is the key in determining whether government personnel improperly treated a non-personal services contract employee as a personal services contract employee in this instance.

Chief of Psychology and other government personnel at KAHC and the Northern Regional Medical Command reasonably assigned work to Contract Psychometrist pursuant to the terms and conditions of her contract. There is limited evidence that any government personnel monitored, oversaw, or directed the manner in which Contract Psychometrist complied with each such assignment. Accordingly, except for the 30-day performance improvement plan proposed and designed to address the competency complaint raised by the Whistleblower, no government employee directly or indirectly *supervised* Contract Psychometrist's performance of her duties under the contract. In essence, government personnel merely assigned Contract Psychometrist work to be performed under the contract and government medical practitioners used her resultant work products as diagnostic tools. Contract Psychometrist's interactions with government employees at KAHC and the Northern Regional Medical Command facilitated the completion of the treatment cycle for patients assigned to Contract Psychometrist's for psychometric processing—from her initial intake of vital medical information, to her conduct of the required testing, to her evaluation of those test results, and her ensuing discussion of those results with the attending doctor who would determine the best course of action in proceeding to provide care and treatment for the patient. None of the work Contract Psychometrist performed was of the sort that required direct government supervision to protect the government's interest, to ensure that the government retained control of the function involved, or to retain full personal responsibility for the function at issue in a government employee.³⁵

With respect to the 30-day performance improvement plan³⁶ that the Whistleblower and Chief of Psychology prepared for Contract Psychometrist, the creation or existence of such a plan, while unusual in the context of a contractor employee, did not establish an improper

³⁵ See FAR 37.104(d)(6).

³⁶ Note that Chief of Psychology developed the 30-day performance improvement plan on or about June 19, 2012, went on maternity leave 20 days later, and returned on September 12, 2012. The 30-day plan became moot after the KAHC and Eagle Allied Sciences agreed as to how Contract Psychometrist's workload and oversight would be addressed in Chief of Psychology's absence.

personal services contract. At most, the plan amounted to “[t]he sporadic, unauthorized supervision of only one of a large number of contractor employees . . .,” such that it was not determinative of an improper personal services contract. [See FAR 37.104(c)(2)]. When the Whistleblower started questioning Contract Psychometrist’s competency, both government personnel and Contract Psychometrist properly turned to the contract vendor, Eagle Applied Sciences, to address the issue. Contract Psychometrist showed that she understood her position when, after the Whistleblower asked her to attend a meeting, she stated “I don’t work for Kenner. I work for Eagle.” [TAB 4, Statement of the Whistleblower, dated May 17, 2013, page 3]. The e-mails between Contract Psychometrist and her contract employer points of contact (mostly the Eagle Applied Sciences Program Manager for the KAHC Tele-health contract), also demonstrate that Contract Psychometrist understood who her “supervisors” were and how to approach them for assistance in resolve problems related to her performance of contracted work. [See TAB 7, Statement of Contract Psychometrist, dated May 17, 2013, pages 6-23 and 26-27].

The training that Contract Psychometrist received also supports a finding that no improper personal services contract existed. Initially Contract Psychometrist required what she and Chief of Psychology termed, “familiarization” with some of the psychometric tests that she was required to administer. In a similar vein, the Whistleblower identified that Contract Psychometrist required “remedial training.” The short-term or intermittent instruction that the Whistleblower would have provided to Contract Psychometrist, by definition, would not have created a personal services contract.³⁷ Within 30 days after Eagle Applied Sciences was made aware that Contract Psychometrist required training familiarization to properly perform her duties as a contract psychometrist, Eagle arranged to send Contract Psychometrist to the Rosslyn, Virginia Tele-health facility for Eagle-funded evaluation and training. [See TAB 7; TAB 16, pages 1-4; and TAB 2, page 3]. The Tele-health COR approved Contract Psychometrist’s travel to Rosslyn based on the government’s request and in accordance with paragraph 12.1, Travel, of the Performance Work Statement of the KAHC Tele-health contract. [See TAB 3, page 19]. Contract Psychometrist traveled to Rosslyn for a week of training, paid for by her contract vendor (Eagle), under the supervision and mentorship of a neurologist who was also a contractor employee. [See TABs 2, 7, and 13].

