



U.S. OFFICE OF SPECIAL COUNSEL

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The Special Counsel

April 27, 2015

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

Re: OSC File No. DI-13-3495

Dear Mr. President:

On May 29, 2014, pursuant to 5 U.S.C. § 1213(e)(3), I sent to you an agency report prepared by the Department of Health and Human Services (HHS) in response to an Office of Special Counsel (OSC) referral. The disclosures were made by an employee of the Indian Health Service (IHS), Portland Service Area, Portland, Oregon. The whistleblower, who chose to remain anonymous, disclosed that IHS Purchased/Referred Care (PRC) (formerly Contract Health Service) funds were improperly approved to pay for federal salaries, vendor payments, and other inappropriate expenditures, in violation of federal law and agency policy. The agency did not substantiate the allegation that federal law was violated by employees in the Portland Service Area, but did find that the expenditure of PRC funds to pay for drugs through a Department of Veterans Affairs program was not specifically authorized by IHS policy. As a result, IHS undertook an evaluation to determine whether the permissible uses of PRC funds should be updated or clarified and whether any additional training was needed. At my request, HHS recently submitted an update on the agency's progress in this evaluation. I am now transmitting a copy of the update to you.

The update outlines the agency's planned revisions to its existing PRC policies, and acknowledges that policies governing the use of PRC were issued separately over a period of years, contributing to confusion about the appropriate use of PRC funds. IHS is updating the PRC chapter of the Indian Health Manual to include approved uses for PRC funds. IHS also plans to require area offices and service units to seek approval for legally permissible uses of PRC funds that exceed the revised policy limits. For example, any purchase of care using PRC funds in support of direct care that is not consistent with policy must be pre-approved by the Director, Office of Resource Access and Partnerships.

OSC is authorized by law to receive disclosures of information from federal employees alleging violations 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

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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).

The initial January 2014 agency report determined that although no violation of law or policy occurred, IHS practice in using PRC funds was neither uniform nor fully consistent with agency policy. Specifically, the agency asserted that by statute IHS is authorized to spend appropriated funds for the "conservation of health" of Native Americans. Under such authority, IHS and tribes use CHS funds to pay for medical care to beneficiaries from public and private providers. However, the report acknowledged that the agency's guidance on the use of PRC funds was scattered and unclear. The report further determined that the Portland Service Area did not use PRC funds to pay federal salaries for employees in certain area clinics, nor were any clinics inappropriately paid for with PRC funding. However, the Portland Service Area does use PRC funds to pay for medical and pharmaceutical supplies through an agreement with the Department of Veterans Affairs. The report found that while this use of PRC funds was not specifically authorized by agency policy, the expenditure of PRC funds in this manner was not unauthorized or impermissible. As a result of its investigation, the agency determined that its policies on PRC funds required review and clarification, and that additional training for employees was necessary.

The agency's February 2015 update reflects the corrective actions it has undertaken as a result of OSC's referral to HHS. These actions include streamlined policy guidance for employees on the use of PRC funds, including uses that are not included in policy documents but are still considered permissible. In addition, the agency's review allows for additional oversight of the expenditure process.

In comments to the update, whistleblower disagreed with the agency's assertion that confusion around the use of PRC funds was the result of unclear policies. Rather, the whistleblower suggested that the agency maintains a very large amount of information about PRC funding on its website and that local staff communicate frequently with headquarters PRC staff regarding funding to ensure they are well acquainted with

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relevant regulations and policies. Additionally, the whistleblower noted that there are employees who specifically provide technical assistance and training on PRC policies, procedures, and issues to ensure adherence to guidelines and regulations. The whistleblower asserted that despite this, Portland Service Area management has, on occasion, decided not to follow the advice available to them and has misused PRC funds. The whistleblower contended that these problems are systemic within IHS, and that additional safeguards should be in place to ensure that the misuse of PRC funds does not reoccur.

I have reviewed the agency's original report and its update, as well as the whistleblower's comments. While the whistleblower raises legitimate concerns regarding the ongoing use of PRC funds, the agency's update indicates that it has taken significant steps to streamline and clarify its processes. Thus, I have determined that the agency's report contains all of the information required by statute and the findings appear to be reasonable.

As required by law, 5 U.S.C. § 1213(e)(3), I have sent copies of the update and whistleblower comments to the Chairman and Vice Chairman of the Senate Committee on Indian Affairs and the Chairman and Ranking Member of the House Committee on Natural Resources. We also associated the update with the above-referenced closed files and placed the update in our public file, which is available online at www.osc.gov.

Respectfully,



Carolyn N. Lerner

Enclosures