



U.S. OFFICE OF SPECIAL COUNSEL

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The Special Counsel

November 24, 2014

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

Re: OSC File No. DI-14-0026

Dear Mr. President:

Pursuant to my duties as Special Counsel, enclosed please find the Department of the Army's (Army) investigative report based on a disclosure of wrongdoing at the Network Enterprise Center (NEC), 106<sup>th</sup> Signal Brigade, Fort Buchanan, Puerto Rico, made to the Office of Special Counsel (OSC). OSC has reviewed the report and provides the following summary of the allegations and our findings. The whistleblower, who chose to remain anonymous, disclosed that the NEC director repeatedly took improper actions to benefit NEC contract employees.

**The agency substantiated several of the whistleblower's allegations, including that the NEC director improperly issued awards to contract employees and recommended certain contract employees for promotion who lacked the requisite knowledge and training for the positions. The agency found that the NEC director created the appearance of favoritism toward contract employees, which had a substantial negative effect on staff morale. As a result of the investigation, the agency undertook a number of corrective actions, including targeted ethics and contract law training for the NEC director. I have reviewed the agency's report and the whistleblower comments and determined that the agency's findings appear to be reasonable.**

The whistleblower's allegations were referred to Secretary of the Army John McHugh to conduct an investigation pursuant to 5 U.S.C. § 1213(g). The Secretary delegated to Acting Assistant Secretary of the Army (Manpower and Reserve Affairs) Karl F. Schneider authority to issue a report of investigation. On June 23, 2014, Acting Assistant Secretary Schneider submitted the agency's report to this office. The whistleblower commented on the Army's findings. I am now transmitting the report and the whistleblower's comments to you.<sup>1</sup>

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<sup>1</sup> The U.S. 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 or safety. 5 U.S.C.

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## **I. The Allegations**

The whistleblower disclosed that NEC contract employees, who are employed by GC&E System Group, regularly receive improper benefits as a result of their relationship with NEC Director Gregorio Ortiz. For example, the whistleblower alleged that Mr. Ortiz has on several occasions distributed awards to contract employees with whom he is friends. Specifically, on June 25, 2013, Mr. Ortiz presented gift cards for local restaurants to contract employees Jose Gutierrez and Carlos Nieves. The gift cards were valued at approximately \$50. On September 6, 2013, Mr. Gregorio Ortiz presented contract employee Josue Vazquez with an award for “outstanding performance.” On September 25, 2013, Mr. Gregorio Ortiz held an inventory form completion competition with the winning team receiving a lunch paid for by Mr. Ortiz. The whistleblower stated that two groups of contract employees tied in the competition. The contract site manager, Carmen Maldonado, also a contract employee, decided on the winning team, which was led by Mr. Vazquez. The whistleblower alleged that these actions were improper because they involved the expenditure of agency funds on contract employee awards and created the appearance of an employee/employer relationship between contract employees and agency management. The whistleblower asserted that the awards also violated Department of Defense (DoD) Instruction 1400.25, Volume 451 (November 4, 2013), Para. 3.h., which prohibits awards, awards programs, ceremonies, or receptions acknowledging contributions by companies that have a profit-making relationship with DoD. Pursuant to Para. 3.g., awards may be given to private citizens who significantly support or assist DoD functions, but only where such actions are performed as a public service, which does not apply in this case.

In addition to the actions described above, the whistleblower made allegations regarding other perceived improprieties between management and contract employees, including:

- Government-sponsored Avaya Voice training was improperly provided to contract employees Mr. Vazquez, Mr. Harold Ortiz, and Mr. Gutierrez between September 20, 2013, and October 4, 2013;

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§ 1213(a) and (b). These allegations were transmitted to you, as the head of your agency, pursuant to 5 U.S.C. § 1213(g)(2). This statutory provision mandates that, within a reasonable time, you inform me in writing what action your agency has taken or is taking in regard to this matter, and when that action will be completed. Upon receipt, I review the agency report to determine whether it contains all of the information required by statute. I am required to inform the whistleblower of the report, pursuant to 5 U.S.C. § 1213(g)(2). I may provide a copy of the report to the whistleblower and provide the whistleblower the opportunity to comment on the report. I may thereafter transmit the report, the whistleblower’s comments, and my comments or recommendations to the President and the appropriate oversight committees in the Senate and House of Representatives.

