



U.S. OFFICE OF SPECIAL COUNSEL

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The Special Counsel

October 30, 2015

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

Re: OSC File No. DI-13-2224

Dear Mr. President:

Pursuant to my duties as Special Counsel, enclosed please find the Department of Veterans Affairs' (VA) reports, based on disclosures of wrongdoing at the Robley Rex VA Medical Center, in Louisville, Kentucky (Louisville VA), made to the Office of Special Counsel (OSC). OSC has reviewed the reports and, in accordance with 5 U.S.C. § 1213(e), provides the following summary of the investigation, whistleblower comments, and my findings.

The whistleblower, Karen Seng, who consented to disclosure of her name, helped develop the Community Residential Care (CRC) Program at the Louisville VA in 2005 and was the program coordinator of the CRC Program until May 2012. She alleged that veterans eligible for placement in the CRC Program were wrongfully excluded from the program; veterans in the CRC Program were assigned to unapproved facilities; and facilities were impermissibly removed from the CRC Program without due process in violation of regulations.

**The VA substantiated the allegations that veterans eligible for placement in the CRC Program facilities were excluded from the program in violation of agency rules and federal regulations, and that facilities were removed from the CRC Program without due process. The VA did not substantiate the allegation that veterans were improperly assigned to unapproved facilities. In response to these findings, the VA pledged to ensure that the CRC Program is not limited to mental health patients and facilities within 30 miles of the Louisville VA, and that the program complies with all applicable laws, rules, and procedures. The VA has also moved the CRC Program from the Mental Health Division to the Geriatrics and Extended Care Program. I have determined that the agency reports contain all of the information required by statute and that the findings appear reasonable.**

Ms. Seng's allegations were referred to then-Secretary Eric K. Shinseki, to conduct an investigation pursuant to 5 U.S.C. § 1213(c) and (d). On December 27, 2013, Secretary Shinseki submitted the agency report to OSC based on an investigation

The President  
October 30, 2015  
Page 2 of 4

conducted by the VA's Office of the Medical Inspector (OMI). On June 17, 2014, pursuant to § 1213(e)(1), Ms. Seng submitted comments disagreeing with the OMI's conclusions in the report. OSC requested further information from the VA to address Ms. Seng's concerns. On March 30, 2015 the VA submitted a supplemental report. On October 20, 2015, Ms. Seng submitted comments on the supplemental report. As required by 5 U.S.C. § 1213(e)(3), I am now transmitting the reports and comments to you.<sup>1</sup>

Ms. Seng asserted that her supervisor, Gaila Taylor, excluded CRC-eligible veterans by restricting admission to veterans who were mental health patients, which is not a limitation imposed by the regulations. Ms. Seng also reported that veterans were assigned to facilities that were not approved by the CRC Program, without requisite waivers, and that CRC facilities located more than 30 miles from the Louisville VA were removed from the program without recourse and without appropriate notice.

The investigation found that veterans eligible for placement in the CRC Program were excluded in violation of the Veterans Health Administration (VHA) Handbook 1140.01 and 38 C.F.R. § 17.61. The Louisville VA used its CRC Program almost exclusively for the placement of mental health patients with little or no attention given to veterans with medical conditions, who are eligible for the program under the regulations. As a result, OMI recommended that the VA ensure that the CRC Program complies with all applicable regulations and policies. Specifically, the report found that the CRC Program may not be limited to mental health patients, or to locations within 30 miles of the Louisville VA.

Further, the OMI concluded that facilities were removed from the CRC Program without due process as required by agency policies. In particular, the Louisville VA did not follow procedures detailed in the VHA Handbook and failed to include a description of the procedures in VA Memorandum 603-13-116-009, which describes the policies and procedures of the Louisville VA's CRC Program. OMI further determined that the Louisville VA was not compliant with VHA directive 2009-001, as it did not inform the VA Central Office of the significant downsizing that occurred when the CRC Program stopped accepting individuals with medical conditions into the program and removed facilities that were located more than 30 miles from the Louisville VA. Consequently, OMI recommended that the Louisville VA ensure that its practices do not contradict

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<sup>1</sup> The Office of Special Counsel (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 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 President  
October 30, 2015  
Page 3 of 4

federal regulations or VHA policies and that it includes due process procedures. OMI also proposed that the Louisville VA move the supervision of the CRC Program from the Mental Health Division to the Geriatrics and Extended Care Program, as recommended by a CRC Program audit completed in March 2012. The VA informed our office that all of these recommendations were adopted and the Louisville CRC program was realigned from Mental Health to the Geriatrics and Extended Care Program on December 29, 2013. The VA did not take disciplinary action against any employees because it was not determined to be warranted by VA leadership.

OMI did not find that veterans in the CRC Program were inappropriately assigned to unapproved facilities. In its investigation, OMI determined that all current CRC veterans were in approved facilities. The VHA Handbook allows veterans to choose placement in non-approved facilities and directs that the action be documented in their medical records. The investigation did not identify any instances where veterans were improperly placed in unapproved facilities. In particular, the OMI found that in the case examples cited by Ms. Seng, veterans had elected their placements in the non-approved facilities.

In her comments, Ms. Seng expressed disagreement with OMI's finding that veterans in the CRC Program were properly assigned to facilities. In particular, she maintains that this final allegation would have been substantiated if additional personnel were interviewed, and if OMI had reviewed other placements outside of the program prior to May 2012.<sup>2</sup> As a result, OSC requested further information from the VA addressing these concerns. OMI conducted additional interviews and gathered information regarding the veteran examples Ms. Seng provided. After its follow-up investigation, the VA submitted a supplemental report maintaining that it did not find that there had been inappropriate placements in the examples provided of placements prior to May 2012. In her comments to the supplemental report, Ms. Seng reiterates her belief that OMI's scope of review should have been broader and that additional interviews should have been conducted to ensure a thorough and proper investigation.

I have reviewed the original disclosure, the agency reports, and Ms. Seng's comments. Based on that review, I have determined that the reports meet all statutory requirements and the findings of the agency appear reasonable. While I understand Ms. Seng's disappointment, I am satisfied with the breadth and scope of the OMI's review and the changes made to the program.

As required by 5 U.S.C. § 1213(e)(3), I have sent copies of the unredacted reports and Ms. Seng's comments to the Chairmen and Ranking Members of the Senate and House Committees on Veterans' Affairs. I have also filed copies of the redacted reports

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<sup>2</sup> OSC's referral to the VA did not task the agency with investigating placements outside of the CRC Program, as OSC had not made a substantial likelihood determination regarding such placements.

The Special Counsel

The President  
October 30, 2015  
Page 4 of 4

and Ms. Seng's comments in our public file, which is available online at [www.osc.gov](http://www.osc.gov).<sup>3</sup>  
OSC has now closed this file.

Respectfully,



Carolyn N. Lerner

Enclosures

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<sup>3</sup> The VA provided OSC with redacted reports, which substituted titles or positions for the names of VA employees and other individuals referenced therein. The VA cited the Privacy Act of 1974 (Privacy Act) (5 U.S.C. § 552a) and the Health Insurance Portability and Accountability Act of 1996 (HIPAA) as the basis for these revisions to the report produced in response to 5 U.S.C. § 1213. OSC objects to the VA's use of the Privacy Act to remove the names of certain individuals on the basis that the application of the Privacy Act in this manner is overly broad. The VA also redacted certain information that could be used to identify patients, such as dates and ages.