DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
MANPOWER AND RESERVE AFFAIRS
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March 30, 2010

Acting Special Counsel William E. Reukauf
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1730 M Street, N.W., Suite 218
Washington. D.C. 20036-4505

RE: Whistleblower Investigation-Munson Army Health Center (MAHC), Fort Leavenworth, Kansas - (Office of Special Counsel File Number DI-08-3062)

Dear Mr. Reukauf:

In accordance with Title 5, United States Code (USC), Section 1213(c) and (d), the enclosed report is submitted in response to your referral of information requesting an investigation of allegations and a report of findings in the above referenced case.

The Secretary of the Army (SA) has delegated to me his authority, as agency head, to review, sign, and submit to you the report required by Title 5, USC, Section 1213(c) and (d) [Tab A]

Note that this report and its exhibits contain the names and duty titles of active duty service members and civilian employees of the Department of the Army. Subsequent release of this information may result in violations of the Privacy Act[1] and breaches of personal privacy interests. Accordingly, those releases required by Title 5, USC, Section 1213(e) excepted, the Department of the Army is enclosing two versions of the report of investigation. The first version contains the names of witnesses and is for your official use. I understand that you will provide a copy of this version to the Complainant, the President, and the House and Senate Armed Services Committees for their review. However, witness names are redacted from the second version. The second version is suitable for release to the general public. I request that you make only this redacted version available on your web-site, in your library, or in any other forum in which it will be accessible to members of the general public.

INFORMATION INITIATING THE INVESTIGATION

By letter dated February 20, 2009, the OSC referred to the SA allegations submitted by the whistleblower, Mr. Karl Gibson, an Industrial Hygienist and Industrial Hygiene Program Manager (IHPM) at Munson Army Health Center (MAHC), Fort Leavenworth, Kansas (MAHC). Mr. Gibson alleged that Department of the Army officials in the Preventive Medicine section of MAHC had deliberately interfered with the effective operations of MAHC's Industrial Hygiene (IH) Program, in violation of law, rule, or regulation, including but not limited to a violation of Title 29, Code of Federal Regulations (CFR), Part 1960, *Basic Program Elements For Federal Employee*

[1] The Privacy Act of 1974, Title 5, USC, Section 552a

Occupational Safety and Health Programs and Related Matters; Army Regulation (AR) 40-5, *Preventive Medicine*; and Department of the Army Pamphlet (DA Pam) 40-503, *Medical Services, Industrial Hygiene Program.*

THE OSC REFERRAL

Mr. Gibson,[2] who consented to the released of his name [Tab B, p. 1], made several allegations to the OSC. The OSC concluded that there existed a substantial likelihood that information provided by the Mr. Gibson established that since June 2007, Mr. Gibson's supervisors, Lieutenant Colonel (LTC) [redacted] and First Lieutenant (1LT) [redacted], actively interfered with Mr. Gibson's ability to conduct an effective Industrial Hygiene Program at Fort Leavenworth and that these actions constituted an abuse of authority and created the potential for a substantial and specific danger to the public health and safety. Further, the OSC concluded that there existed a substantial likelihood that information provided by Mr. Gibson established that since June 2007, adequate industrial hygiene assessment and testing had not occurred at Fort Leavenworth, in violation of law, rule and/or regulation [Tab B].

CONDUCT OF THE INVESTIGATION

By statute, an agency is afforded 60 days to complete the report required by Title 5, USC, Section 1213.

The SA directed the Commanding General, U.S. Army Medical Command (MEDCOM) to conduct an investigation into the allegations referred to him by the OSC. [Tab F]. This referral was appropriate because MEDCOM provides healthcare oversight and control of all medical centers and medical treatment facilities and activities in the Army, with the exception of field units. [Tab G]. On March 23, 2009, the Department of the Army Office of the General Counsel (OGC) forwarded the SA's directive to the MEDCOM Office of the Staff Judge Advocate [Tab H].[3]

It was determined that the Commanding General, Great Plains Regional Medical Command (GPRMC), Brigadier General (BG) James Gilman, should act as the appointing authority in this

[2] On February 12, 2009, Mr. Gibson received a notice of placement on a performance improvement period (for 90 days) based on his unsuccessful performance. It was asserted that Mr. Gibson failed to meet two job objectives set forth in his 2008 performance plan [Tab C and ROI, Tab 21/Exhibit 17]. On February 17, 2009, Mr. Gibson received a notice of proposed removal for failure to comply with a policy or directive (three specifications); careless or negligent performance of duties; and failing to provide accurate information on an official report (two specifications) [Tab D]. On March 16, 2009, a decision was rendered sustaining all of the charges and Mr. Gibson's proposed removal [Tab E]. The decision memorandum established March 27, 2009 as the effective date of Mr. Gibson's removal. However, OSC requested a series of informal stays of Mr. Gibson's removal pending its investigation of his allegation of reprisal based on his whistleblower activity. On completion of its reprisal investigation, OSC advised the Army that it would not request any further informal stays and that the Army could proceed with Mr. Gibson's removal. Mr. Gibson's removal was effective on July 31, 2009. [Tab HH].