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- Mr. Vazquez and Mr. Gutierrez were promoted to network engineer contract positions by Mr. Gregorio Ortiz, an agency employee, without the guidance of the contracting officer (CO) or Ms. Maldonado;
- Mr. Vazquez and Mr. Gutierrez were promoted without the required experience, training, and certifications for their positions;
- Contract employees regularly engage in inherently governmental functions, such as attending meetings for federal employees and conducting training for top management;
- Mr. Ortiz directed contract employees to work on projects outside the scope of their contract, such as construction of a gazebo on government property;
- Materials for the gazebo building were purchased on a government purchase card at Home Depot, but were later returned to the store and logged by the responsible parties as “furniture;” and
- Contract employees are permitted to use government-owned vehicles to conduct on-base work, while federal employees are required to use their own vehicles for both on- and off-base work.

## II. The Agency Report

### A. Improper Gifts and Awards to Contract Employees

The agency partially substantiated the whistleblower’s allegation that Mr. Ortiz improperly provided gift cards and performance awards to contract employees. The investigation found no evidence that Mr. Ortiz used government funds to purchase the gift cards or free lunches. However, the agency did find that Mr. Ortiz’s actions were improper because they created the appearance of favoritism toward contract employees. While the report notes that Mr. Ortiz was well-intentioned and was attempting to include contract employees as part of the team, the agency determined that the presentation of gift cards and performance awards during workplace gatherings constituted a violation of 5 C.F.R. § 2635.702(c)<sup>2</sup> and DoD Joint Ethics Regulation (JER) 5500.07-R, para. 3-209.<sup>3</sup> Further, Mr. Ortiz’s actions violated the “spirit and intent of DoD policy guidance” by creating the perception that he was “endorsing” the contract employees. According to the

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<sup>2</sup> Section 2635.702(c) provides that, “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.”

<sup>3</sup> DoD JER 5500.07-R, para. 3-209, states that, “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 ....”

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report, the appropriate action would have been for Mr. Ortiz to allow the contractor to provide the gifts and recognition directly to the contract employees.

*B. Improper Training for Contract Employees*

The agency did not substantiate the whistleblower's allegation that contract employees should not have received government-sponsored Avaya voice training. The report notes that the GC&E contract, W91RUS-08-D-0004, para. C.1.2.2, stated that, "If...the Government installs new equipment that requires training to meet the certification requirements of this contract, the Government will provide one-time training for those employees currently working on-site." The investigation found that the Avaya communication system was a voice over internet protocol system that was installed to replace the NEC's older analog telephone system. According to the report, the location's old phone system was run through copper wires, while the new Avaya system uses the computer network to connect voice calls. The local subject matter experts explained that the Avaya system was completely new and different from the old analog system, and it was therefore imperative that those responsible for the system receive training on the new equipment. This would include local area network (LAN) administrators, network engineers, desktop administrators, and plant personnel, but due to a limited number of training slots, Mr. Ortiz was responsible for prioritizing who would be trained first. The agency determined that because the deployment of the Avaya system constituted an installation of new equipment, the Army was obligated under its contract with GC&E to provide one-time training for affected contract employees.

*C. Improper Promotion of Contract Employees*

The agency did not substantiate the allegation that Mr. Ortiz promoted contract employees without consulting the contracting officer's representative (COR), the contracting officer (CO), or the contractor. The report states that during a weekly staff meeting in late June or early July 2013, Mr. Ortiz asked two contractors, one of whom was Mr. Gutierrez, if they had considered applying for a vacant contract network engineer position. Then, in July 2013, Mr. Ortiz e-mailed a notification to his staff that Mr. Gutierrez had been promoted to NEC network engineer. Prior to his promotion, Mr. Gutierrez was the contract LAN administrator.

