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The Special Counsel

November 9, 2012

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

Re: OSC File No. DI-11-1358

Dear Mr. President:

Pursuant to 5 U.S.C. § 1213(e)(3), please find enclosed a report received from the Honorable Thomas R. Lamont, Assistant Secretary of the Army (Manpower and Reserve Affairs) in response to disclosures made by the whistleblower, a Registered Nurse (RN), alleging that employees at the Department of the Army, U.S. Army Medical Command (MEDCOM), Lyster Army Health Clinic (LAHC), Department of Preventive Medicine, Fort Rucker, Alabama, engaged in conduct that constituted a substantial and specific danger to public health and safety. The whistleblower was employed as a community health nurse at LAHC.[1]

The whistleblower disclosed that her duties as a community health nurse at LAHC required her to perform advanced medical tasks that she was neither trained nor certified to carry out. The investigation did not substantiate the allegations and, thus, found there was no substantial and specific danger to public health and safety. The Army acknowledged that Army Regulation (AR) 40-68 improperly includes community health nurses as a type of advanced practice registered nurse, and stated that the regulation will be revised. However, the investigation found that the duties assigned to the whistleblower were appropriate for the position for which she was hired. I have determined that the agency's findings appear reasonable.

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

[1]The whistleblower consented to the release of her name to the Army for the investigation of the allegations. Since she provided her comments on the report, however, she has withdrawn her consent to the disclosure of her name for OSC's public file. Her name is included in the unredacted report for your review, but will not appear in the documents publicly available on OSC's website.

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 allegations in this case had been referred to the Honorable John McHugh, Secretary, on March 28, 2011. Secretary McHugh delegated responsibility for the investigation to Asst. Secretary Lamont, who tasked MEDCOM with investigating and writing the report for OSC. Upon completion of MEDCOM's investigation and review by the Staff Judge Advocate and the Southern Regional Medical Command, Asst. Secretary Lamont transmitted the agency's report on December 2, 2011. The whistleblower provided comments on the report on February 17, 2012.

The Whistleblower's Allegations

The whistleblower disclosed that the Department of Preventive Medicine at LAHC required her to perform advanced medical tasks that she was neither trained nor certified to carry out. The whistleblower received her Associate's Degree from Purdue University in 1974, and was licensed as an RN in the State of California thereafter. In August 2010, she was hired by the LAHC. The agency found her 37 years of professional nursing experience to more than meet the requirements for the position and hired her at a higher salary than advertised due to her "superior qualifications."

Although the whistleblower and LAHC leadership felt she was qualified for the position at the time of her hiring, she alleged that, upon beginning work at LAHC, she was assigned advanced nursing duties beyond the scope of her training and experience. Specifically, she was responsible for ordering and interpreting tests for latent tuberculosis and sexually transmitted infections. She was also responsible for ordering hepatic liver enzyme tests and re-filling prescriptions for Isoniazid, an antibiotic used to treat tuberculosis. The whistleblower informed her supervisors, Supervising Preventive Medicine Physician (supervising physician) Dr. Richard Gilbert and Chief of Preventive Medicine Major Laura Ricardo, that as an RN she was not qualified to perform these advanced tasks. She was nevertheless told that the tasks were part of the required job duties of a community health nurse. When she continued to object to refilling the Isoniazid prescriptions and performing the hepatic liver enzyme and tuberculosis tests, and refused to perform sexually transmitted infection tests, she was threatened with disciplinary action.

At the insistence of Major Ricardo and Dr. Gilbert, the whistleblower ordered liver enzyme tests, interpreted test results, and refilled prescriptions for Isoniazid for approximately 10 to 12 patients per month between August 2010 and early January 2011. She contended that the continued prescription of Isoniazid could result in severe liver damage should she misinterpret liver enzyme test results and fail to detect abnormal liver activity, an outcome made more likely by her lack of training and experience.

The Report of the Department of the Army

Brigadier General Joseph Caravalho, Jr., appointed the Regional Nurse Executive of the Southern Regional Medical Command to be the Investigating Officer (IO), pursuant to Army Regulation (AR) 15-6, *Procedures for Investigating Officers and Board of Officers*. The MEDCOM investigative team also included the MEDCOM Commander and the MEDCOM Office of the Staff Judge Advocate. The IO was tasked with a total of 19 questions to answer.[2]

The IO completed the Report of Investigation (Army report) on November 16, 2011. During the course of the investigation, the IO interviewed the whistleblower, her supervisors, LAHC leadership and Army subject matter experts. The Army's report did not substantiate the allegation that the whistleblower's assigned duties as a community health nurse at LAHC were outside the scope of her licensures.

