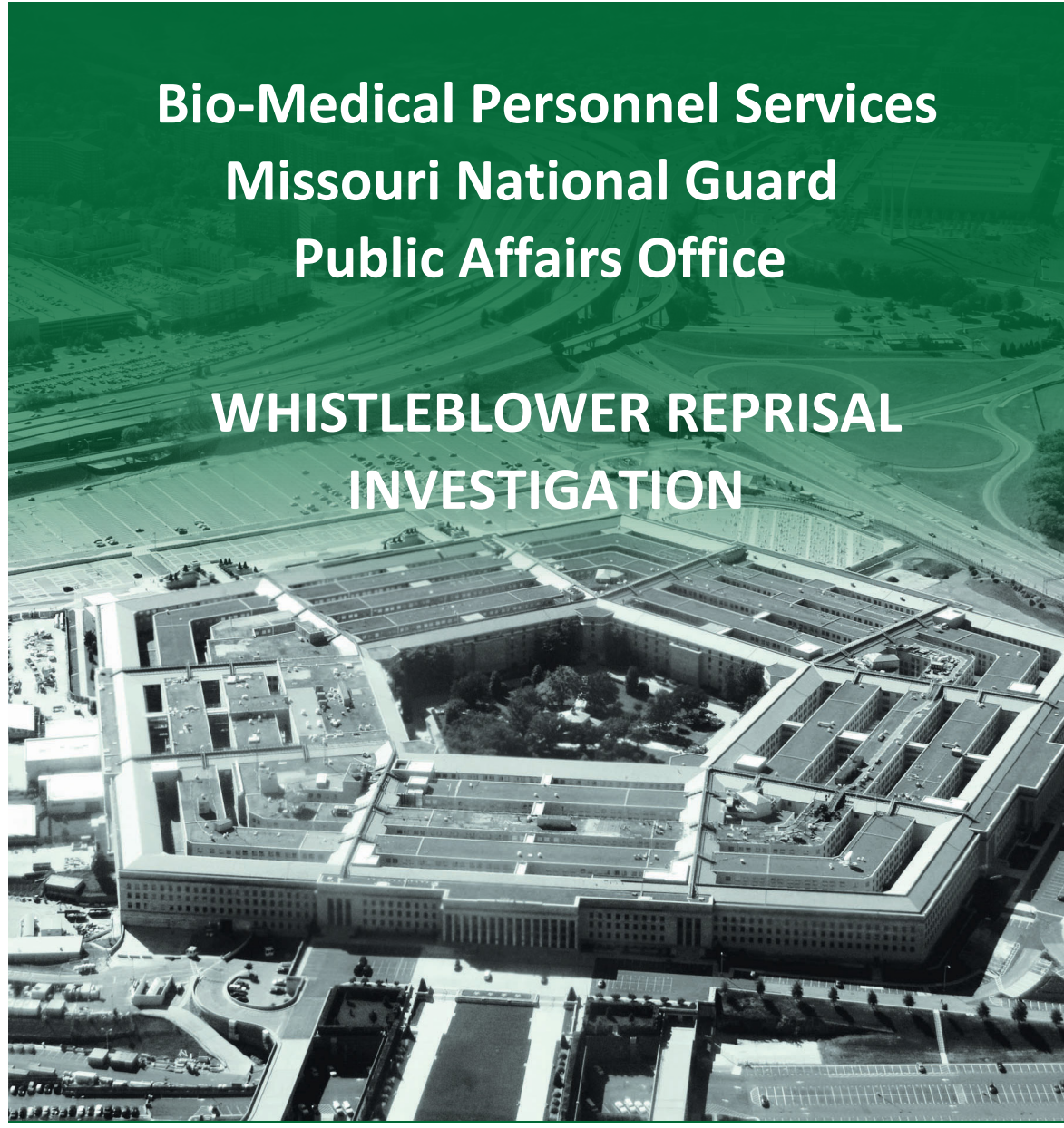


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INSPECTOR GENERAL

U.S. Department of Defense

May 25, 2017



Bio-Medical Personnel Services Missouri National Guard Public Affairs Office

WHISTLEBLOWER REPRISAL INVESTIGATION

INTEGRITY ★ EFFICIENCY ★ ACCOUNTABILITY ★ EXCELLENCE

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WHISTLEBLOWER REPRISAL INVESTIGATION

[REDACTED]
BIO-MEDICAL PERSONNEL SERVICES
MISSOURI NATIONAL GUARD
PUBLIC AFFAIRS OFFICE

I. EXECUTIVE SUMMARY

We conducted this investigation in response to an allegation that officials from Bio-Medical Personnel Services (BPSI) Incorporated placed [REDACTED] (Complainant), BPSI, Multimedia Specialist, on unpaid administrative leave and then discharged him in reprisal for making protected disclosures to BPSI and to officials from the Missouri National Guard Joint Force Headquarters Inspector General (MONG JFHQ IG) about not having the proper equipment to do his job and about the assignment of tasks outside the focus of what the contract specified.

We determined that Complainant reported information to BPSI and the MONG JFHQ IG that evidenced a reasonable belief of an abuse of authority by his supervisor relating to a Department of Defense (DoD) contract and were, therefore, considered protected disclosures. We also determined that BPSI had knowledge of Complainant's protected disclosures and that Complainant experienced personnel actions when BPSI placed him on unpaid administrative leave and subsequently discharged him.

We substantiated the allegation that BPSI placed Complainant on unpaid administrative leave and subsequently discharged him in reprisal for Complainant's protected disclosures, in violation of Title 10, United States Code, Section 2409 (10 U.S.C. § 2409), "Contractor employees: protection from reprisal for disclosure of certain information," as amended by Section 827 of the National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112-239) and as implemented by Defense Federal Acquisition Regulation Supplement, Subpart 203.9, "Whistleblower Protections for Contractor Employees" (February 28, 2014).

We recommend that the Secretary of the Army direct National Guard Bureau officials to:

- Consider appropriate action against BPSI and any possible successor in interest.
- Order BPSI or any possible successor in interest to reinstate Complainant to the position he held prior to the reprisal, correct Complainant's personnel record to expunge the February 4, 2014 termination letter from his file, and to award compensatory damages (including back pay), employment benefits, and other terms and conditions of employment that would apply to Complainant in that position if the reprisal had not been taken.

II. BACKGROUND

Bio-Medical Personnel Services (BPSI) was founded and incorporated [REDACTED] as a Maryland corporation in 1997, and [REDACTED]. [REDACTED] testified to us that the company dissolved in September 2015.¹ BPSI specialized in biomedical research support, professional and administrative services, and military family and veteran support. BPSI employed over 400 employees across the United States in functions such as program management, training, and human resource management. During the contract period, BPSI aligned with Military Personnel Services Corporation, a Virginia limited liability company that formed in 2006, to form a joint venture characterized as BPSI/MPSC, LLC.²

The Missouri National Guard's (MONG) primary mission is to provide support to the Missouri Governor in times of crisis and, when needed, provide federal support for national crises. The MONG is headquartered in Jefferson City, Missouri, and composed of both Army and Air National Guard units. Major General (MG) Stephen Danner, U.S. Army National Guard (ARNG), has been The Adjutant General (TAG), MONG, since 2009, and Brigadier General (Brig Gen) David Newman, Air National Guard, (ANG), Missouri Air National Guard (MOANG), was the Director, Joint Staff, from July 2012 to August 2015.

On September 2, 2009, the Department of the Army, as the contracting agency, together with the 127th Wing, Michigan Air National Guard, through the National Guard Bureau, as the contracting activity, awarded BPSI/MPSC, LLC, a base plus four option years contract for professional and administrative support services with an award maximum of \$90 million. On November 15, 2011, the 127th Wing awarded BPSI/MPSC, LLC, a bridge contract for professional and administrative support services with a one year period of performance and a maximum contract award amount of \$58 million. BPSI/MPSC, LLC was not entitled to receive funds from either contract until an ARNG or ANG contracting office in the United States ordered services from the base contract through task orders.

In 2012, MONG awarded BPSI/MPSC, LLC, two task orders for public affairs-related work. Specifically, on March 27, 2012, a contracting officer with MONG awarded a \$249,404.64 task order to BPSI/MPSC, LLC, with a period of performance from March 19, 2012, to August 19, 2012. The task order objective included administrative assistance and public affairs support for the MONG Public Affairs Office (PAO), located in Jefferson City, Missouri.

On September 18, 2012, the MONG contracting officer awarded a \$509,719.64 task order to BPSI/MPSC, LLC, with a period of performance from September 19, 2012, to May 19, 2013. The task order objective included photography; news and video archiving of the MONG; and development and maintenance of an archive program that gathered, indexed and preserved documents, images, interviews, and print and video news broadcasts related to the MONG. The work to be performed was in support of the MONG PAO.

¹ Maryland corporate records show Bio-Medical Personnel Services, Inc., is a dissolved corporation.

² Neither BPSI or MPSC are shown as active according to Maryland and Virginia corporate records.

