

August 10, 2009

Mssrs. Penhollow, Swinson, White
132 Talton Drive
Delta, PA 17314

RE: Whistleblower Investigation –
22d Chemical Battalion (Tech Escort)
Aberdeen Proving Ground, Maryland
(OSC Files DI-07-2722, DI-07-3064/3065)

Dear Mr. Flood:

We came forward because we have a fiscal responsibility to the unit, its customers and the American taxpayers to be sound financial stewards of their money. That ultimate responsibility, and every leader's obligation to uphold it or be held strictly accountable when they do not, seems to have been lost in this investigation and report. Several other fundamental leadership principles appear to be negotiable as well.

While we appreciate the information and answers this report provides, we are concerned by what it does not. Just as disconcerting is the manner in which they try to minimize senior leaders' negligence in the performance of their supervisory duties, essentially accepting the responsible officials' explanations of, "It's not my fault; these things are confusing. I'm new and was busy with more important things."

What Was Not Discussed

The exhibits provided to support the investigative results discuss a January – May 2007 15-6 investigation into all three of us, and an IG complaint the respondents state we did not follow through with. Though presented as separate and distinct events that happened to have occurred in the same timeframe as our disclosure to OSC, they are actually intertwined. It is important for all who review this record to see the entire picture. Knowing all of the circumstances and actions helps explain why it took two investigations, a supplemental report and seven extensions to answer the relatively basic threshold question as to whether or not certain personnel were entitled to receive HDP.

Exhibit 3, Enclosure 1 is a record of our 10-month effort to seek redress through IG channels concerning the command climate, undue command influence, and related actions, to include our growing retaliation concerns for having raised the HDP issue. Far from demonstrating our lack of intent to follow through, it documents how an unresponsive DAIG, a disinterested RDECOM IG and an adversarial 20th SUPCOM IG impeded our efforts. We presented our initial concerns in July 2007 and maintained our efforts through May 2008. What you will not find is anything supporting the report's contention that the IG issue was superseded by an open request for a Congressman's intervention. That request was closed May 31, 2007.

Exhibit 1, Enclosure 8 contains a timeline of our efforts to resolve the HDP issue and the coinciding 15-6 that was put in motion following our persistence with the chain of command and our informing our UXO subordinates that they may no longer receive HDP. This report makes a point of stating that neither Mr. Penhollow nor Mr. Swinson continued to speak with Ms. Jensen or reached out to CPAC for assistance. Though this is true, it is misleading. After informing their chain of command, Mssrs. Penhollow and Swinson followed up through their Detachment chief, asking Mr. White at least every pay period for a status of the action. Ms. Jensen continued to assure Mr. White it was being looked into, and the Battalion S3 Shop personnel continued to insist it was authorized. As the investigatory record shows, we did take the initiative to advise our UXO personnel that they may no longer receive HDP once our concerns about the entitlement were resolved. We are certain that we would not have been subjected to the 15-6 investigation, which was based on emotionally charged and unsubstantiated allegations of those who stood to lose the most, had we not informed and pushed our chain of command to address the legality of the HDP payments.

Exhibits 1 and 2 contain the grievances we filed in response to the handling of the 15-6 investigation and the disposition of the allegations.¹ It includes the Reviewing Official's decision memo in which he concedes, "The Investigating Officer (IO) did not conduct a model investigation. Even discounting the questionable aspects of the IO's interviews, the remaining evidence is sufficient" (Exhibit 1, Enclosure 7). Without the statements, there was no other objective evidence to support the allegations. Exhibit 1, Enclosure 8 contains a request for review of and action on prohibited personnel practices we filed with OSC's Complaints Examining Unit (CEU) in August 2008. We filed there after it became clear to us that all other conventional methods for resolving

¹ We have provided our grievance memorandums, supporting enclosures we wrote to provide missing information, address misleading information, and point out gross procedural errors. We did not include regulatory or case law references, though we listed them in the index of tabs to show the basis of some of our concerns and analysis, nor did we include parts of the 15-6 documentation we did not reference directly.

our concerns with the command climate and the questionable nature of past and current actions towards us had failed.²

Lowering the Standard

LTC Terrell and Ms. Jensen were the senior-most leaders in the 22nd CM BN (TE); therefore, they were responsible for the unit's personnel and pay practices, to include customer charges. As the Commander and Deputy to the Commander, they could and should ultimately be held accountable for the actions of any and all unit members. Doctrine, history and the law tell us that this responsibility is not diminished by their ability to oversee directly all actions or the completeness of their knowledge of those actions. We know they understand these responsibilities and consequences because they punished one of their subordinate leaders specifically for allegedly failing to meet that very standard (Exhibit 3, Enclosure 2, Tab C), despite being provided copious objective evidence to refute the largely hearsay and subjective evidence presented against the individuals involved (Exhibit 1, Enclosure 6, Tab K; Exhibit 2, Enclosure 6, Tab G; Exhibit 3, Enclosure 2, Tab B).

