



U.S. OFFICE OF SPECIAL COUNSEL

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Washington, D.C. 20036-4505

The Special Counsel

March 30, 2015

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

Re: OSC File No. DI-13-1252

Dear Mr. President:

Pursuant to 5 U.S.C. § 1213(e)(3), enclosed please find an agency report based on disclosures made by an employee at the Department of the Army, Kenner Army Health Clinic (Kenner), Fort Lee, Virginia, alleging that employees engaged in conduct that constituted violations of law, rule, or regulation. The whistleblower, Ms. Amy Trotto, who consented to the release of her name, is a behavioral sciences coordinator at Kenner. Ms. Trotto alleged that management at Kenner improperly created an employer-employee relationship between the government and a psychometrist at Kenner, who is a contract employee; that management has continued this improper relationship despite being informed several times of the psychometrist's status as a contract employee; and that the improper relationship between the government and the contract psychometrist may violate the Federal Acquisition Regulation (FAR), Anti-Deficiency Act (ADA), and other procurement guidelines.

Although the Army did not substantiate Ms. Trotto's allegations, it did determine that due to the complexity and confusion associated with the issue of personal services contracts, and the government employee-contractor relationship in general, U.S. Army Medical Command (MEDCOM) would promulgate and disseminate additional command-wide guidance and standardize training on the differences between a personal service contract and a non-personal service contract. I have determined that the report meets all statutory requirements and that the findings of the agency head appear reasonable.

Ms. Trotto's allegations were referred to Secretary of the Army John McHugh to conduct an investigation pursuant to 5 U.S.C. § 1213 (c) and (d). The Secretary delegated the authority to sign the Army's report of investigation to Assistant Secretary of the Army Thomas LaMont. On September 20, 2013, Assistant Secretary Lamont submitted the agency's report to OSC based on investigation conducted by the MEDCOM

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Commander. Ms. Trotto submitted comments on the report pursuant to § 1213(e)(1). As required by 5 U.S.C. § 1213(e)(3), I am now transmitting the report and comments to you.¹

The Whistleblower's Disclosures

Ms. Trotto previously served as a contract psychometrist supporting Walter Reed Army Medical Center (WRAMC) with a duty location at Kenner. As a psychometrist, Ms. Trotto was employed under a non-personal services contract between the agency and Eagle Applied Sciences (Eagle), a private contractor. She served in this position for approximately one year before she was hired directly by the agency as a government employee. Eagle then hired Ms. Giorgia Adams as a psychometrist to fill Ms. Trotto's former position at Kenner.

Ms. Trotto explained that shortly after Ms. Adams began working at Kenner, Ms. Adams began having serious competency issues. Ms. Trotto requested assistance from Captain Jacquelyn Flood, chief of psychology, on how to correct Ms. Adams's competency shortcomings in light of Ms. Adams's status as a contract employee. Ms. Trotto and Capt. Flood then held a meeting with Ms. Adams to put her on a performance plan. Capt. Flood also directed Ms. Trotto to review and submit for co-signing Ms. Adams's patient encounters.

Ms. Trotto stated that she followed these instructions, as well as provided Ms. Adams with additional testing and feedback. However, Ms. Trotto claimed that Ms. Adams's competency issues continued. Ms. Trotto notified management about her concerns, which led to a July 2012 teleconference focusing on enhancement training for Ms. Adams. Following this teleconference, Wendy Baynard, Department of Tele-Health program manager, WRAMC, sent an email dated July 13, 2012, indicating that Ms. Adams would be supervised by providers who assign her referrals for testing and the supervising psychologist. The email also stated that Ms. Adams's training would be managed by the supervising psychologists at Kenner. Significantly, the email said that testing batteries should be "tailored" to Ms. Adams's strengths and knowledge.

¹ The Office of Special Counsel (OSC) is authorized by law to receive disclosure of information from federal employees alleging violation of law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health and safety. 5 U.S.C. § 1213(a) and (b). OSC does not have the authority to investigate a whistleblower's disclosure; rather, if the Special Counsel determines that there is a substantial likelihood that one of the aforementioned conditions exists, she is required to advise the appropriate agency head of her determination, and the agency head is required to conduct an investigation of the allegations and submit a written report. 5 U.S.C. § 1213(c) and (g).

Upon receipt, the Special Counsel reviews the agency report to determine whether it contains all of the information required by statute and that the findings of the head of the agency appear to be reasonable. 5 U.S.C. § 1213(e)(2). The Special Counsel will determine that the agency's investigative findings and conclusions appear reasonable if they are credible, consistent, and complete based upon the facts in the disclosure, the agency report, and the comments offered by the whistleblower under 5 U.S.C. § 1213(e)(1).