On February 13, 2013, the Department of the Army, together with the National Guard Bureau, awarded a second bridge contract to BPSI/MPSC, LLC, for professional and administrative services with a one year period of performance from February 14, 2013, to November 14, 2013, and with a maximum contract award amount of \$50 million. Task orders could be issued to BPSI/MPSC, LLC anytime between February and November 2013.

On August 5, 2013, a contracting officer with MONG awarded a \$211,556.88 task order to BPSI/MPSC, LLC, with a period of performance from August 5, 2013, to August 4, 2014. The task order objective included program coordination and video and graphic design support for the MONG PAO, with a focus on creating a monthly, half-hour television program (called MO Guard TV) about the MONG. This represented a change from the two task orders BPSI/MPSC, LLC, received in 2012 for work performed at the MONG PAO.

The two 2013 task order objectives for BPSI/MPSC, LLC included the following:

Provides program coordination services and oversees video and graphic design support (and provide video and graphic design support) in support of Missouri National Guard (MONG) Public Affairs efforts with a focus on creating of (*sic*) monthly, half-hour TV program and producing video, radio and print products that can be used across a range of media including online, social media, broadcast and print. The contractor shall perform tasks at the Public Affairs Office (PAO) as detailed in this PWS.³

III. SCOPE

On May 7, 2015, Complainant filed a DoD Hotline complaint of whistleblower reprisal, alleging that BPSI officials placed him on unpaid administrative leave and then discharged him in reprisal for making a complaint about the MONG PAO to BPSI and the MONG JFHQ IG.⁴ Complainant alleged that he was set up for failure because [REDACTED], ARNG, MOARNG [REDACTED], assigned him tasks unrelated to the production of the half-hour television program, which was the focus of the task order, and that he was not provided proper equipment to complete his job.

On June 23, 2015, the DoD OIG notified Complainant that his complaint did not warrant further investigation in that his complaints to BPSI and the MONG JFHQ IG did not constitute protected disclosures under 10 U.S.C. § 2409, because they did not convey information that evidenced a violation of law, rule, or regulation related to the contract.

In February 2016, U.S. Senators Claire McCaskill and Charles Grassley expressed concern that the DoD OIG may not have applied the appropriate analysis to Complainant's reprisal claims. They noted that 10 U.S.C. § 2409 also prohibits reprisal against contractor employees for disclosures that an employee believes constitute gross mismanagement of a DoD

³ PWS stands for performance work statement.

⁴ Complainant's May 7, 2015 DoD Hotline complaint was numbered 20150507-031174-01.

contract or grant, a gross waste of Department funds, or an abuse of authority relating to a contract or grant. Senators McCaskill and Grassley requested information specifically about Complainant's complaint, as well as information about the DoD OIG policy on the analysis and evaluation of contractor reprisal complaints.

On April 11, 2016, the Acting DoD IG notified Senators McCaskill and Grassley that we reconsidered the complaint and would reopen Complainant's case and proceed with a full investigation. This report reflects that investigation.

We interviewed Complainant, BPSI's former president, government employees, and relevant witnesses with first-hand knowledge of the matters. We were unable to interview Complainant's supervisor at BPSI, [REDACTED], [REDACTED], who did not respond to our attempts to contact her. We also reviewed documentary evidence provided by BPSI, Complainant, and the MONG JFHQ OIG including personnel records and a MONG command investigative report initiated because of a MONG OIG request.

We did not consider [REDACTED], ANG, MOANG, [REDACTED] to be subjects of this investigation. [REDACTED] actions in this matter have previously been addressed by a MONG investigation, which substantiated misconduct by them both, as discussed in this report.

IV. STATUTORY AUTHORITY

The Department of Defense Inspector General (DoD IG) conducts whistleblower reprisal investigations involving employees of Defense contractors under Title 10, United States Code, Section 2409 (10 U.S.C. 2409), "Contractor employees: protection from reprisal for disclosure of certain information," as amended by Section 856 of the National Defense Authorization Act for Fiscal Year 2015 (Pub. L. 113-291), and as implemented by Defense Federal Acquisition Regulation Supplement, Subpart 203.9, "Whistleblower Protections for Contractor Employees" (April 28, 2014).

V. FINDINGS OF FACT

On September 5, 2013, BPSI hired Complainant as a Multimedia Specialist. BPSI e-mailed Complainant pre-employment paperwork, including a copy of the BPSI Employment Handbook, for signature and electronic (e-mail) return.⁵

⁵ The BPSI Employment Handbook was provided to Complainant as a Microsoft Word document. Pages 4 through 26 of the Handbook contain a footer that automatically resets the date each time the document is opened. For example, if Complainant opened the Handbook on the date he received it, September 5, 2013, the footer would read "BPSI, Employee Handbook, Maryland Edition Revised 09/05/2013." If the Handbook was opened the next day, the footer would reflect, "Revised 09/06/2013."

On September 19, 2013, Complainant began work at the MONG PAO. Complainant has a degree in filmmaking and 26 years of public affairs experience and had retired from the U.S. Army Reserve as a master sergeant.

Complainant stated that his supervisor at BPSI was [REDACTED], BPSI, [REDACTED], but that day-to-day assignments were communicated directly to him by [REDACTED]. Complainant reported that [REDACTED] gave direction and [REDACTED] “guide and follow to ensure things were being done.”

The task order noted the COR [REDACTED] assumed certain quality assurance duties with respect to the contract with BPSI, and provided an example quality assurance worksheet (QAW) for the COR to fill out on a monthly basis and provide to BPSI and the Contracting Office. The task order required the COR to:

...monitor contractor performance, complete and sign the [QAW] provided below at least monthly, but you can submit the worksheet more frequently if needed. This worksheet allows you to document compliance with the task order and fill a regulatory requirement to ensure adequate oversight is being performed ...

***(Bold in task order)* [QAWs] are to be sent directly to the Schedule Holder (BPSI) and Administering Contracting Office, not later than the 5th day of the month following the service (every month).** The quality rating may change from “Green” to “Red” without notice, however we encourage the COR to utilize the “Yellow” quality rating to alert the Contracting Office and the Schedule Holder of quality issues that have the potential for a “Red” quality rating if corrective action is not taken.

Any time the rating is less than “Green” the COR shall clearly document the worksheet to indicate what did or did not occur per the PWS requirement. When an observation indicates other than a “Green” rating, the COR will require the Contractor to initial the observation ... Notify the Contracting Officer if there is a deficiency. If the Contractor’s response to an identified quality deficiency is unsatisfactory, the Contracting Officer along with the COR will contact the Schedule Holder (BPSI) to implement a plan of action to remedy the identified deficiency.⁶

On October 8, 2013, Complainant signed and dated the last page of the BPSI Employment Handbook that acknowledged he had received, read and understood the document.

⁶ A Contracting Officer is a person with the authority to enter into, administer, and/or terminate contracts and make related determinations and findings. A Contracting Officer’s Representative is an individual designated and authorized in writing by the contracting officer to perform specific technical or administrative functions.

In October 2013, [REDACTED] (Colleague 1) and [REDACTED] (Colleague 2) joined the MONG PAO as BPSI employees.⁷ Colleague 1 testified to us that his understanding of the main goal of the contract (under which he was performing work) was to produce the television series, and afterwards their responsibility was to help the PAO wherever necessary. Colleague 1 described how he, Complainant, and Colleague 2 were a three-person team, and that Complainant was:

the producer of the show, and the producer's job is to tell myself and [Colleague 2] to, what to do with that scenario. Basically [Complainant] showed us what we were to do with the cameras, where we would go, who we would speak to, all that sort of thing.

Complainant and Colleague 2 corroborated Colleague 1's characterization that Complainant led Colleague 2 and Colleague 1 in the execution of their duties. [REDACTED] testified to us that Complainant was responsible for the production of the monthly half-hour television program while also ensuring Colleague 1 and Colleague 2 completed their job-related duties. [REDACTED] stated that while Complainant's focus was the development of the monthly half-hour television program, MO Guard TV was not the sole focus of Complainant's responsibilities.

Colleague 2 explained that he was hired to help produce the half-hour television program, and that he and Colleague 1 were responsible for going out and obtaining the video stories while Complainant would remain at the station to find stories for them and set the production schedule.

According to Complainant, shortly after beginning with BPSI he inventoried the equipment the MONG PAO provided to him and his colleagues, which included one video camera, one tripod, one wireless microphone, one light kit, and one laptop computer. According to Complainant, he and his colleagues were not given the proper equipment to do their job and, at a minimum, each individual should have received a camera, laptop, tripod, and set of microphones.

Colleague 2 corroborated that Complainant felt that he was not provided enough "gear" (laptop and camera) to do the job and brought his own camera and laptop to supplement the equipment BPSI provided. However, Colleague 2 stated that he did not agree with Complainant, that Complainant did not need to bring his own equipment, and when asked if he believed the equipment the MONG PAO provided was sufficient to perform their responsibilities, Colleague 2 said, "It was." Colleague 2 stated that the MONG mobile public affairs division (MPAD) offered the contractors one or two additional cameras, and they used them occasionally.