[3] Under Army doctrine, all Army lawyers servicing an installation or command are consolidated in the Office of the Staff Judge Advocate. The Office of the Staff Judge Advocate is led by the Staff Jude Advocate, a military judge advocate, generally serving in the grade of COL.

case. On April 22, 2009, BG Gilman appointed Colonel (COL) [redacted], United States Army Center for Health Promotion and Preventive Medicine (USACHPPM), Aberdeen Proving Ground, Maryland, under provisions of Army Regulation (AR) 15-6, *Procedures for Investigating Officers and Board of Officers*,[Tab J]. to investigate the allegations forwarded by OSC [ROI, Tab 2; Tab I]. COL [redacted] was chosen, in part because he possessed specialized expertise in the area of industrial hygiene [See Tab K for COL [redacted] qualifications and Curriculum Vitae]. COL [redacted] began investigating the matter immediately and was meticulous in his approach to the allegations. His attention to detail is evidenced by the core questions he developed to guide his investigative efforts [Tab L] and his expansion of the questions to provide for a more detailed record of the evidence [Tab L]. COL [redacted] made steady progress in his investigation. However, on May 26, 2009, OSC brought to the OGC's attention Mr. Gibson's allegations that COL [redacted] had behaved unprofessionally during their interview session on May 14, 2009. It appears that COL [redacted] had requested that Mr. Gibson provide a sworn statement responding directly to the 25 questions that COL [redacted] had provided him on May 5, 2009.

Given Mr. Gibson's allegation and to preclude even the appearance of bias against the whistleblower, BG Gilman excused COL [redacted] from his duties as IO on May 31, 2009 [ROI, Tab M]. Both COL [redacted] and Mr. Gibson were asked to provide a statement about their Mat 14, 2009 encounter and each submitted a Memorandum for Record [Tabs N and O, respectively]. There were no findings of wrongdoing by either the IO or Mr. Gibson, however.

The new Commanding General, GPRMC (now Southern Regional Medical Command (SRMC) (Provisional))[4], BG Joseph Caravalho, Jr., appointed Mr. [redacted] USACHPPM, an expert in industrial hygiene, as the replacement IO on June 9, 2009 [ROI, Tab 2; Tab P]. *See* Tab Q for Mr. [redacted] qualifications and Curriculum Vitae.

Upon Mr. [redacted] appointment as IO, he immediately proceeded to familiarize himself with the evidence that COL [redacted] had gathered prior to his excusal. Mr. [redacted] determined that there remained a few outstanding issues that needed to be further developed to complete the investigation. Mr. [redacted] began a series of interviews with the principal witnesses, specifically, COL [redacted], the MAHC Medical Department Activity (MEDDAC) Commander from 2006-2008, COL Andrea Crunkhorn, the MEDDAC Commander who succeeded COL [redacted] LTC [redacted], Chief of Preventive Medicine, MAHC; former 1LT [redacted], Chief of Environmental Health and Environmental Science Officer, MAHC; and Mr. Gibson. Upon reviewing Mr. Gibson's sworn statements obtained by COL [redacted] Mr. [redacted] realized that Mr. Gibson had not provided an answer to an important question, to wit: "During 2008 were 1LT [redacted] and LTC [redacted] arbitrary in denying 39 of Mr. Gibson's 40 requests to conduct time weighted measurements testing on buildings without an explanation?" [ROI, Exhibit 24; Tab R]. Mr. [redacted] attempted to meet Mr. Gibson in person to discuss the statements and evidence that he had provided COL [redacted] to secure Mr. Gibson's response to the unanswered question, and to provide Mr. Gibson with the opportunity to present any additional information he wished. Although Mr. [redacted] was able to make

[4] As explained on p. 6 of this report, MEDCOM reorganized in 2009 and GPRMC was renamed as Southern Regional Medical Command (SRMC).

telephone contact with Mr. Gibson on July 1 and 2, 2009, he was not successful in his efforts to meet with Mr. Gibson or to obtain from Mr. Gibson the additional information he sought. In an effort to arrange the meeting, Mr. [redacted] went so far as to send e-mails to both Mr. Gibson's office and personal e-mail addresses [ROI, Exhibit 24; Tab R]

Mr. [redacted] made a good faith attempt to meet with Mr. Gibson and to afford him the opportunity to provide input to the investigation, but Mr. Gibson did not respond. For example, in an e-mail to Mr. Gibson, dated July 8, 2009, Mr. [redacted] advised, "Please understand that I want to give you every opportunity to present any and all additional information that you wish to present for my consideration regarding any matter addressed in the Appointment Memo. If there is any additional information that you wish for me to consider, please feel free to send it along, as well. Also, please let me know your availability (and the availability of your Union representative) to discuss these matters face-to-face in more detail." [Tab R, email dated July 8, 2009, para 4. Even though the Whistleblower's employment with the Army had been terminated on July 31, 2009, Mr. [redacted] intended to consider any information Mr. Gibson wished to submit regarding his allegations. Shortly thereafter, on September 9, 2009, Mr. Gibson contacted OSC to allege that Mr. [redacted] had refused to meet with him. In response, Army OGC advised OSC about Mr. [redacted] attempts to meet with Mr. Gibson. Army OGC received no further communications from OSC regarding this issue. As of this date, Mr. Gibson has never contacted Mr. [redacted]