In August 2013, the COR for the GC&E contract submitted to the installation contracting office a modification to the contract's performance work statement. The modification included the creation of a new position, "engineer assistant." Mr. Ortiz announced his intention to place Mr. Vazquez into the new engineer assistant position during a September 2013 meeting with Information Assurance Chief Justin Gehrke, the COR and the GC&E site lead. According to the report, Mr. Gehrke cautioned Mr. Ortiz against placing Mr. Vazquez into the new position because of the appearance of

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favoritism. Mr. Gehrke also stated that Mr. Vazquez was not qualified for the position and that such appointments needed to be made by the contractor.

In interviews with NEC employees, the agency learned that it was not always clear to employees how or why Mr. Ortiz made certain staffing decisions, and there did appear to some to be an element of favoritism involved. However, the agency found that Mr. Ortiz's staffing decisions were made with input from the COR and other employees, and were not arbitrary. Despite this finding, the report acknowledges the appearance of favoritism in Mr. Ortiz's actions, and notes that his authoritarian management style and communications failures negatively impacted the morale of the unit.

The agency determined that neither Mr. Vazquez nor Mr. Gutierrez was qualified for their positions. The investigation found that the contract modification, which was signed by the CO in January 2014, included the requirement that the engineer assistant "have a minimum of five years' experience on networks, Cisco equipment and systems under windows platform (windows server 2008, 2003, Vista and XP), Sonet Ring and UNIX ... The contractor shall certify the person at this position as IT Level I during the first 6 months of the contract commencement." The agency determined that the network engineer and engineer assistant positions required the contract employees to complete specific training and certification within six months of appointment. Neither Mr. Gutierrez nor Mr. Vazquez was certified at the time of appointment, nor had they completed the training and certification at the time of the investigation, over six months after their appointments. In addition, neither Mr. Gutierrez nor Mr. Vazquez had the required five years of experience on networks. Thus, the agency found that contractor positions were filled with individuals who lacked the requisite experience, training, and certification for those positions.

*D. Contractors Engaging in Inherently Governmental Functions*

The agency did not substantiate the whistleblower's allegation that NEC contract employees regularly engage in inherently governmental functions in violation of the Federal Acquisition Regulation (FAR). Part 7.5 of the FAR describes "policies and procedures to ensure that inherently governmental functions are not performed by contractors." The FAR provides a non-exhaustive list of functions that could be considered inherently governmental, *e.g.*, determining agency policy, directing federal employees, and administering public trusts. The FAR also provides a non-exhaustive list of functions not generally considered to be inherently governmental, including serving as a technical advisor to a source selection board, participating in reorganization activities, and conducting agency training courses. The investigation found that NEC contract employees "attend meetings, conduct training, and brief top management on administrative and technical details." Thus, the agency determined that contract employees are not engaged in functions similar to those prohibited by the FAR.

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*E. Working Outside the Scope of the Contract*

The agency did substantiate the allegation that contract employees were improperly utilized for projects that were outside the scope of the GC&E contract. The report explains that in one instance, which occurred during a worker shortage, Mr. Ortiz temporarily reassigned his administrative assistant to work in the warehouse. Mr. Ortiz then had a contract employee fill in for his administrative assistant. The report notes that the terms of the GC&E contract do not provide for contract employees to be reassigned to administrative assistant duties. The FAR, Part 43.102, states that only a contracting officer can issue a contract change. Further, FAR Part 37.104 prohibits personal services contracts. The agency determined that in this instance, Mr. Ortiz improperly exerted control over a contract employee's assignment and tasked a contract employee with work beyond the scope of the contract. In addition, Mr. Ortiz created the perception of a personal services contract, which is prohibited by the FAR.