According to the task order technical specifications, the BPSI contractors would be provided with adequate office space, located at MONG PAO, including a complete workstation and chair, expendable supplies, computer hardware and software (and support), internet, intranet, and Local Area Network (LAN) (and support), telephone and fax, copy machine and printer, and

⁷ DoD OIG Whistleblower Reprisal Investigations is addressing Colleague 1's allegations of reprisal in a separate report (20150507-031172-CASE-03).

mail service and postage. The task order also noted that BPSI and government representatives would determine the working condition of all equipment, and that the government would replace or repair any item not in working order.

The BPSI contractors and PAO staff attended weekly meetings in which they would receive guidance and assignments from the MONG PAO officers. According to a timeline [REDACTED] [REDACTED] provided BPSI, at a September 24, 2013, PAO weekly meeting, [REDACTED] tasked Complainant with contacting a television program called "Mystery at the Museum" to determine program interest, and with creating a timeline for the program, equipment list, and potential script.⁸ The suspense for these tasks was September 30, 2013, and, according to the timeline [REDACTED] [REDACTED] provided BPSI, the suspense was not met.

As of September 30, 2013, [REDACTED] had neither completed nor provided the contracting office or BPSI a completed QAW as required by the task order. [REDACTED] testified that, "I didn't do one for September, because [Complainant had] only been there a couple days. It didn't seem at that point like there was any reasonable way to judge how things were going."

According to Complainant, the one laptop computer MONG PAO provided "crashed" the first week of October and never regained its ability to run editing equipment. Complainant said he "ran a diagnostic" on the computer, and that Colleague 2 called an Apple store in St. Louis and was told the laptop could be repaired for about \$200.00, but that [REDACTED] and [REDACTED] told them the money wasn't available. According to Complainant, he continued to shoot footage but at that time had no editing equipment available. [REDACTED] testified to us that she recalled Complainant telling her the laptop "went out," but stated that Complainant had other computers available for his use.

[REDACTED] stated that, although she could not remember having a conversation with Complainant directing him to obtain additional equipment from the MPAD, she said she believed she gave Complainant and Colleague 1 access to other computers, and that there were multiple computers in the PAO and in the MPAD for their use. [REDACTED] told us that he could not recall exactly what the issue was with the laptop computer, but that he thought [REDACTED] would have coordinated obtaining equipment from the MPAD for Complainant. Colleague 2 testified to us that the crashed laptop computer was the computer he used, and that he obtained a replacement laptop computer from the MPAD around the same day it malfunctioned.

According to the timeline that [REDACTED] provided BPSI, during an October 8, 2013, PAO weekly meeting, the BPSI contractors (including Complainant) communicated their intent to complete two MO Guard TV programs for review by November 6, 2013, in time for Veteran's Day, but that they were advised by [REDACTED] to aim for just one program. The timeline reflected that the November 6, 2013, suspense date was not met and that no interviews were completed in connection with the planned program.

On October 21, 2013, [REDACTED] had a meeting with Complainant to counsel him on missed deadlines. [REDACTED] told us that [REDACTED] had received a complaint

⁸ Mysteries at the Museum is an hour-long television program on the Travel Channel that features museum artifacts of unusual or mysterious origins.

that Complainant and Colleague 2 had been disruptive at the September 28, 2013, Military Police (MP) ball; that Complainant had not contacted the producers of a television program (Mystery at the Museum) as ██████████ had requested; and that Complainant and Colleague 1 had not produced a video on a detachment departure ceremony they attended.

Colleague 2 confirmed that he and Complainant had been asked to leave the MP ball on September 28, 2013, because Complainant insisted on leaving bright lights turned on around the ballroom in spite of complaints by attendees that it disrupted the mood. Colleague 2 added that Complainant insisted that the only way to obtain footage was to have these bright lights on, and that they were asked to leave the ball because Complainant refused to turn the lights off. Colleague 2 told us that, in his estimation, they could have filmed the ball without the bright lights because their video cameras had a setting that allowed low light filming.

According to ██████████ timeline submitted to BPSI, on October 22, 2013, he emphasized to Complainant and Colleague 2 the importance of making deadlines because no suspenses had been met yet. ██████████ also noted in the timeline that Complainant told him that equipment problems had led to the delay in accomplishing their tasks, and that he, Complainant, and Colleague 2 discussed a way forward and produced a new set of deadlines and expectations in a draft schedule. While the timeline noted that Complainant, Colleague 2, and Colleague 1 had traveled to Kansas City to interview a MONG mixed martial arts instructor, the timeline noted the following concerns, missed deadlines, and tasks that had not been accomplished:

- a complaint received about Complainant and Colleague 2's "disruptive activities" at the September 28, 2013, MP ball;
- a missed September 30, 2013, deadline to turn in a timeline, an equipment list, and a script for the first MO Guard TV segment;
- a missed October 15, 2013, suspense to turn in a list of interviewees for the first half-hour television program;
- missed deadlines on two written stories;
- a Skype interview with deployed soldiers that was not completed;
- a history lesson that was not completed;
- MONG social media tasks that were not completed; and
- an interview with TAG that was not completed.

██████████ timeline further noted that, although a draft schedule was submitted to ██████████, additional updates should have been submitted to her on a weekly basis, which was not done.

Colleague 2 testified that they had missed deadlines but attributed this to Complainant always trying to "prove to ██████████ that they need more gear. [Complainant] wanted to sit down and make a point that the mission could not be done with the equipment they were provided." Complainant corroborated the October 22 meeting with ██████████ and confirmed that he told ██████████ the reason they could not meet deadlines was that their laptop had malfunctioned. Complainant also stated that a new set of deadlines came out of the meeting. However, Complainant testified to us that, without video editing equipment, the deadlines would

not be met, so, on his own initiative, he acquired an additional laptop computer and supplies from the MPAD.

On October 23, 2013, [REDACTED] contacted the contracting officer and courtesy copied [REDACTED], and told them that with regard to contractor performance, “we’ve already started seeing signs that a couple of them might not quite work out, and we want to make sure we’re documenting everything correctly in case, at some point, we need to start looking at other options in the future.”

Brig Gen Newman had administrative control of the PAO and reported directly to MG Danner. He testified that [REDACTED] briefed him weekly on PAO accomplishments, and then he would pass these updates to MG Danner. Brig Gen Newman stated that there was friction between the contractors and [REDACTED], and that [REDACTED] was probably not the easiest person to work for, I would guess. But those two [REDACTED] and Complainant] did not get along and [REDACTED] would be in my office, I would ask her if the videos were online, you know, on time, and stuff like that. On timeline (*sic*). And she was constantly saying that these guys weren’t doing their job, or she was just having problems with them.”

[REDACTED], USA, MOARNG, [REDACTED], worked for [REDACTED], USA, MOARNG, [REDACTED]. [REDACTED] attended the weekly PAO meetings and recalled that after Complainant began work at the PAO, the TAG, through Brig Gen Newman, began inquiring into the progress of the half-hour television program. [REDACTED] testified that production of the television show was “taking forever,” corroborated Complainant’s contention that there were equipment issues that they were trying to “wade” through, and stated it was readily evident that there was a significant difference of opinion concerning what “they were trying to produce versus what was being produced. It seemed, it seemed very emotional between all of them ... they were not very happy with each other ...”

[REDACTED] reported that some of the conflict was “silly stuff” and provided an example of conflict between [REDACTED] and Complainant: Complainant was tasked to film a social gathering at a soldier’s home and, after arriving, realized that several soldiers in attendance received military awards (such as the Purple Heart) during a shared deployment. [REDACTED] explained how, instead of just filming footage of their social gathering, Complainant interviewed each individual about a particular day during their deployment. [REDACTED] characterized what Complainant did as “phenomenal” and said that he remembered hearing that he “got into a little bit of hot water with [REDACTED] over that because he wasn’t sent there to interview them.”

According to [REDACTED], Complainant “never performed in any meaningful sense of the word ... he never produced much, he was never on time, he was difficult to work with, and I would say that was a pretty consistent experience ...”

[REDACTED] stated that while Complainant was a very enthusiastic and passionate individual, with regard to his work performance, “Basically, he never accomplished his job. So I would say he performs very poorly at the needed accomplishments we were looking for ...”

added that when Complainant was initially hired, they pushed to have the half-hour television program produced as quickly as possible. However, she went on to say that,

Complainant was incredibly difficult to manage ... he was not able to provide the right feedback for me to set appropriate deadlines. So we would have a meeting and he would say, I've got it, I've got it. I'll be done in a day. And then seven days later ... it wasn't done.

██████████ also stated that the biggest challenge was getting any kind of finalized product, and that she met repeatedly with Complainant to counsel him on deadlines and on his failure to meet the needs of the program.

██████████ told us that the BPSI contractors had taken much video but that nothing had been produced into the half-hour television program. ██████████ noted that ██████████ or ██████████ had made comments about being at odds with Complainant "five or six times"; they told him Complainant was difficult to manage and he was not doing exactly what he was told to do. ██████████ also told us, "It seems to me at some point in time, no matter what [Complainant] and [Colleague 1 and Colleague 2] showed them, it was not right. It was not good enough. It wasn't right."