Additionally, although Contract Psychometrist may not have been familiar with some higher-level testing that certified psychometrists may perform, no one at KAHC ever questioned Contract Psychometrist’s credentials or competence. Although the requirements to be a Certified Specialist of Psychometry and a member in good standing of the National Association of Psychometrists were conditions of employment applicable to the Whistleblower in her GS-11 DA civilian position as a Behavioral Sciences Coordinator, such certification and membership requirements were not a part of the Tele-health contract applicable to Contract Psychometrist in her status as contract psychometrist. Consequently, management at KAHC never had cause to employ continuous, close supervision or control over Contract Psychometrist’s performance such that it would have made Contract Psychometrist “appear to be, in effect, [a] government employee.”

It is true that KAHC personnel were confused about whether Contract Psychometrist was working under a personal services or a non-personal services contract. Many factors contributed

³⁷ See FAR 2.101.

to this confusion. Foremost, in 2009, the higher headquarters MEDCOM contracting office modified the Tele-health contract, changing the psychometrist position from one for personal services to a non-personal services contract. MEDCOM did not ensure that the changes effected by the contract modification were incorporated throughout the base contract nor was KAHC management advised of the change. Consequently, some KAHC personnel believed that Contract Psychometrist was working in a personal services position. Nonetheless, in practice, KAHC utilized Contract Psychometrist as a non-personal services contractor. Contract Psychometrist and the KAHC leadership clearly understood that Contract Psychometrist worked for Eagle. Contract Psychometrist and KAHC turned to Eagle for her training and guidance. Contract Psychometrist's performance of duties was not so closely controlled by KAHC employees as to create an improper personal services contract.

Consequently, the weight of the evidence does not support the allegation of an improper employer-employee relationship.

OSC Referred Allegation 2:

KAHC management has continued this improper relationship despite being informed several times of the psychometrist's status as a contract employee.

Army Findings as to Allegation 2:

This allegation is unsubstantiated.

As discussed above in Allegation 1, there was a great deal of confusion concerning Contract Psychometrist's status. The December 2009 modification of the KAHC Tele-health contract was not fully incorporated into all of the relevant sections in the base contract and was effected without the knowledge of KAHC management, contributing to this confusion. However, there was insufficient government control over how Contract Psychometrist performed her duties to make this contract an improper personal services contract.

Initially, based solely on the Whistleblower's observations and reports early in Contract Psychometrist's employment, Chief of Psychology relayed information to her technical supervisory chain indicating that she was not satisfied with Contract Psychometrist's performance. As part of a 30-day performance improvement plan arranged with Chief of Psychology, the Whistleblower stated that she was asked to evaluate Contract Psychometrist, was expected to provide Contract Psychometrist with additional training on certain testing procedures and to co-sign Contract Psychometrist's patient notes, as well as to take other actions to assist in the remediation of Contract Psychometrist's performance deficiencies. The 30-day plan signed by Contract Psychometrist on June 19, 2012 specifically states that higher priority assessments will be observed by the Behavioral Sciences Coordinator (the Whistleblower) or the Chief of Psychology (Chief of Psychology.) [See TAB 10, Statement of Chief of Psychology, dated August 16, 2013]. Pursuant to an e-mail from (the Northern Regional Medical Command Tele-health Program Manager) in early July 2012, however, oversight of Contract Psychometrist was changed to a "floating" system—each psychologist who requested that Contract Psychometrist test an individual patient would direct her on-site activities with regard to that patient. The KAHC Tele-health contract authorizes this type of direct tasking. [TAB 3, page 28, paragraph 19.9.9]. And it is generally accepted within the field that the professional