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According to Ms. Trotto, Ms. Adams continued to be supervised and trained by government employees, and not by employees of Eagle. Furthermore, Ms. Trotto alleged that management repeatedly indicated that “everyone should be treated equally,” regardless of contractor status. For example, Ms. Trotto disclosed that Dr. Martin Leibman, acting chief of psychology, chose which assessment batteries would be provided to Ms. Adams in order to ensure that she receives meaningful employment. Ms. Adams also improperly received leave along with Kenner government employees as directed by Colonel Joe Pina, command officer, Kenner, in an email dated September 19, 2012.

Ms. Trotto stated that she repeatedly brought concerns about the ongoing supervisory relationship between the agency and Ms. Adams to the attention of management, including Capt. Flood, Dr. Eleanor Gagon, department head of Behavioral Health, and Lt. Col. Michael Pelzner, deputy commander of Clinical Services. She alleged that the contract under which she formerly worked, and under which Ms. Adams worked, Contract No. W81XWH-09-0168, is not a personal services contract, and thus there can be no such relationship. Specifically, FAR 37.104(a) characterizes personal services contracts as arising when an employer-employee relationship is established between the government and contractor personnel. FAR 37.104(b) forbids the government from entering into such personal services contracts unless specifically authorized by statute to do so. FAR 37.104(c)(1) explains that improper employer-employee relationships are identified by six factors: (1) performance is on site; (2) principal tools and equipment are furnished by the government; (3) services are applied directly to the integral effort of agencies or an organizational subpart in furtherance of assigned function of 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 one 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 in order to adequately protect the government’s interest, retain control of the function involved, or retain full personal responsibility for the function supported in a duly authorized federal officer or employee.

Although the Department of Defense (DoD) is authorized by 10 U.S.C. § 1091(1) to enter into personal services contracts, Ms. Trotto alleged that Ms. Adams’s contract is not, in fact, a personal services contract. Despite this, Ms. Adams was regularly treated as a government employee, particularly with regard to her supervision, training, and leave. Ms. Trotto stated that Ms. Adams’s relationship with the agency meets each of the factors outlined in FAR 37.104(c)(1) as indicating an improper employer-employee relationship. Furthermore, as a result of this improper employer-employee relationship, Ms. Trotto alleged that a violation of 31 U.S.C. § 1342 (Anti-Deficiency Act) may have occurred. Section 1342 prohibits government employees from employing personal services exceeding that authorized by law, such as § 1091(1). While DoD is authorized to procure

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personal services via contract personnel, the contract at issue in this matter is specifically not a personal services contract and, thus, Ms. Trotto alleged that the agency's relationship with Ms. Adams was outside the scope of its authority.

Ms. Trotto further noted that Ms. Adams's experience was not unique. Ms. Trotto disclosed that another contract employee approached management to resolve disputes about what was required of her by her contract, which was not a personal services contract, and what the agency was requesting her to do, which she believed was outside of the scope of the contract. Similarly, Ms. Trotto was also informed by Wanda Miller, Kenner's contracting officer's representative, that the Kenner Pharmacy Department experienced a dispute with an employee who was not under a personal services contract but was regularly treated as a government employee. The contractor was ultimately excluded from a non-contractor function and filed an Equal Employment Opportunity complaint, which brought the improper employer-employee relationship to light. Thus, Ms. Trotto alleged that these types of contracting irregularities may be widespread at Kenner.

The Agency's Report

The agency did not substantiate Ms. Trotto's allegations, although it did determine that due to the complexity and confusion associated with the issue, and the government employee-contractor relationship in general, MEDCOM would promulgate and disseminate additional command-wide guidance and standardized training on the differences between a personal services contract and a non-personal services contract.

With regard to the alleged improper employee-employer relationship, the agency found that Ms. Adams did not require continuous oversight from Army employees to perform her duties as required. The investigation determined that although Capt. Flood believed that Ms. Adams was employed under a personal services contract, her actions in reference to Ms. Adams were not beyond those required for oversight of a non-personal services contract. Specifically, the investigation addressed the six elements outlined by FAR 37.104(d) to be used in assessing whether or not a contract is a personal services contract. While the agency found that five of the first six elements could be used to describe Ms. Adams's position, MEDCOM explained that the sixth element, the level of supervision, was key to determining whether government personnel improperly treated Ms. Adams as a personal services contract employee. The report noted that, with the exception of Ms. Adams's 30-day performance improvement plan, government employees did not supervise Ms. Adams's completion of her job duties. The agency determined that none of the work Ms. Adams 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.

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With regard to Ms. Adams's 30-day performance plan, the agency acknowledged that such a situation was unusual, but found that the performance plan alone did not establish an improper relationship. The report stated that Ms. Adams was aware of her role as a contractor, and noted that when concerns about her performance were raised, the agency appropriately turned to Eagle to resolve the situation. As a result, the weight of the evidence did not support the allegation that the government created an improper employee-employer relationship. Similarly, the agency found that Ms. Adams's training was not improper because it was arranged and funded by Eagle. Further, during training Ms. Adams was under the supervision and mentorship of a fellow contract employee. In addition, Ms. Adams's contract did not require certification or membership in the National Association of Psychometrists and, thus, her credentials and competence were never at issue and she did not require additional, targeted supervision.