██████████ said that as a result, he and ██████████ began "politicking" with Brig Gen Newman to have Complainant, Colleague 1, and Colleague 2 transferred under ██████████ guidance so that the contractors could complete the half-hour television program.

On November 5, 2013, Complainant, Colleague 1, and Colleague 2 were transferred from ██████████ to ██████████. Although Brig Gen Newman did not recall the specific details surrounding their transfer, he stated that, while he believed the idea came from either ██████████ or ██████████, he was the one who made the decision.

At this time ██████████ had not completed or provided the contracting office or BPSI a completed QAW for the month of October, as required by the task order. ██████████ testified:

By the time the October one would've been filled out [it] coincided pretty directly with the transfer over the (*sic*) ██████████ ... [he] was supposed to do the training as the COR, but never did it, or at least didn't do it until, I want to say December. So, since he was over the program, and I didn't have any visibility on it, but he couldn't sign the paperwork because he wasn't the COR, you know, I didn't fill out the QA forms. I didn't feel comfortable doing it ... I didn't have any oversight over the program ...

Contact with BPSI

On November 14, 2013, [REDACTED] called [REDACTED] and noted that his first week with Complainant had produced “a few roadblocks,” and that he had told Complainant to “follow guidance and not to do his own work.” That same day, [REDACTED] e-mailed [REDACTED] and told him the Contracting Officer [REDACTED]:

stated that there are monthly quality assurance reports or plans due on each contractor. Were you able to do any yet? It is needed if we were interested in releasing a contractor.

[REDACTED] responded to [REDACTED] and courtesy copied [REDACTED] and [REDACTED]:

I didn't do one for the first invoice because at that point there was nothing to report. For the second invoice, the plan was to fill it out with all the shortfalls we'd observed.

At this time, however, [REDACTED] had not completed or provided the contracting office or BPSI a completed QAW for the month of November, as required by the task order.

[REDACTED] stated that he requested [REDACTED] and [REDACTED] put together “a brief history of the team.” On November 15, 2013, [REDACTED] e-mailed [REDACTED], and courtesy copied [REDACTED], [REDACTED], and [REDACTED], and provided her a historical timeline of his observations of the BPSI contractors from September 20, 2013, to November 13, 2013, with a section titled, “Overarching Concerns.” [REDACTED] told us she fully participated in the development of this timeline that noted, in part, the following issues:

- “[Complainant] and the rest of the team have done nothing on the web site ...;
- The half-hour program [Complainant] promised completion of by early November remains incomplete;
- On Sept. 24, [Complainant] was asked to help with a submission for the program ‘Mystery at the Museum.’ Despite repeated tasking (*sic*) [Complainant] never completed the tasking;
- On Sept. 28, [Complainant] covered the MP ball. The MPs complained to the PAO, the first time the PAO had received a complaint about staff at a military event; and
- It is difficult to get [Complainant] to follow through on coordination with outside entities including the Mystery at the Museum staff, Media.com, or Missouri Viewpoints. In the case of Media.com and Missouri Viewpoints, these are companies that are viewed as a key to success in growing the program.”

[REDACTED] testified that [REDACTED] shared [REDACTED] timeline with her sometime in “mid-November” and stated that,

[REDACTED] and I] were disappointed that they were under performing on the contract and our response was to provide them

counseling and give them an opportunity to improve their skills so that they could continue to perform. So, that was our immediate response is that we would, we would look at the issues very carefully and then share those issues with the employees and hope that they would be able to resolve their performance issues.

██████████ added that she and ██████████ worked closely together, that they collaboratively decided to issue the final warning, and that ██████████ was the individual who summarized all the issues and developed the final warning letter for Complainant.⁹

On November 18, 2013, ██████████ e-mailed Complainant and asked him to review the attached final warning letter, the timeline ██████████ had provided documenting Complainant's performance issues, and the PWS. The warning letter notified Complainant that BPSI had received a call and complaint, "from a military authority responsible for work assignments in your area," and that the call's purpose was to advise BPSI that, although Complainant had received standard training, the quality, efficiency, and accuracy of his work would need to sufficiently and continuously improve to meet the standards required in the PWS for his position. ██████████ also noted specific concerns:

- failure to satisfactorily complete and submit security paperwork; process started on September 20, 2013;
- continuous and repeated missed deadlines, incomplete assignments, numerous errors on work submitted, requiring correction and re-submission;
- inappropriate response to October 21, 2013 meeting; provided military with pamphlet "How to Manage Creative People";
- inappropriate use of time reported for unauthorized assignment;
- resistance to training and advice from military authority; and
- work proficiency and efficiency needing improvement.

██████████ also notified Complainant that she would contact his military authority on November 25, 2013, to determine if there was improvement in all areas, and that failure to provide satisfactory work performance immediately in all areas of service "may result in further consultation up to and including termination of employment."

On November 20, 2013, ██████████ e-mailed Complainant and notified him she had not received an acknowledgement for the documents she had sent to him on November 18, 2013, and, "As there is a very short period of time allowed for improvement, I want to make certain that you are aware of the issues." On November 22, 2013, Complainant signed the final warning document acknowledging his receipt.

On November 25, 2013, ██████████ e-mailed ██████████, and courtesy copied ██████████, inquiring whether Complainant had made any improvement towards acceptable performance. ██████████ stated she would check back the next week in order to give Complainant "a fair opportunity" to resolve the issues.

⁹ Although called a "final warning," this was the first "warning" of this type Complainant received from BPSI.

On November 26, 2013, [REDACTED] responded to [REDACTED] and [REDACTED] and said,

I've pushed [Complainant] to produce a product and limit the excuses. He has some work left to do but I believe he understands that his job is on the line. I will continue to monitor and let you know how he works.

When asked about Complainant's performance while assigned to his and [REDACTED] oversight, [REDACTED] told us Complainant "did great work," that he "initially followed his own path for success rather than the MONG route," and that he "understood him better than most and spent more time with him which helped me understand his passion, although he expressed it differently as most people tend to do."

[REDACTED] told us,

I've managed and led a lot of organizations ... [and Complainant] is a difficult individual to get along with ... I'm not going to hold any punches there. He's probably one of the toughest guys I've ever had to manage ... he's a contrary person ...

[Complainant is] going to paint what he wants to paint. Now, he'll make a mess from time to time, but in the end it still heavily adds flavor. And so if you're an individual, and I'm, which I believe [REDACTED] to be, where you are a very dictator kind of person, you would not get along with [Complainant] at all, because [Complainant] can't paint within the lines. Now, [REDACTED] and I didn't see that as a weakness, we saw it as a strength. So, we let him paint outside the lines all day long ... it'd be kind of painful to get there from time to time, but the end result was, I thought, was pretty darn good.

[REDACTED] said that he told Complainant to take what he had (video footage) and develop the program and that, in a matter of days, Complainant put together the different segments for the half-hour television program. [REDACTED] stated that he and [REDACTED] were "quite impressed" and that he believed they showed it to TAG who, [REDACTED] told us, blessed off on the program. However, [REDACTED] also told us he didn't "know that it actually had made it out into the TV world."

Colleague 2 told us that while Complainant preferred working for [REDACTED], the transfer did not improve his work performance, and during the time he, Complainant, and Colleague 1 worked under [REDACTED], they still were not able to produce a half-hour television program. Colleague 2 said that by December they were still no closer to putting a show together, despite having filmed different segments for the show. Colleague 2 stated that he thought [the transfer to [REDACTED]] took away from [REDACTED] mission and was a waste of his time, and that he thought it was ultimately [REDACTED] who decided to return them to [REDACTED].

On December 4, 2013, [REDACTED] e-mailed [REDACTED] with the subject line, "FW: [Complainant]" and wrote, "I am just following up to make certain there is improvement. Please let me know if you have continuing problems." That same day, [REDACTED] responded to [REDACTED] and said, "We are good, his production has increased and he is on track."

[REDACTED] did not provide BPSI or the contracting officer a QAW for the month of December, as required by the task order.

January 16, 2014, Complainant Response to "Final Warning" Letter

On January 16, 2014, Complainant responded to [REDACTED] final warning letter that she e-mailed him on November 18, 2013. In the first paragraph of his e-mail, Complainant stated, "I sincerely believe that all of the concerns raised have been addressed to the satisfaction of the client and would appreciate confirmation." He went on to blame the team's lack of success on the government for only providing them one laptop computer for video editing, and for the assignment of tasks outside the focus of the monthly half-hour television program. Complainant went on to say that, since the beginning of the contract, he had routinely used his own equipment, which he valued at \$12,000, and that he believed this demonstrated his commitment to the project. Complainant also noted that Colleague 1 and Colleague 2 had no experience in the editing program, and their lack of experience required him to train them to successfully execute their assignments.

When asked if she was aware of Complainant's response to the final warning letter, [REDACTED] told us she did not recall.