They do not dispute the legal and factual evidence presented in this whistleblower action and investigation, only their liability for it. They do not dispute that at some point, and certainly now, they knew their organization's personnel and pay practices violated legal requirements and continued to do so after both of them were made aware the practices may be incorrect. It is beyond ironic that their response to the clear evidence of wrongdoing was to refuse to accept responsibility for their actions (or lack thereof), make excuses for their failing to uphold their duties as financial stewards, and then willingly accept being held to a markedly lower standard than the one to which they had held one of their own leaders not more than a year earlier.

What are offered as mitigating and extenuating circumstances, to justify such minimal corrective actions with respect to the senior leaders, are just as easily aggravating factors and cause for concern in leaders at their level. Both LTC Terrell and Ms. Jensen provide testimony that implies their relative newness to the unit, lack of involvement in classifying the positions, organizational changes and a pending deployment absolve them of their responsibility to know and understand the UXO position descriptions and the proper implementation of an HDP plan, to include authorizing the special pay. It was initially LTC Terrell's command. As of May 1, 2007,

² Mr. Swinson did not file with the CEU following Mr. Booker's review of Mr. Penhollow's submission and his determination that it was not an issue within the CEU's purview. The memorandum prepared for Mr. Swinson's filing is included as Exhibit 2, Enclosure 10 because it contains elements not covered in Mr. Penhollow's.

Ms. Jensen assumed command and control of the positions in question as the Director, CBRNE Analytical and Remediation Activity (CARA).

Yet she freely admits “she had not had any training with regard to the recommendation and approval of HDP payments” (page 21)³. After more than two years as the 22nd CM BN (TE)’s deputy to the commander, she never took the initiative to become more informed about the uniqueness of the unit’s UXO and chemical material specialists and how to manage their special pays. As the Director, CARA, she remained conveniently unaware of the fundamental requirements, preferring instead to take the easy way out of believing status quo. That they were content with not knowing about and understanding the very elements that set their organization apart is inexcusable. How can they manage effectively what they do not understand?

On page 7 of this report:

The creation of the 20th SUPCOM (CBRNE) [October 16, 2004] was intended to bring together under one umbrella headquarters all of the Army’s CBRNE response elements, with a view to providing more effective and responsive command and control of CBRNE specialized operational assets, eliminating redundancies, and facilitating more efficient management and employment of these unique and limited resources...

What greater impetus for the two most senior leaders to ensure they have a fundamental understanding of the organizational assets, capabilities and functions than facilitating more efficient management and employment of them? One must know and understand assets in order to properly utilize them. Given the customer reimbursable status of many of those assets, avoiding any fiscal irregularities should be impetus enough to become familiar with a special pay program that impacts the costing structure. And yet, neither LTC Terrell nor Ms. Jensen felt such obligations to any of the unit’s stakeholders.

Even if you attribute existing failures in program implementation and management to prior commanders and continuing to be an AMC element through the numerous reorganizations, Ms. Jensen should be held accountable for the failure to maintain the basic requirements of the program when the latest reorganization brought the unit under an entirely different MACOM. The admitted lack of knowledge aggravates her lack of action because she had a basic responsibility to her gaining command, in addition to the rest of the stakeholders, to be informed of her own organization and its mission, functions and requirements and impart that same level of understanding to the new

³ This and following page references are referencing the page in the investigation report provided to OSC.

leadership. Had she fulfilled that responsibility, she would have recognized the shortfalls in the HDP program well before July 2006.

We (Mssrs. Penhollow and White, and Swinson through his supervisor White) presented to LTC Terrell and Ms. Jensen factually supported concerns about the payment of HDP to unit UXO personnel in July and August 2006. With the exception of the draft memorandum from Ms. Jensen requesting an HDP change, it was the same documentation we eventually forwarded to OSC that generated OSC's request for an investigation. Yet, both senior leaders chose to take no substantive action to address or resolve the potential erroneous HDP payments we brought to their attention.

We were not just three disgruntled non-UXO personnel complaining about pay inequity. Mr. White was the chief, the civilian commander, of the unit with first-line pay and accountability responsibility for most of the positions being paid HDP, and Mssrs. Penhollow and Swinson were first-line supervisors of civilian UXO personnel. Our experience includes seeing the unit through every reorganization in the past 20 years (Exhibit 3, Enclosure 3). We saw the need to examine the proposed changes more closely, as opposed to accepting things as the way they've always been done.

We did the research and analysis, based on copies of the UXO personnel's position descriptions we received from our Battalion S1, our familiarity with the and day-to-day work requirements in question, and the applicable regulations. When we determined the HDP payments may be in error, we had a mandate to take it to our chain of command to resolve the issue. Given our credentials, LTC Terrell and Ms. Jensen had every reason to place value in the analysis we presented in July and August 2006, particularly given their recognized lack of expertise, and at least suspend continued HDP payments until they found the time to investigate to their own satisfaction. Instead, the payments continued unabated and unquestioned by anyone, other than us, for well over a year.