relationships between psychometrists and psychologists will involve such an arrangement. [See Statement of Chief of Psychology, dated May 16, 2013]. In addition, the Whistleblower's GS-11 Position Description contemplated her overseeing the training and evaluation of subordinates, including contractors. [See TAB 5, Position Description, Behavioral Sciences Coordinator]. Nevertheless, for the period of time between June 19 and July 13, 2012, the Whistleblower's oversight of Contract Psychometrist's work appeared to inappropriately blend government and contractor functions. However, Chief of Psychology and the Director of Tele-health for the Northern Regional Medical Command worked with the Tele-health COR and the contracting office to have Contract Psychometrist's employer, Eagle Applied Sciences, coordinate additional training for Contract Psychometrist to remedy the performance issues raised by the Whistleblower. [See TAB 11; TAB 16, Statement of Chief of Psychology, dated May 16, 2013, pages 1-4; TAB 3, page 19; and TAB 2, Statement of Chief of Psychology, dated July 1, 2013, page 3]. Although KAHC management should have turned earlier to the Tele-health COR to assist them in determining the boundaries of their contractor oversight activities, the regulatory guidance and the totality of the evidence indicate that Chief of Psychology's supervision of Contract Psychometrist did not exceed the bounds of a non-personal services contract.

OSC Referred Allegation 3:

The improper relationship between the government and the contract psychometrist may violate the Federal Acquisition Regulation, Anti-Deficiency Act, and other procurement guidelines.

Army Findings as to Allegation 3:

This allegation is not substantiated. However, nonetheless, with respect to a related but independent basis from the OSC referred allegations, the Army does acknowledge that the Commander improperly presented Commander's coins to three contractor employees and certificates of recognition to two other contractor employees, in contravention of Army and MEDCOM Regulations and JER prohibitions on the endorsement of non-federal entities.

Given the findings with regard to OSC-referred allegations 1 and 2, above, there is no violation of the Federal Acquisition Regulation, Anti-Deficiency Act, or other procurement guideline as they pertain to Contract Psychometrist status as a contractor employee. For the reasons set forth below, we find no violation of the Federal Acquisition Regulation, Anti-Deficiency Act, and other procurement guidelines, including the Purpose Statute. However, it should be noted that with respect to the Whistleblower's allegations that other contractor employees working at KAHC improperly received awards and recognition, the Army acknowledges the finding that Commander's conduct was not in keeping with Army and MEDCOM Regulations and was not consistent with JER cautions regarding the endorsement of non-federal entities.

Multiple e-mails between KAHC personnel suggest that contractor employees may have been tacitly invited to partake in 59-minute time-off awards, without being provided specific guidance that they were not authorized to do so absent prior coordination with their contractor employers for leave, and that such leave would not be chargeable to hours for which the government was obligated to pay under the contract. [See TABs 13, 14, and 15]. The "KAHC Civilians" e-mail distribution list includes both government civilian and contractor employees. KAHC management, including the Commander, all asserted that they were aware of the rules for dealing with contractor employees and all stated that they upheld those rules. However,

Commander's ARA Program policy fails to specify that the informal 59-minute rule does NOT apply to contractors. [See TAB 21, Commander's Awards, Recognition and Acknowledgements (ARA) Program policy, dated August 23, 2013, page 2]. It is also does not appear that contractors were specifically reminded that they were not authorized a 59-minute time-off award, particularly because the e-mail announcements of such awards appeared to be all inclusive. Although it was not wholly unreasonable for management to presume that lower-level supervisors were knowledgeable of the rules relating to the administration of contractor employees and to expect that those would ensure that such rules were enforced, two better courses of action were available. First, management could have limited dissemination of the e-mail notifying employees of the 59-minute time-off award only to Soldiers and DA civilian employees. Second, management could have included both DA civilian employees and contractor employees in the same e-mail, while taking care to set forth clearly the "different" rules applicable to the contract employees. It is important to note, however, that notwithstanding the inclusion of contract employees on the distribution list of several e-mails announcing a 59-minute time-off award, the AR 15-6 IO uncovered no evidence that any contractor employee ever had availed himself/herself of a time-off award without being in a proper leave status through their contractor/vendor.