Monday, January 27, 2014, Transfer back to [REDACTED]

On January 27, 2014, Brig Gen Newman notified [REDACTED] that Complainant, Colleague 1, and Colleague 2 would return back to work under [REDACTED]. When asked to explain why the BPSI contractors were returned to [REDACTED] supervision, Brig Gen Newman speculated that he thought [REDACTED] might have asked MG Danner to have the BPSI contractors returned to her because the work they performed was inherently a PAO function, and the videos were a public affairs product. Brig Gen Newman stated that during a meeting to discuss the videos, MG Danner directed that the BPSI contractors be returned to [REDACTED], but MG Danner did not tell him why.

IG Complaint

Later that same day, Complainant filed a complaint with the MONG JFHQ IG alleging that [REDACTED] failed to provide BPSI contractors with adequate equipment to produce the half-hour television program, which Complainant believed was his primary responsibility based upon the PWS. Complainant provided the IG a number of documents, including the PWS, his resume, a timeline [REDACTED] had drafted and submitted to BPSI, and the final warning letter he received from BPSI, among other documents. Complainant alleged that [REDACTED] assigned him and Colleagues 1 and 2 tasks other than production of the half-hour television program.

When asked if she was aware Complainant had gone to the IG to file a complaint, [REDACTED] testified, “No. Probably in retrospect, but no, not at the time.”

Also that day, [REDACTED] met with Complainant, Colleague 1, and Colleague 2 to set future program goals, and tasked Complainant with bringing a future events timeline and an equipment list to a follow up meeting scheduled for 10:00 a.m. the next morning. From contemporaneous notes [REDACTED] took, [REDACTED] noted that “they” (he and [REDACTED]) learned that Complainant had been complaining about using his personal equipment to do his job. [REDACTED] testified that this was information he learned of from the IG.

Tuesday, January 28, 2014

On January 28, 2014, Complainant attended the follow up meeting but did not bring the timeline or equipment list that he was previously tasked to provide. During the meeting, [REDACTED] directed Complainant to remove all of his personal equipment from the office by noon that day, and she established eight suspenses for Complainant to meet by 3 p.m. the next day. The task order, however, did not prohibit contractor employees from using their own equipment.

That same day, Complainant, Colleague 1, and Colleague 2 collectively went to the MONG JFHQ IG. According to officials from the MONG JFHQ OIG, Colleague 1 and Colleague 2 used Complainant’s documentation as the basis for their complaints, as “they all had the same complaint” and that the “IG engaged the three as they expressed their concerns ... they feel they are being unjustly targeted by the PAO.” Colleague 1’s complaint noted that the specific action he requested was resolving the issues regarding working under the PAO. Colleague 1 complained of abuse of authority as his document noted, “We have been prevented from doing our primary mission through misdirection, misinformation, overtasking, and obfuscation.”

Colleague 2’s complaint reflects that the purpose of his visit was to “talk and get information” and Colleague 2 told us that he went to the IG because “Complainant told me I was supposed to go with him because we’re a team.” He added that he “did not actually have any complaints,” and stated, “if I did not go into that [IG] office, then I feel like I would have had to explain myself to [Complainant] ... and I didn’t want to deal with all that stuff.” Colleague 2 testified that, “I didn’t want to say no, because I didn’t want controversy going on between [Complainant] and myself,” and added:

[Complainant is] still my superior, for the most part, because I still had to answer to him with the final say ... So I just kind of went with whatever he needed.

And if there was anything that needed to be signed on my part to say is [Complainant] right or wrong, I would have said what I needed to say, which, I didn’t, I don’t agree with [Complainant] in a lot of this stuff, you know. I just feel that he, he just wanted too

much. He just wanted too much production. He wanted too much equipment. And it just wasn't what the contract was written out for us to do.

Wednesday, January 29, 2014

On January 29, 2014, Complainant and Colleague 2 met with [REDACTED], [REDACTED], [REDACTED], and [REDACTED] to discuss completing the half-hour television program. According to [REDACTED] notes, [REDACTED] told Complainant and Colleague 2 that she wanted to meet with them after the meeting concluded, and that Colleague 2 showed up but Complainant did not, and that he was not seen for the rest of day.

According to the MONG JFHQ IG notes, at around 12:00 p.m. that day Colleague 1 went to its office and:

reported to the CMD IG that matters in the PAO office are getting worse. He (Colleague 1) would like additional information to assist him in getting his company notified of the harsh work environment created by the PAO office. Colleague 1 stated that [Complainant] and [Colleague 2] had a meeting mid morning with the PAO who (via hear say [sic]) on several times told [Complainant] to not talk and take the task. [Colleague 2] had stated it was very humiliating. After receiving "instructions" from the PAO, [Complainant] just walked out and keeps walking ... it was during this time that Colleague 1 noted emotional concerns to the IG about [Complainant, who] seemed very despondent after the meeting earlier and was disengaged from everything.

At 12:38 p.m., [REDACTED] sent Complainant an e-mail and courtesy copied [REDACTED] and [REDACTED] with the subject line, "Status?" In the e-mail, [REDACTED] noted that Complainant had not made the meeting they had scheduled and asked him for his status, and told him to report to her office as soon as he was back on the installation.

At 12:42 p.m., [REDACTED] e-mailed [REDACTED] the following:

As you know, on Jan 27 ... we switched administrative control of the program from [REDACTED], our special projects officers, back to the public affairs office. We met with the media team that afternoon to outline our goals for the future. We already have issues that we wanted to make sure we had documented for your awareness.

On Jan. 28, we learned that [Complainant] approached our inspector general to complain. Chief among his complaints was that he was using personal equipment in creating products. Our team has made it clear to him on several occasions that we neither

want nor need him to use personal equipment. After learning of the complaint, [REDACTED] immediately told him that personal equipment could not be used and must be removed from office areas immediately. A major issue has arisen from his use of personal equipment, namely, he uses a different editing system from what the [MONG] has used and he claims the two programs are not interchangeable.

Additionally, he told the inspector general that he refused to meet with [REDACTED] at a scheduled 10 a.m. Tuesday meeting to review the product the team put together. Although he did show up at the meeting, he did not bring any of the requested materials or meet any of the deadlines [REDACTED] set at the meeting. After a meeting this morning, Jan. 29, he skipped a meeting.

[Complainant] and the team have never been asked to do anything outside the parameters of the contract. Since September, their focus has solely been on the half-hour television program.

All of the officers who have had a hand in supervising the program, [REDACTED] and myself, have found [Complainant] to be discourteous and unprofessional. He has repeatedly displayed a complete disregard for authority, hasn't accepted guidance or acted on guidance given. Although I am not aware of the specifics of any issues from the past two months, we provided a lengthy list of issues and concerns in early November.

[Complainant] fails to grasp, or lacks the ability to grasp, who he works for. [Complainant] has repeatedly demonstrated that he is unwilling to do the work he was hired to do. As a retired Army Reserve Soldier, he is surely aware that he has gone far outside the chain of command and ignored processes that are in place to ensure that any and all issues are dealt with fairly and appropriately ...

[REDACTED] did not, however, provide the contracting officer or BPSI a completed QAW for the month of January, despite the apparent seriousness of his concerns, as outlined by the task order.

Later that day [REDACTED] acknowledged [REDACTED] e-mail and told him she would respond the next day. When we asked [REDACTED] if [REDACTED] shared with her [REDACTED] e-mail identifying that Complainant had gone to the IG, [REDACTED] testified that she did not recall.

Also on January 29, 2014, Colleague 1 sent BPSI an e-mail that said it was from himself, Complainant, and Colleague 2. In the e-mail Colleague 1 identified that they were having great difficulty fulfilling their contractual obligations, and that the team felt it was through little fault of their own as they were not provided the equipment or support needed to fulfill the contract. Colleague 1 wrote, in part, that they had tried communicating their difficulties but had been met with “derision, silence and dismissiveness,” that they had been “yelled at, lectured to and talked to” but not listened to. Colleague 1 noted that he, Complainant, and Colleague 2 were all in agreement that their performance improved under [REDACTED], but that being moved back to [REDACTED] was not going to work. Colleague 1 also said that:

The primary goal of our contract has been to produce a half-hour show. Under the direction of [REDACTED], we are being tasked to do things more along the lines of Electronic News Gathering. While we admit this is a part of our contract, we are seeing that become our primary focus, to the detriment of the half-hour show production guideline ... in summation, we feel as though we are not able to follow (*sic*) contract due to lack of support, lack of equipment, and lack of adequate management.

We are now advising you on the situation, and are asking what needs to be done in order to resign from our positions.

When asked about the letter Colleague 1 provided BPSI, Colleague 2 told us Colleague 1 wrote the letter with the Complainant. Colleague 2 added that he did not speak with them about the letter, and that he “just buried [himself] into working on the shows” the best he could.