The one action they both stated they did take was to task Mr. White to write the battalion's HDP policy, though there is confusion as to what the tasking actually was, when it was made and if it was completed. Ms. Jensen states she "decided to task Mr. White to research the appropriate rules and develop the appropriate policy" in or around September 2006 (page 29). She also states he did not complete the final work product. A September tasking for a subordinate unit leader to write battalion policy never occurred; however, "LTC Terrell recalled that while on a detail to the battalion staff, Mr. White had been tasked to research the regulation" (page 23). The detail action occurred in January 2007 and was pursuant to the abovementioned 15-6 investigation. This is most likely the tasking to which Ms. Jensen was referring. LTC Terrell states Mr. White provided the report on the Toxic Material Control Operators but did not complete a

report on the UXO personnel. Mr. White had provided his report on the UXO personnel in August 2006—it was what he presented to his chain of command to highlight the HDP concerns and what eventually became the base document for the OSC disclosure—there was nothing more to add.

The investigation and report are rife with references to the confusing nature of the HDP policy, of the difficulty in understanding and properly implementing the requirements. None of us, to include Mr. Swinson's spouse who was helping us, have specialized or formal personnel or classification training. We have not received classification training, nor were we the ones who classified the positions in question. None of us are lawyers or legal specialists either. We were supervisors of personnel who received additional pay for using specialized skills. What we did have was a responsibility and commitment to all of the unit stakeholders, to include the ones who stood to be negatively impacted by our findings, to do the right thing, to ask the questions and do the research to ensure we complied with fiscal and legal requirements. Almost a year of investigations substantiated our initial allegations. The fact is, that with nothing more specialized than our commitment to uphold our duties, our dedication to finding the information and answers we needed to do our jobs to the best of our abilities, our assessment of the situation was correct.

Unfortunately, neither LTC Terrell nor Ms. Jensen saw any merit to our concerns in 2006. According to page 30 of this report,

When the AR15-6 investigation was initiated to address the allegation referred by OSC [circa October 2007], it was Ms. Jensen who led the effort to ascertain whether the allegation had merit. On January 18, 2008, ...Ms. Jensen terminated all such payments and initiated a complete overhaul of the unit's HDP program.

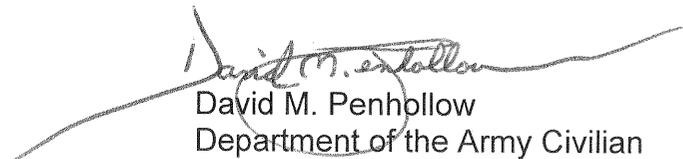
We do not understand how this mitigates her lack of action. The fact that she, and LTC Terrell, did nothing formative with our concerns until she received the exact same information in the form of an OSC investigation leaves us to wonder if the source determined the urgency to act, and our subordinate status gave us no priority (despite the potential dollars involved, our well-established subject matter expertise and the research we provided). Imagine how much money would have been saved if leadership had given impartial consideration to our initial concerns in 2006. We know it struck a chord because Ms. Jensen, as Chief, CARA, planned to obtain approval of an HDP work situation as late as June 2007 (Exhibit 3, Enclosure 4). And, imagine the savings is all we can do because the actual costs were not provided in the report, despite specifically being requested.

There is no denying CPAC hampered efforts to resolve the HDP situation, or that the command group lacked an effective working relationship with CPAC personnel to

garner better support. It is just as true that LTC Terrell and Ms. Jensen were entrusted with fundamental leadership responsibilities at which they ultimately failed. Instead of taking immediate action to correct the errors in 2006, they delayed until they had no choice but to act. And instead of accepting responsibility for the consequences of their actions and inactions, they appear to have done everything they could during the investigation to deflect and redirect their own accountability, or lack thereof.

On page 30 of the report it is stated that "LTC Terrell's actions...evidenced a degree of disregard not expected of a person occupying a similar position of authority and responsibility." Ms. Jensen's eventual actions do not mitigate her initial inaction. They aggravate it. They demonstrate she knew what to do and how to do it...and that she could have done her duty in 2006 had she been resolved to do it when her subordinates brought it to her attention, as opposed to requiring the attention of her entire chain of command to force her to act. She had the tools all along, she simply chose not to use them. The taxpayers deserve to know what costs were involved with this continued regulatory violation. More precisely, they deserve to know what monies were saved by identifying and correcting the erroneous policy and recouping the unauthorized payments. Finally, the unit, the Army and all of its stakeholders deserve a better accounting of its senior leaders and more than a counseling session to assure them this or similar neglect of supervisory responsibilities does not happen again.

Sincerely,



David M. Penhollow
Department of the Army Civilian



Thomas R. Swinson
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Albert J. White
CSM (ret)

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