Further, Commander's ARA Program policy blurs the distinction between civilian employees and contractor employees in certain regards. As to the "Civilian Employee of the Month Award," for example, the policy specifically provides that "[n]ominations can be made by and for any member of the Kenner AHC staff (including contractors)." [See TAB 21, Commander's Awards, Recognition and Acknowledgements (ARA) Program policy, dated August 23, 2013, page 3, paragraph 5c].

The Whistleblower's allegation that awards and recognition were provided to contractor employees is substantiated by the photographic evidence she provided, as well as by Commander's testimony, his Commander's Coin Distribution Tracker, and other e-mails collected during the AR 15-6 investigation. The Whistleblower provided pictures of the three contract employees during the ceremony with the Commander, including one picture of a contractor employee holding a coin that had apparently just been conveyed by the Commander. This is consistent with Commander's testimony that he presented awards to the individuals in the picture, although he did not realize that they were contractors, and with his Coin Distribution Tracker that reflects that on September 24, 2012, the Commander presented a KAHC Commander's Coin to three contractor employees. Additionally, the Whistleblower provided copies of pictures showing the Commander awarding two contractor maintenance employees with certificates of recognition. The Whistleblower also provided a copy of e-mail correspondence between herself and a KAHC contractor employee (who had later converted to a job at KAHC as a GS civilian) confirming that she had received a coin awarded as part of the "Employee of the Month" recognition. These "awards" and recognitions, however well-intentioned on the part of the KAHC command and however *di minimus* in actual value were not in accord with Army and MEDCOM Regulations addressing Commander's coins.

These regulatory violations notwithstanding, none of the evidence gathered over the course of this investigation serves to substantiate a violation of either the Purpose Statute or the Anti-Deficiency Act. Violations of the Purpose Statute or the Anti-Deficiency Act attach at the

time appropriated funds are obligated and disbursed. A review of the available evidence reveals that the obligation and disbursement of Operations and Maintenance funds by the KAHC Logistics Division to pay for Commander's coins requested by the Commander, was authorized by law, Army Regulations establishing departmental awards programs for Soldiers and DA civilian employees, and the subordinate MEDCOM Regulation and Northern Regional Medical Command policy. The clear purpose underlying the KAHC purchase of Commander's coins was to award them to military and civilian personnel when merited by "excellence" in performance. Accordingly, there was no violation of the "Purpose Statute." And, since no Purpose Statute violation occurred, there can be no violation of the Anti-Deficiency Act under these circumstances. [See DoD FMR, Chapter 2, paragraph 020202B].

To be clear, we note that no matter how well intentioned the Commander was in to seeking to recognize the contractor employees performing contract work for KAHC as part of the "team," his *conduct* in presenting Commander's coins and certificates of appreciation was not in accord with Army and MEDCOM Regulations. These regulatory violations do not implicate the Purpose Statute or the Anti-Deficiency Act, however.

Had the Commander wished to recognize contractor employees for their contributions to the mission of KAHC, he should have coordinated his proposed actions with the appropriate Contracting Officer or COR to ensure that any such recognition took the form of a factual "Letter of Input" (as appeared to be contemplated by Commander's own ARA Program policy) to the contractor/vendor organization, which then may have elected to recognize one or more of its contractor employees on an individual basis. Further, it would have been appropriate for the Commander, or other members of KAHC management, to provide the Contracting Officer or COR with specific, detailed, stand alone, and fully supported information about contractor employee performance—whether in the form of "negative feedback" or kudos—to facilitating the documentation of same in established contractor performance assessment databases (as described in the *DoD COR Handbook*), as part of the contract quality surveillance process.

VIOLATIONS OR APPARENT VIOLATIONS OF LAW, RULE, OR REGULATION

The AR 15-6 investigation into matters referred by OSC revealed that military coins and certificates of recognition were provided to contractor employees in contravention of Army and MEDCOM Regulations and JER prohibitions on the endorsement of non-federal entities.