The MONG JFHQ IG notes also reflect that on January 29, 2014, the IG:

inquired about [Complainant] whom stated he was in the parking lot sitting in his car and is somewhat despondent. IG Riley went to [Complainant's] car Summary: IG and [Complainant] spent about 45 min to an hour talking, most of the time the IG and [Complainant] walked the parking lot in a big circle. IG did ask, and [Complainant] did state, that emotionally he is spent and drained, but he is NOT suicidal.

And

Key words that [Complainant] used to describe everything was that he feels belittled by the PAO and that [REDACTED] is so not wanting the TV show and only wanting the team to do news's (*sic*) links or straight journalism links. The degrading commentary is just overwhelming. [Complainant] stated that when they moved from PAO to [REDACTED] the entire environment changed. Then back to the PAO and it's like nothing changed. [Complainant] just sees the Contractors being the fall guys for the PAO's office when

Friday, January 31, 2014, Unpaid Administrative Leave

On January 31, 2014 at 2:36 p.m., BPSI notified Complainant that he was being placed on unpaid administrative leave. [REDACTED] told Complainant, in part:

This will confirm our conversation this afternoon indicating my instructions for you not to report to your duties at the MONG until we have an opportunity to review the complaints received from the military contracting office. As indicated during our conversation, you did not advise the military of your absence. You may use sick leave from the time you walked out on Wednesday, January 29, (*sic*) Thursday, January 30 and Friday, January 31 only. All further leave will be unpaid administrative leave ...

February 4, 2014, Discharge

On February 4, 2014, BPSI provided Complainant a letter with the heading "Termination." The letter noted that BPSI had received:

unsatisfactory reports regarding your work production, work quality, attitude, and failure to follow instructions. Although these issues were communicated to you on November 18, 2013, you did not respond until January 16, '2013'. I assume you entered the wrong date, however, it took you two months to reply.

Based on information received from you and the military on Thursday, January 30, 2014, there is a dramatic escalation of events resulting in you walking off the job on Wednesday, January 29 and reporting out 'sick' on Thursday and Friday. You did not notify the military of your departure or your absence. As your employer, the proper course of action would be for you to report any dissatisfaction to BPSI - you did not. I received a brief email from you that you would return on Monday indicated (*sic*) that 'work turned hostile and volatile.' There was no further explanation and no prior notice of your complaint.

Your actions resulted in a complaint from the military that the issues outlined in November have not improved. Your attitude toward the military authority in charge of the program that you are there to support has deteriorated markedly. You left the military with incomplete projects and missed deadlines. At this point, it appears that you are extremely dissatisfied with the position. I have documented complaints from every military member assigned to the program regarding your lack of performance, your attitude, your attempts to impede progress, create turmoil within the

workplace and your inappropriate complaints to the military superiors.

The letter noted BPSI offered Complainant the option to resign in lieu of termination, but that he elected termination.

We asked both [REDACTED] if they provided BPSI any negative information about Complainant as documented in Complainant's termination letter. [REDACTED] told us that initially he had contacted BPSI and told them there had been a few roadblocks with Complainant, and he did not reach back out to BPSI after telling them on December 4, 2013, that Complainant was "on track."

[REDACTED] stated, "I don't recall sending anything negative. In fact, I do recall a phone conversation between myself and somebody from the contractor world. I have no idea exactly what I said, I believe it was much more positive than negative. Quite possibly all positive."

When asked why BPSI let Complainant go, Colleague 2 testified that he believed, in part, that it was because they were not showing any sort of movement towards a finished product, and that "BPSI had to find somebody that would fit that description and that position to be able to make the mission happen, instead of complaining with what we don't have, and making it a point that we could get this stuff done if we had this gear. I feel that he, he was just a distraction."

[REDACTED] testified:

We wanted to have the time to understand what all of the performance issues were, and he was on administrative leave until we could sort that out, and then when we had the opportunity to review all of the issues with his performance, we decided to terminate him based on performance, or lack of performance.

[REDACTED] and I] reviewed together all of the issues that the customer had regarding his performance, and based exclusively on performance we made the decision collectively to terminate him from that contract, from that task order. He was not fulfilling the obligations of that performance work statement. And we looked to see if there was another place we could put him within our organization, but BPSI was starting to wind down, and we didn't have another opportunity for employment within BPSI. So, as a consequence to that he was ultimately terminated from BPSI.

When asked to comment on Complainant's contention that the equipment he received was not adequate, [REDACTED] testified:

Well, I could see that the equipment was adequate for several other people working in the same capacity. So, BPSI had several

employees working in the [PAO] prior to the employment of Colleague 1 and [Complainant]. We probably employed 15 to 20 people over the course of the years who worked in that department and never was there a complaint about the adequacy of the equipment.

Colleague 2 also stated that they had filmed and put together three stories and filmed one additional story that was not put together, but that during Complainant's tenure at BPSI no half-hour television programs were approved or released. Colleague 2 reported that within approximately one week after BPSI discharged Complainant, he (Colleague 2) finished producing the first episode of MO Guard TV, which he said was approved by [REDACTED], [REDACTED], and MG Danner, and that it aired approximately one week later. As evidence to support this claim, Colleague 2 directed us to the Defense Video & Imagery Distribution System (DVIDS) website which listed the air date of "Episode 2" (Episode 1 aired in 2012 prior to Complainant joining BPSI) as February 24, 2014. [REDACTED] corroborated the information Colleague 2 provided us about the release date of Episode 2.

To emphasize his contention that the equipment the MONG PAO provided was sufficient to do the job, Colleague 2 testified that after Complainant was discharged from BPSI, he produced six half-hour programs with the equipment provided and that the equipment "worked fine." Colleague 2 said that in March he developed a second show, and continued to develop the programs through Episode 7, which aired on September 2, 2014. A review of the DVIDS website reflected Colleague 2's name on Episode 7.

[REDACTED] went on to say that they hired replacements for Complainant and Colleague 1 (who was subsequently discharged), and the replacements began in March or April, 2014, and stayed through the remainder of the task order period of performance (August 2014). When asked if MONG PAO was able to produce the videos (half-hour television program) in this time period, [REDACTED] told us it was, and that she never received another complaint from the PAO about the performance of the contract or the adequacy of the equipment.

MONG Investigation

On February 5, 2014, [REDACTED], ARNG, MONG JFHQ IG, provided Brig Gen Newman a memorandum that notified him the MONG JFHQ IG office had received an action request concerning the work environment of contract employees and the PAO, and that in accordance with Army Regulation 20-1, Inspector General Activities and Procedures, the IG referred the matter to him for action. The memorandum requested Brig Gen Newman conduct an inquiry into the matter and provide a copy to the IG upon completion. The memorandum requested that Brig Gen Newman determine, at a minimum, the following:

- if contract employees associated with the PAO's office were working within their contract and if the MONG Contracting Officer had been apprised of any issues with the contracted employees;
- if the employees were afforded opportunities to use their system of redress; and

- if the PAO created a healthy work environment (i.e., if people are treated with dignity and respect).

On February 7, 2014, Brig Gen Newman appointed an Inquiry Officer (IO) to conduct an investigation into whether contract employees associated with the PAO worked within their contract, and if the MONG Contracting Officer had been apprised of any issues with the contract employees. The appointment also directed the IO to investigate whether contract employees were afforded opportunities to use their system of redress, whether the PAO created a healthy work environment, and whether people were treated with dignity and respect.

The IO collected e-mails, documents, and eleven sworn statements. The IO concluded in his memorandum to Brig Gen Newman that the contractors were working within the contract, but,

Proper video equipment was not available for the [contractors] ... they had continual problems with equipment, having only one functioning video editing laptop. Under [REDACTED] supervision the [contractors] did receive some additional equipment and were able to produce a 30 minute video ... a former employee of the PAO with 17 years professional broadcast experience, in is (*sic*) sworn statement, said the [contractors] didn't have sufficient equipment to complete the mission.

The IO noted that the contractors were not afforded proper redress as outlined by the contract. The IO added that [REDACTED] as the COR was required to complete QAWs at the end of each month, beginning with an employee's start date, but that at the time Complainant was discharged, no worksheets had been completed. The IO noted that, per the contract, if employee performance dropped below "green" to "yellow" or "red" (demonstrating a performance decline), the employee was to be counseled and initial the worksheet acknowledging his or her lack of acceptable performance. The IO found that [REDACTED] as the COR "knew the requirements stating he read the contract and that the COR was responsible for the QAW."

The IO also found that the only performance issue ever raised to BPSI came from [REDACTED]. BPSI notified Complainant of a performance issue via the final warning letter, but the issue was resolved while Complainant worked under [REDACTED].

The IO also found that [REDACTED] demeanor did not allow for a healthy, productive work environment and "the improper handling of the [contractors], directing the removal of the contract employees was negligent and a direct reflection of the work environment and failure of the leadership of both [REDACTED]."

The IO recommended that [REDACTED] be counseled, and that [REDACTED] technician appraisal note the negative effects of her leadership style. The IO recommended that [REDACTED] technician appraisal highlight, in part, the liability, importance,

and consequences of being a COR, and how his negligence in improperly following the contract reflected negatively on the MONG and would not be tolerated.¹⁰

On May 5, 2014, a legal review was completed and sent to Brig Gen Newman. The legal review indicated the IO's findings were supported by competent and substantial evidence.