The Army report cited the California Board of Registered Nursing guidelines regarding the experience and training requirements for community health nurses outside of military service. The report noted that all 50 states implement the same requirements for community health nurses and RNs. Thus, to be a community health nurse, an individual must have a Bachelor of Science in Nursing or an Associate's Degree from an accredited nursing program and licensure as an RN. The report noted that there is no difference between an RN with a Bachelor's or Associate's degree; once licensure is secured, "there is nothing to indicate what degree is required for being licensed."[3]

The Army report noted that AR 40-68 improperly labels community health nurses as a type of advanced practice registered nurse, which includes nursing specialties that require either a master's or doctorate level of education along with advanced knowledge and clinical competency skills in the area of specialization. The Chief, U.S. Army MEDCOM Quality Management Division, Headquarters, who was the proponent of AR 40-68, explained that community health nurses are not advanced practice registered nurses and that they were mistakenly placed under paragraph 7-4a(2) during the promulgation of the regulation, leading to inaccuracies and confusion. She stated that the regulation will be corrected in the next revision of AR 40-68.

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[2] *See* Report of Investigation (report), p. 3-5.
[3] *See* report at 27.

The Army report explained that clinical privileging requirements apply to providers who may initiate, alter, or terminate a regimen of medical care independently. These licensed and/or privileged professionals may delegate specific patient care tasks to non-privileged individuals, while retaining the professional responsibility and accountability for overall patient care and patient outcomes. Members of the healthcare staff (such as RNs) who perform delegated tasks under the authorities of Clinical Practice Guidelines, Standard Operating Procedures, or other written protocols do not require clinical privileges. Local leadership retains the responsibility to ensure individual competency of those to whom additional tasks and procedures are delegated.

Under AR 40-68, a community health nurse may fulfill an expanded role under the authorities of Clinical Practice Guidelines, including refilling prescriptions and performing other clinical functions, so long as she "does not independently initiate, alter, or discontinue" medical treatments. The report explained that a Clinical Practice Guideline, Standard Operating Procedure, or other written protocol was available to authorize and describe each of the duties the whistleblower was tasked with performing. In the attachments submitted with its report, the Army provided copies of the relevant written protocols.

In this case, the Army investigation concluded that as a licensed RN with 37 years of nursing experience, the whistleblower should have been capable of performing all of the tasks assigned to her. The Chief, Policy and Programs Branch, Civilian Human Resources Division, Headquarters, U.S. Army MEDCOM, reviewed the whistleblower's resume, the vacancy announcement and the position description. After review of these documents in conjunction with the relevant Office of Personnel Management (OPM) Position Classification documents, he determined that the RN position for which the whistleblower was hired was neither designed nor advertised as an advanced nursing position. He further explained that the whistleblower was hired under direct hire authority and not pursuant to vacancy announcements advertising the position. Therefore, he also reviewed the position description as well as the whistleblower's application and concluded that she met all the qualification requirements to perform the scope of the duties assigned.

The whistleblower worked at LAHC from August 2010 to January 4, 2011. The report explains that shortly after she began working at LAHC, she refused to perform her properly assigned duties and rejected training opportunities during her orientation period. Both the supervising physician and the Occupational Health Nurse (OHN) noted difficulties in the initial training process.

The OHN described the interview with the whistleblower as very interactive and stated that based on the whistleblower's education, training, experience and license, she met all the requisites to be a successful community health nurse at LAHC. The OHN stated that during one-on-one training she reviewed and demonstrated for the whistleblower the steps related to the management of the latent TBI, HIV and sexually transmitted infections and other epidemiological cases. The whistleblower took detailed notes, but the OHN found that she had difficulty executing some of the assigned duties. The OHN questioned whether the

whistleblower had the requisite RN skill set if she believed her license would be in jeopardy if she followed standard protocols. The OHN stated that nursing involves critical thinking and problem solving and that training cannot be provided for every circumstance. The OHN emphasized that the whistleblower only wanted to perform certain duties and if there was a particular duty or task she did not want to perform, the whistleblower asserted that the task was outside the scope of her licensure. The OHN reported that she offered assistance and additional guidance several times, but her offers were not accepted.

The supervising physician testified that the steps for the care of latent tuberculosis patients were provided in the protocol signed and authorized by the Department Head for Preventive Medicine and that he had also signed the protocol as the supervising physician. He supervised the whistleblower's initial patient assessments and told her that she would have to become familiar with the Centers for Disease Control (CDC) documents regarding the evaluation, diagnosis and treatment of latent tuberculosis. He provided her with some of the relevant documents and directed her to the CDC website where she could obtain additional information. He reported that given her training and credentials he expected her to quickly learn the evaluation process. After several patient meetings he expressed concern about the whistleblower's abilities to her supervisor. However, after the supervisor spoke with the whistleblower, the whistleblower followed the facility protocols for the management of latent tuberculosis patients and periodically consulted with the supervising physician on patients having 30-day follow-up examinations.

The Army report explains that the introduction of the duties regarding the ordering and interpreting of sexually transmitted infection tests began in late December 2010. The whistleblower refused to perform the evaluations and, to the supervising physician's knowledge, never performed them. Given the whistleblower's concerns that the duties assigned to her were outside the scope of her licensure, her supervisor, the Chief of Preventive Medicine, sought guidance from the California Board of Nursing. After discussion and consultation with the California Board of Nursing, the whistleblower was informed that the duties she was required to perform in her position were within the scope of her license because they were protocol-based practices. Nevertheless, she did not accept this conclusion and refused to perform her duties.