CORRECTIVE ACTIONS UNDERTAKEN

Even though no violation of the legal constraints on personal services contracts was deemed to have occurred in this case, the complexity and confusion associated with this issue, and with government employee-contractor relationships in general, warrants some corrective action. MEDCOM will promulgate and disseminate additional command-wide guidance and standardized training on the differences between a personal services contract and a non-personal services contract, as well as the roles and responsibilities of government employees in a

“blended” government workplace. Training will address the proper use and “supervision” of, as well as the allocation of work to, contractor employees.

Further, the training will emphasize that contractor employees are not authorized to receive performance awards, recognition, or acknowledgments procured with appropriated funds—including Commander’s coins or certificates of appreciation. The specific provisions of Army and MEDCOM Regulations prohibiting awards to contractors will be discussed, as will the JER prohibitions on the endorsement of non-federal entities. The applicability of the “59-minute rule” will be discussed, as will the fact that contractor employees are not eligible for a time-off award, and may depart the workplace early only after having coordinated with their contractor employers for leave, and that such leave will not be chargeable to hours for which the government is obligated to pay under the contract. The training will include discussions as to how commanders, supervisors, and other leaders best can craft and disseminate workplace messages—including e-mail communications—announcing a grant of “59-minutes”—so as to minimize confusion between the role and rules applicable to DA military and civilian employees and those governing contractor employees. Finally, the training will educate MEDCOM personnel on the use of appropriate measures to assess and document contractor performance.

Further, MEDCOM has requested that the COR for the KAHC Tele-health contract review the psychometrist position as set forth in the contract to ensure that the position should remain categorized as non-personal services given the nature of the duties the psychometrist must perform.

In the intervening period since OSC referred the Whistleblower’s allegations to DA, the Commander has departed KAHC for a new duty assignment. Accordingly, the MEDCOM SJA will take affirmative action to ensure that Commander’s ARA Program policy, if still in use at KAHC, is redrafted to render it wholly consistent with applicable law, regulation and policy, with a focus on making plain the prohibition on providing awards to contractor employees. Additionally, the matter of Commander’s conduct as documented in this report, however well-intentioned that conduct may have been, has been referred to the Commanding General, Northern Regional Medical Command, for review and action as appropriate.

CONCLUSION

The DA takes very seriously its responsibility to address, in a timely and thorough fashion, the concerns of the OSC. In this case, the Army conducted a comprehensive investigation of the allegations referred by OSC. This investigation revealed that the increasing reliance on contractors in the Federal government workplace has created certain challenges.


The KAHC leadership attempted to meet mission requirements as a “team” in a blended work environment of military personnel, DA civilian employees, and contractor employees. In such an environment, however, the rules related to contractor employees require an arm’s length approach to incorporating them into the workplace; such rules are often in tension with traditional principles of enhancing team building for mission accomplishment. Our investigation documented that although the higher headquarters MEDCOM contracting community changed the nature of the performance for the psychometrist position from “personal services” to “non-personal services” as part of a contract modification, KAHC leadership did not know about this modification and did not ascertain whether the contract psychometrist was a personal services or non personal services contractor. However, the methods and procedures KAHC used to assign specific work and duties to the contract psychometrist were proper and reflected that the contractor was not supervised in a manner that created an unlawful employer-employee relationship. While there does not appear to be a violation of applicable rules, KAHC leadership could have done a better job of ensuring that all personnel knew the rules and implemented them correctly.

The investigation did document several instances in which the stringent rules regarding contract employees were not strictly observed. In some cases, awards purchased with appropriated funds were presented to contract employees. This is unacceptable and KAHC is implementing measures to prevent a recurrence as well as educating its personnel on the use of appropriate measures to assess and document contractor performance.

I am satisfied that this is the correct outcome in this matter. Further, the Army found no criminal violations had occurred, and thus, made no referral of any violation to the Attorney General pursuant to Title 5, USC, Section 1213(d)(5)(d).

This letter, with enclosures, is submitted in satisfaction of my responsibilities under Title 5, USC, Section 1213(c) and (d). Please direct any further questions you may have concerning this matter to [REDACTED] the DA Office of General Counsel [REDACTED].

Sincerely,



Thomas R. Lamont
Assistant Secretary of the Army
(Manpower and Reserve Affairs)