On June 5, 2014, ██████████ notified Complainant that the OIG had conducted a thorough inquiry into his request for assistance, and their inquiry determined that Complainant was working within the contract, that proper video equipment was not provided, that Complainant was not provided opportunities to use his system of redress as outlined in the contract through the QAWs, and that there was an unhealthy work environment in the MONG PAO.

According to MONG JFHQ OIG case notes from June 5, 2014, Brig Gen Newman met with ██████████ and notified him that he had verbally counseled ██████████ ██████████, and that he intended to follow up with ██████████ to ensure he understood the contracting process. The case notes also reflected that Brig Gen Newman considered the matter complete with regard to ██████████, and with regard to ██████████, it would be complete once he spoke to him.

VI. ANALYSIS

Under 10 U.S.C. § 2409, reprisal is proven in a 2-step process. First, a preponderance of the evidence must establish that one or more protected disclosures could have been a contributing factor in the decision to discharge, demote, or take another unfavorable action against the employee who made the protected disclosures. The complaint is thus substantiated, unless clear and convincing evidence establishes that the contractor or subcontractor would have discharged, demoted, or taken or failed to take another action with respect to Complainant, absent the protected disclosure(s).

A. Did Complainant make a protected disclosure? Yes

We determined that Complainant made two protected disclosures under 10 U.S.C. § 2409.

Complainant's Response to "Final Warning" Letter

On January 16, 2014, Complainant responded to ██████████ "Final Warning" letter that she e-mailed him on November 18, 2013. In his e-mail, Complainant blamed the team's lack of success on the fact that the government only provided them one laptop computer for video editing, and that they had been assigned tasks other than the monthly half-hour television program, which was the primary focus of the task order. Complainant's response to ██████████ is protected because he provided information about the lack of equipment and assignment of tasks outside the focus of his primary responsibility to a management official with

¹⁰ A technician appraisal is a U.S. National Guard Bureau service member's annual performance appraisal.

the responsibility to investigate, discover, or address misconduct, and this was information that he reasonably believed evidenced an abuse of authority relating to a DoD contract. Furthermore, [REDACTED], as the BPSI [REDACTED], was a management official of the contractor with the responsibility to investigate, discover, or address misconduct.

IG Complaint

On January 27, 2014, Complainant alleged to [REDACTED] that [REDACTED] abused her authority by assigning him, Colleague 1, and Colleague 2 tasks other than production of the half-hour television show. Complainant's report to [REDACTED] is protected because his complaint about the assignment of tasks outside the focus of what he believed was his primary responsibility under the contract was information that he reasonably believed evidenced an abuse of authority relating to a DoD contract. Furthermore, an IG is a recipient qualified to receive such disclosures under 10 U.S.C. § 2409.

As described above, a preponderance of the evidence established that Complainant made two protected disclosures.

B. Did the contractor or subcontractor discharge, demote, or take or fail to take another action with respect to Complainant? Yes

We determined that BPSI took two actions with respect to Complainant.

Unpaid Administrative Leave

On January 31, 2014, BPSI placed Complainant on unpaid administrative leave. Unpaid administrative leave constitutes an action that may dissuade a reasonable employee from making a protected disclosure. Accordingly, unpaid administrative leave is a covered action under 10 U.S.C. § 2409.

Discharge

On February 4, 2014, BPSI discharged Complainant. Discharge of a contractor employee is a specific covered action under 10 U.S.C. § 2409.

As described above, a preponderance of the evidence established that BPSI took two actions with respect to Complainant.

C. Could a reasonable person conclude that one or more protected disclosures were contributing factors in the contractor or subcontractor's decision to take or fail to take an action with respect to Complainant? Yes

“Contributing factor” means any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision. To determine whether a protected disclosure was a contributing factor in a decision to take or fail to take, or threaten to take or fail to take, any action, our analysis ordinarily weighs the following factors: knowledge of the

protected disclosures on the part of the officer or employee involved in the decision and the decision's proximity in time to the protected disclosure. In most instances, these two factors together suffice to establish that a protected disclosure was a contributing factor. However, if knowledge and timing alone fail to establish that a disclosure was a contributing factor, any other circumstantial evidence may also be considered, such as the strength or weakness of the company's stated reasons for the action, whether the protected disclosure was personally directed at the responsible management official, or whether the company had a desire or motive to retaliate against the complainant.

We determined that Complainant's protected disclosures were a contributing factor in BPSI's decision to take actions with respect to Complainant. Discussion of the factors weighed together follows the factor-by-factor analysis below.

Knowledge

BPSI had knowledge of both of Complainant's protected disclosures. [REDACTED] was the direct recipient of both Complainant's January 16, 2014, e-mail (his first protected disclosure) and [REDACTED] e-mail notifying her that Complainant had gone to the IG, which served as the employer's notice that Complainant had made a protected disclosure to an IG. [REDACTED] testified that she and [REDACTED] worked closely on Complainant's final warning letter, so it is more likely than not that [REDACTED] would have shared Complainant's response to that warning letter with her. Furthermore, [REDACTED] and [REDACTED] were two of the three employees in BPSI's corporate office. Therefore, BPSI had knowledge of both of Complainant's protected disclosures.

Timing of Actions Taken

The timing between Complainant's protected disclosures and the actions taken against him was very close. Complainant's first protected disclosure occurred on January 16, 2014, and the second occurred on January 27, 2014. The actions taken against him occurred on January 31, 2014, and February 4, 2014. The close timing between the protected disclosures and the actions taken raises an inference of reprisal.

Based on the factors analyzed above, a preponderance of the evidence established that Complainant's protected disclosures could have been a contributing factor in BPSI's decision to place Complainant on unpaid administrative leave and discharge him.

D. Does clear and convincing evidence indicate that the contractor or subcontractor would have discharged, demoted, or taken or failed to take another action with respect to Complainant absent the protected disclosure(s)? No

Once a preponderance of the evidence establishes that one or more protected disclosures contributed to the decision to discharge, demote, or take or fail to take another action with respect to Complainant, the case is substantiated unless clear and convincing evidence establishes that the action would have been taken or fail to be taken even in the absence of the protected disclosure. For each action, our analysis weighs together the following factors: the

strength of the evidence in support of the stated reasons for taking or failing to take the action; the existence and strength of any motive to retaliate on the part of the company officials who were involved in the decision; and any evidence that they take or fail to take similar actions with respect to employees who are not whistleblowers, but who are otherwise similarly situated.

We determined that BPSI would not have taken the same actions with respect to Complainant absent his protected disclosures. Discussion of the factors weighed together follows the factor-by-factor analysis below.

BPSI's stated reasons for unpaid administrative leave and discharge

BPSI's November 18, 2013, final warning letter notified Complainant that he had failed to satisfactorily complete security paperwork, had missed deadlines, had submitted incomplete assignments, and had made numerous errors on work submitted; had inappropriately reported time for an unauthorized assignment; and was resistant to training and advice from military authority. [REDACTED] provided Complainant the warning letter as an attachment to an e-mail notifying him that failure to provide satisfactory work performance immediately, in all areas of his service, may result in further consultation up to and including termination of his employment.

BPSI notified Complainant on January 31, 2014, that he was being placed on administrative leave until it could review the complaints received from the MONG. BPSI's notification added that Complainant did not advise the military of his absence, and authorized him to use sick leave from the time he "walked out on Wednesday, January 29, (*sic*) Thursday, January 30 and Friday, January 31 only. All further leave will be unpaid administrative leave."

BPSI's February 4, 2014, termination letter notified Complainant of the following concerns:

- BPSI received unsatisfactory reports about his work production, work quality, attitude, and failure to follow instructions;
- he took nearly two months to respond to the November 18, 2013, final warning letter, and that he walked off the job on Wednesday, January 29;
- he reported out "sick" on Thursday and Friday, and he did not notify the military of his departure or absence;
- he did not further explain his complaint of how work turned hostile and volatile;
- that his actions resulted in a complaint from the military that the issues outlined in November had not improved;
- his attitude toward the military authority in charge of the program he was hired to support had deteriorated markedly, and that he left the military with incomplete projects and missed deadlines; and
- BPSI had complaints from every military member assigned to the program regarding his lack of performance, attitude, and attempts to impede progress, and he created turmoil within the workplace and made inappropriate complaints to the military superiors.

Motive to Retaliate

Complainant's protected disclosure to BPSI on January 16, 2014, blamed the government for his team's lack of success, specifically that the team had only been provided one laptop computer for video editing, that the team had been assigned tasks other than focusing on the monthly half-hour television program, and that he augmented the government-provided equipment with some of his own equipment. Complainant also told BPSI that Colleague 1 and Colleague 2's lack of experience in the video editing program required him to train them to successfully complete their assignments. The information Complainant provided about Colleague 1 and Colleague 2 could have motivated BPSI to reprise because it implied BPSI hired two individuals not qualified to adequately perform their work without specialized training from Complainant.