The agency did not substantiate Ms. Trotto's allegation that Kenner management continued an improper relationship despite being informed several times of Ms. Adams's status as a contract employee. The investigation did determine that Ms. Trotto's oversight of Ms. Adams during her initial 30-day performance plan appeared to inappropriately blend government and contractor functions. However, oversight of Ms. Adams was later changed to a "floating" system, whereby Ms. Adams would be directed by individual patients' treating psychologists. Further, Capt. Flood and Ms. Baynard worked with Eagle to coordinate additional training for Ms. Adams to remedy her performance issues. While the report concedes that management should have turned earlier to Ms. Baynard in order to establish the parameters of their contractor oversight activities, the agency found that Capt. Flood's supervision of Ms. Adams did not exceed the bounds of a personal services contract.

Finally, the agency did not substantiate Ms. Trotto's allegation that the improper relationship between Ms. Adams and the government was in violation of the FAR, ADA, or other procurement guidelines, as no such relationship existed. However, the report notes that through a related review, independent of OSC's referral, the agency determined that Col. Pina improperly presented Commander's Coins to three contractor employees and certificates of recognition to two other contract employees, in contravention of Army, MEDCOM, and Joint Ethics Regulations, as well prohibitions on the endorsement of non-federal entities.² Thus, the report acknowledges that contractors at Kenner received improper recognition from Col. Pina, including 59-minute time off awards and consideration for "Civilian Employee of the Month" awards. However, the investigation did not find that Col. Pina's actions violated the ADA or any other law, rule, or regulation.

² MEDCOM substantiated Ms. Trotto's allegation that awards and recognition were provided to contractor employees through the use of photographic evidence she provided, as well as by the Commander's testimony, his Commander's Coins distribution tracker, and other emails collected during the investigation.

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Regarding the corrective actions undertaken, MEDCOM indicated that it would 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. The training would address the proper use and supervision of contract employees; emphasize that contractor employees are not authorized to receive performance awards, recognitions, or acknowledgements procured with appropriated funds; and educate MEDCOM personnel on the use of appropriate measures to assess and document contractor performances.

On January 31, 2014, MEDCOM published and disseminated a policy entitled "Contractor Personnel in the Federal Government Workplace." A training presentation was developed to introduce employees to the details of the policy, which touched upon the topics recommended in the agency's report. However, the training was not reviewed by the MEDCOM Staff Judge Advocate Office's contract law attorneys prior to dissemination. That review occurred in February 2015, and revisions were then incorporated into the final version of the training, which has been approved for distribution in March 2015. Further, the Kenner award program was modified in April 2014 to ensure that contractors are only recognized through their contracting officers. However, additional concerns within the program remained, and the MEDCOM Staff Judge Advocate requested additional corrective action from the Northern Regional Medical Command. Final revisions to the award program are expected by April 2015.

The agency noted that since OSC's referral of these allegations, Col. Pina was moved to a new duty assignment, and the Commanding General of the Northern Regional Medical Command retired. Thus, the agency was unable to determine what disciplinary or other action, if any, was taken in response to the improper award program. The agency has indicated that it will notify OSC should additional be taken.

The Whistleblower's Comments

In her comments, Ms. Trotto asserted that the testimony within the report was incongruent and should be clarified because it gave an inaccurate representation of what actually occurred. She also indicated that the individuals within MEDCOM who conducted the investigation lacked FAR expertise, which significantly undermines the credibility of the investigation. Finally, Ms. Trotto noted that the policy regarding awards, recognition, and acknowledgement had not yet been updated at the time she submitted her comments.

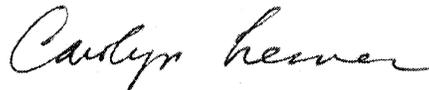
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The Special Counsel's Findings

I have reviewed the original disclosure, the agency report, and Ms. Trotto's comments. While Ms. Trotto's comments included important critiques of the agency's actions, it appears that the Army has taken significant steps since that time to implement changes to its programs. Thus, I have determined that the report meets all statutory requirements and that the findings of the agency head appear reasonable.

As required by 5 U.S.C. § 1213(e)(3), I have sent copies of the unredacted report and comments to the Chairmen and Ranking Members of the Senate and House Committees on Armed Services. I have also filed copies of the redacted report in our public file, which is available online at www.osc.gov.³ OSC has now closed this file.

Respectfully,



Carolyn N. Lerner

Enclosures

³ The Army provided OSC with a report containing employee names (enclosed), and a redacted report in which employees are identified by title only. The Army cited the Privacy Act of 1974 (Privacy Act) (5 U.S.C. § 552a) as the basis for its redactions to the report produced pursuant to 5 U.S.C. § 1213, and requested that OSC post the redacted version of the report in our public file. OSC objects to the Army's use of the Privacy Act to remove employee names on the basis that the application of the Privacy Act in this manner is overly broad. However, OSC has agreed to post the redacted version of the agency's report as an accommodation.