In addition, the investigation found that during a town hall meeting, Mr. Ortiz asked for volunteers to assist with building a gazebo for two buildings used by the NEC. On August 8, 2013, Mr. Ortiz told a witness that he and Mr. Vazquez, a contract employee, were planning to go that afternoon to the Home Depot to pick up estimates for gazebos and material. Another witness told investigators that Mr. Vazquez submitted sick leave to cover the time he spent at the Home Depot with Mr. Ortiz. The report notes that the GC&E contract does not cover these types of activities. Further, 31 U.S.C. § 1342 prohibits officers or employees of the federal government from accepting voluntary services. While the agency was unable to confirm that Mr. Ortiz directed contract employees to work on the gazebo, it did find that Mr. Ortiz asked for volunteers, in potential violation of § 1342. The report explains that acceptance of volunteer services can create the appearance of contract impropriety and, in this case, the volunteer services appeared to be a *quid pro quo* for Mr. Ortiz's favored contract employees.

*F. Improperly Purchased Materials*

The agency substantiated the whistleblower's allegation that the materials needed to build the gazebo were purchased using a government purchase card (GPC), but found that the purchase was not improper. The report explains that Mr. Ortiz received initial authorization to use his GPC to purchase a significant amount of lumber and supplies for the gazebo, despite advice from several individuals that the project was "ill-advised." After the purchase, which was classified as "furniture," the Area Support Team deputy director informed Mr. Ortiz that the purchase could not be approved due to fiscal constraints. As a result, the materials were returned to the Home Depot and the cost was returned to the GPC. The investigation thus determined that no wrongdoing occurred with regard to the purchase.

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G. *Use of Government-Owned Vehicles*

The agency determined that contract employees are permitted to use government-owned vehicles per the terms of their contract. The NEC has two government-owned vehicles and, according to witnesses, no one is required to use their privately owned vehicle. According to the report, some witnesses stated a preference for using their personal vehicles to avoid the paperwork and travel associated with picking up a government-owned vehicle. The investigation found that the GC&E contract states that the government will provide a vehicle, if available, when a contract employee must travel off-site or transport equipment. Thus, the agency found that the government-owned vehicles are being used in an authorized manner.

**III. Corrective Actions Taken**

In response to the whistleblower's allegations, Mr. Ortiz completed a targeted training program, including acquisition ethics, contracting officer's representative training, and an Army civilian leadership course. In addition, the 7<sup>th</sup> Signal Command, of which the NEC is a part, provided in-person training to 100 of its leaders, including NEC directors, during its Leaders Summit in August 2014. This training included programs on recognition for contractors, prohibitions on voluntary services and personal services contracts, and ethics issues. Further, the report notes that the brigade commander planned to consult with the civilian personnel office to determine whether any administrative actions were required. As of November 6, 2014, that review is ongoing.

**IV. The Whistleblower's Comments**

The whistleblower provided comments after reviewing the agency's report in this matter. In those comments, the whistleblower questioned management's decision to appoint Mr. Ortiz as NEC director in light of his lack of prior training. The whistleblower stated that Mr. Ortiz's lack of management skills harmed the organization. The whistleblower also described several incidents to illustrate Mr. Ortiz's poor management style and its negative effect on staff morale. The whistleblower also disagreed with the agency's findings on several allegations, including Mr. Ortiz's involvement in contract employee promotions.

**V. The Special Counsel's Findings**

I have reviewed the original disclosure, the agency report, and the whistleblower's comments. Based on that review, I have determined that the agency's report contains all of the information required by statute, and the findings appear to be reasonable.

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I have sent copies of the agency's unredacted report and whistleblower comments to the Chairs 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](http://www.osc.gov).<sup>4</sup>

Respectfully,



Carolyn N. Lerner

Enclosure

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<sup>4</sup> The Army provided OSC with a report containing employee names (enclosed), and a redacted report in which employees' names were replaced with their position titles. The Army cited the Privacy Act of 1974 (Privacy Act) (5 U.S.C. §552a) as the basis for these revisions to the report. OSC objects to the Army's use of the Privacy Act to remove the names of employees on the basis that the application of the Privacy Act in this manner is overly broad, but has agreed to post the redacted version as an accommodation.