Complainant's protected disclosure to the IG on January 27, 2014, concerned his and the team's difficulties working with [REDACTED]. He believed she abused her authority by assigning the team tasks outside the production of the half-hour television program, and that the equipment they were provided was insufficient to perform tasks identified in the PWS. [REDACTED] notified BPSI the next day that Complainant "had approached our inspector general to complain."

[REDACTED] told BPSI that Complainant chiefly complained to the IG that he had to use his personal equipment to create products. [REDACTED] also stated that Complainant had skipped a meeting, that Complainant and Colleagues 1 and 2 had never been asked to perform any duties outside the contract parameters, that all the officers with a hand in "supervising the program" had found Complainant discourteous and unprofessional, and that "although I am not aware of the specifics of any issues from the past two months, we provided a lengthy list of issues and concerns [to BPSI] in early November." [REDACTED] also told BPSI that Complainant was "surely aware that he has gone far outside the chain of command and ignored processes that are in place to ensure that any and all issues are dealt with fairly and appropriately ..."

[REDACTED] provided BPSI the e-mail about Complainant going to the IG on the same day that Colleague 1 provided BPSI his complaint, on behalf of the entire team, indicating they could not work under [REDACTED], that they had tried communicating their difficulties but had been met with "derision, silence and dismissiveness," and that they had been "yelled at, lectured to and talked to," but not listened to.

The information Complainant provided to the IG, and that [REDACTED] communicated, in part, to BPSI, could have motivated BPSI to take a personnel action against Complainant merely because it knew that he had complained to the IG. While [REDACTED] did not elaborate on any other specifics of Complainant's IG complaint, the fact that Complainant complained to the IG, together with Complainant's first protected disclosure to BPSI two weeks earlier and Colleague 1's complaint to BPSI about poor working conditions under [REDACTED], could have caused BPSI to speculate that Complainant's IG complaint contained more than just a report that he had to use his personal equipment to accomplish his job.

Disparate Treatment of Complainant

BPSI employed only two employees other than Complainant under contract at the MONG PAO, and we uncovered no evidence that BPSI either discharged or placed a similarly situated non-whistleblower on unpaid administrative leave.

Discussion

BPSI's stated reasons for placing Complainant on unpaid administrative leave and discharging him are not supported by clear and convincing evidence.

BPSI notified Complainant that he walked off the job on Wednesday, January 29, and reported out "sick" on Thursday and Friday, and noted in both the e-mail that placed him on administrative leave as well as the discharge letter that he did not notify the military of his departure or absence. However, BPSI's own Employment Handbook prohibited Complainant from approaching the MONG PAO (as the BPSI customer) on any employment matter, specifically regarding leaves of absence.

The Employment Handbook states that BPSI is the Complainant's first contact on all employment related issues. Based upon Complainant's e-mail with the subject line, "I'll have to use sick leave Thursday and Friday," and in accordance with the company's procedures in the handbook, Complainant notified BPSI early on Thursday, January 30, 2014, of his need to use sick leave for that day and the next. BPSI granted Complainant sick leave for not only Thursday and Friday, but also for Wednesday afternoon, even though he had not requested leave for Wednesday afternoon. However, in the termination letter, BPSI told Complainant that he, "reported out 'sick' on Thursday and Friday," implying by its use of quotation marks around the word "sick" that Complainant had not been authorized to use sick leave for his absence. BPSI's subsequent calling of Complainant's sick leave into question after it had expressly approved the sick leave provides evidence of pretext.

BPSI told Complainant that his actions resulted in a complaint from MONG that the issues it had outlined in November had not improved. However, from November 5, 2013 to January 29, 2014, Complainant was working under [REDACTED] oversight, and had improved his performance according to [REDACTED] December 4, 2013, e-mail to BPSI that Complainant was "on track." [REDACTED] e-mail also indicated that the issues [REDACTED] identified in November were resolved. Moreover, we uncovered no evidence that the MONG PAO communicated with BPSI about Complainant's performance after December 4, 2013, until January 29, 2014, when [REDACTED] e-mailed BPSI after only two days of oversight of Complainant's performance, in which he stated he was "not aware of the specifics of any issues from the past two months." The evidence did not support concluding that BPSI made even minimal attempts to resolve the significant disconnect between [REDACTED] [REDACTED] positive assessment of Complainant's performance in December 2013 and [REDACTED] e-mail in late January 2014.

Additionally, [REDACTED] believed nothing that the contractors showed [REDACTED] and [REDACTED] would be "right" or "good enough," which prompted his request to

Brig Gen Newman that they be transferred under his and [REDACTED] guidance so the half-hour television program could get produced. [REDACTED] noted that [REDACTED] was a “very dictator kind of person.” [REDACTED] assessment is consistent with Complainant’s allegation to the IG that [REDACTED] “is so not wanting the TV show,” and was assigning other tasks that were not aligned with the production of the show. Furthermore, [REDACTED] January 29, 2014, e-mail to [REDACTED] which highlighted that, since September, the contractor’s focus had “solely” been the half-hour television program is contradicted not only by Complainant’s IG complaint, but also by Complainant and Colleague 1’s BPSI complaints, and [REDACTED] directive that Complainant remove all personal equipment from MONG premises. Accordingly, the preponderance of the evidence supports concluding that Complainant reasonably believed [REDACTED] had abused her authority by directing the team to focus on tasks other than the television program and by not ensuring that they had adequate equipment to perform the task.

BPSI provided Complainant as rationale for his discharge that it had received complaints from “every military member assigned to the program” about his lack of performance, his poor attitude, his attempts to impede progress and create turmoil within the workplace, and his inappropriate complaints to military superiors. However, we uncovered no evidence that BPSI received any such complaints from [REDACTED], who oversaw Complainant’s performance for nearly 13 of the 20 weeks he was employed by BPSI.

[REDACTED] told us that the only issue he raised to BPSI about Complainant occurred shortly after the BPSI contractors were transferred to him, and he told BPSI there were a few roadblocks, but that any issues were resolved by December 4, 2013, when he notified BPSI that Complainant was “on track.” Furthermore, [REDACTED] told us he did not recall providing any negative information about Complainant to BPSI. Accordingly, we find BPSI’s inaccurate statement about the complaints it received to be pretextual in nature.

[REDACTED] did not provide any QAWs for the months of September through January as required by the task order. BPSI made no attempts to solicit these QAWs to gain a month-by-month evaluation of Complainant, Colleague 2, and Colleague 1’s performance. BPSI did not afford its employees the opportunity to compare how their performance was measured against the PWS. The task order also noted, “If the Contractor’s response to an identified quality deficiency is unsatisfactory, the Contracting Officer along with the COR will contact the Schedule Holder [BPSI] to implement a plan of action to remedy the identified deficiency.”

BPSI made no attempt to provide Complainant an opportunity to remedy the performance deficiencies [REDACTED] identified on January 29, 2014, only two days after he reacquired oversight responsibility of Complainant. BPSI also did not question Complainant about the performance issues [REDACTED] identified on January 29, 2014, and did not give Complainant an opportunity to remedy these issues. BPSI also granted Complainant sick leave for the afternoon of January 29, 2014 through January 31, 2014, when it placed him on unpaid administrative leave, yet cited his use of sick leave as one of the bases for discharging him the following Tuesday.

Finally, we note that 10 U.S.C. § 2409(a)(3)(B) prohibits Defense contractors such as BPSI from engaging in reprisal against a whistleblower “even if it is undertaken at the request of

a Department or Administration official, unless the request takes the form of a nondiscretionary directive and is within the authority of the Department or Administration official making the request.” As discussed above, BPSI’s claim that it had received complaints about Complainant from “every military member assigned to the program” was factually inaccurate. Moreover, even though BPSI received complaints about Complainant from [REDACTED], the mere existence of complaints from government officials does not relieve BPSI of its burden to demonstrate by clear and convincing evidence that it would have taken the same actions in the absence of the protected disclosures. Based on the numerous discrepancies identified above, we find that BPSI failed to satisfy this burden of proof.

Weighed together, the evidence analyzed above does not clearly and convincingly establish that BPSI would have placed Complainant on unpaid administrative leave and discharged him absent the protected disclosures.

Accordingly, in the absence of clear and convincing evidence to the contrary, we determine that BPSI placed Complainant on unpaid administrative leave and discharged him in reprisal for his protected disclosures.

VII. CONCLUSION(S)

We conclude BPSI placed Complainant on unpaid administrative leave and discharged him in reprisal for making protected disclosures.

VIII. RECOMMENDATION(S)

We recommend that the Secretary of the Army direct National Guard Bureau officials to:

- Consider appropriate action against BPSI and any possible successor in interest.
- Order BPSI or any possible successor in interest to reinstate Complainant to the position he held prior to the reprisal, correct Complainant’s personnel record to expunge the February 4, 2014 termination letter from his file, and to award compensatory damages (including back pay), employment benefits, and other terms and conditions of employment that would apply to Complainant in that position if the reprisal had not been taken.

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