The Chief of Preventive Medicine also explained during her investigative interview that the whistleblower stated on more than one occasion in her job interview that she had a clear understanding of the experience requirements for the position at LAHC. She noted that the whistleblower impressed the interview panel because she had researched the organization and spoke extensively about what she had to offer as an employee. When the whistleblower voiced concern about the scope of her duties being outside her licensure, in addition to contacting the California Board of Nursing as noted above, the Chief of Preventive Medicine consulted with her supervisor and had all the Standard Operating Procedures reviewed by the Public Health Command to ensure they complied with standard practices for military treatment facilities. She also stated that had the whistleblower notified her of her concern that the whistleblower's name

was listed as the provider on the Isoniazid refills, the issue would have immediately been resolved by substituting the name of the supervising physician.

Based on the information obtained in the investigation, the Army concluded that the whistleblower was qualified to perform the duties for which she was hired and that her assigned duties were within the scope of her licensure. Thus, the whistleblower's objections to performing these duties were misplaced. Although the report indicates there were some concerns with her performance, it also establishes that she received adequate supervision and did in some instances respond to supervisory instruction. It appears that the whistleblower's performance issues arose because her expectations of the position and its responsibilities differed from those of her supervisors.

The Army further determined that there was no substantial or specific danger to public health and safety to any patients as a result of the whistleblower's employment at LAHC. The only negative patient impact was a temporary delay in patient management during the whistleblower's absence from work. Finally, the investigation did not identify any violations of law, rule, or regulation. However, AR 40-68, Chapter 7 will be revised to remove community health nurses from the advanced practice registered nurse heading. On September 19, 2012, Army officials informed OSC that AR 40-68 is in the process of being revised. The revised regulation will move forward for formal review in the next few weeks with publication expected in early 2013.

The Whistleblower's Comments

The whistleblower disagrees with the Army's conclusion that any RN could qualify for a community health nurse position with the requisite training and experience. She distinguishes between an RN with a two-year Associate's Degree and an RN with a four-year Bachelor's Degree. She notes that OPM Standards for the General Schedule Position Nurse Series require that a community health nurse hired at GS-5 or higher must have graduated from a baccalaureate or higher degree nursing program and cites Army regulations that require advanced training for a community health nurse. Thus, according to the whistleblower, while some RNs who have completed a four-year Bachelor of Science in Nursing and have additional training and experience may qualify for community health nurse positions, not all RNs will qualify.

The whistleblower also disagrees that she was offered training but chose not to participate. She asserts that the report fails to mention that she had not performed clinical work for five years prior to her employment at LAHC, and that the training she received was inconsistent and insufficient to allow her to accomplish her assigned duties.

Finally, the whistleblower disagrees that she was acting under appropriate supervision when she was listed as a "Provider" in the electronic health record and required to sign her own charts, prescribe medication, and order laboratory tests. She informed her supervisors that the Standard Operating Procedures were either out-of-date or non-existent, and indicated that the

absence of such procedures prevented her from performing her assigned duties legally. Regarding the sexually transmitted infection testing and treatment, she notes that the Standard Operating Procedures/Clinical Practice Guidelines cited in the report were regulations signed by non-medical personnel, and does not believe they are sufficient to delegate authority to non-privileged healthcare providers.

The Special Counsel's Findings

I have reviewed the original disclosure and the agency report in this matter. I note that agency officials and the whistleblower appear to have had markedly different understandings about the duties and responsibilities of her position. Although the agency report acknowledges there was some concern with the whistleblower's performance, I am unable to conclude that she was not adequately supervised by the Chief of Preventive Medicine and the supervising physician during her brief employment at LAHC. Thus, I have concluded that the agency's findings, including the determination that the whistleblower's employment at LAHC did not result in a substantial and specific danger, appear to be reasonable.

In addition, I note that the regulations provide that a community health nurse may only be granted clinical privileges if the nurse also meets the criteria for being an advanced practice registered nurse. Given that the Army acknowledged that AR 40-68 is "inaccurate and confusing," and is in the process of correcting it, it is wholly understandable that the whistleblower found the Army to be out of compliance with the regulation.

As required by 5 U.S.C. § 1213(e)(3), I have sent copies of the agency report and the whistleblower's comments to the Chairmen and Ranking Members of the Senate and House Committees on the Armed Forces. I have also filed a redacted copy of the agency report and whistleblower comments in OSC's public file, which is available online at www.osc.gov. The redacted Army report identifies employees by title.[4] This matter is now closed.

Respectfully,

Carolyn Lerner

Carolyn N. Lerner

Enclosures

[4]The Army provided OSC with a report containing employee names (enclosed), and a redacted report in which employees' names were removed. OSC objects to the Army's use of the Privacy Act to remove the names of federal employees as an overly broad application of the Act and not within the exceptions to disclosure under OSC's public information requirement at 5 U.S.C. § 1219(b).