Although COL [redacted] and his successor, Mr. [redacted] proceeded diligently, the nature and comprehensiveness of the investigation necessitated that OGC request from OSC several extensions of time to permit Mr. [redacted] to complete his investigation and report, and for OGC to prepare, staff, and finalize the Army's final report to OSC. At OGC's request, the OSC granted six extension requests.[5]

BACKGROUND -- ENTITIES WITH INDUSTRIAL HEALTH AND INDUSTRIAL HEALTH-RELATED MISSIONS

To facilitate a better understanding of the facts and circumstances associated with the whistleblower's allegations to the OSC and to permit a more knowledgeable assessment of the testimonial and documentary evidence collected from all of the witnesses, it is important to understand MEDCOM's organizational structure and functional relationships with supporting organizations [*See generally* documents contained Tab G that depict these various

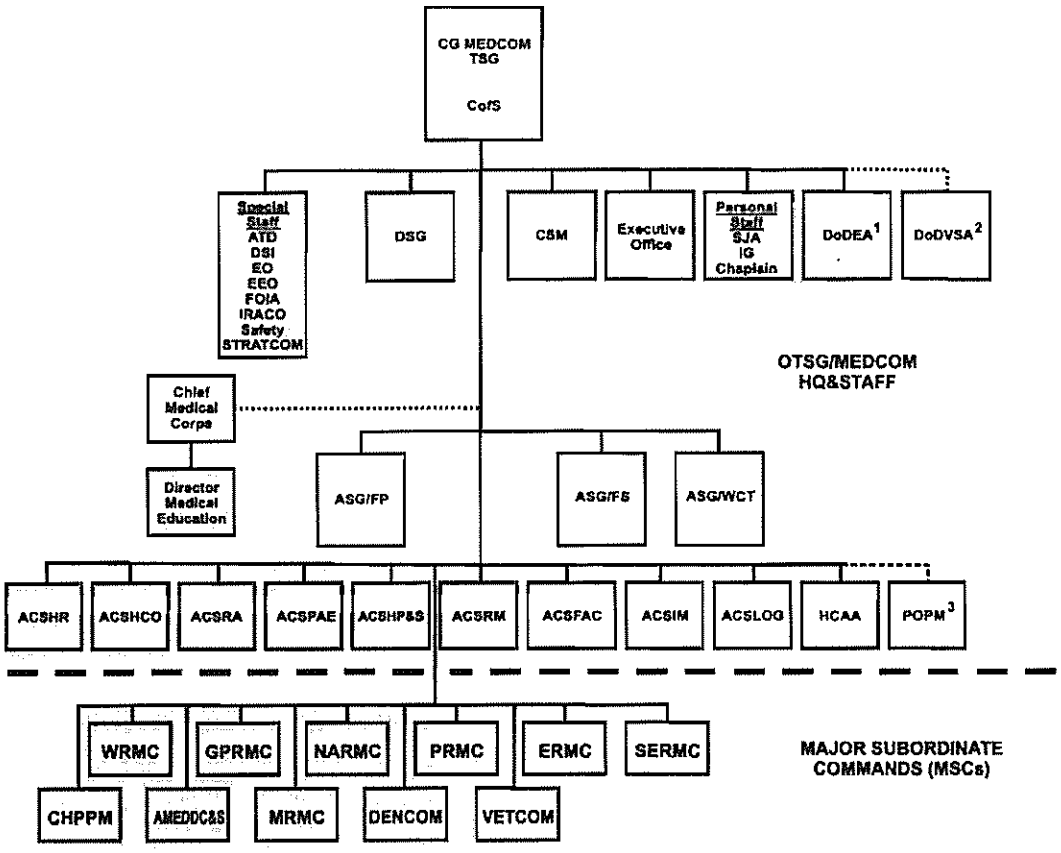
[5] Though by statute, an agency is afforded 60 days to complete the report required by Title 5 USC, Section 1213, extensions to this time period are permitted. *See* Tab B, authorizing the Special Counsel to agree to a longer period of time for the agency to investigate and report its findings. Army request for extension No. 1, dated April 23, 2009, was granted the same day for a period of sixty days, extending the suspense until June 23, 2009; extension request No. 2, dated June 19, 2009, was granted on June 26, 2009 for sixty days, extending the suspense until August 26, 2009; request No. 3, dated August 21, 2009, was granted on August 21, 2009 for sixty days, extending the suspense until October 26, 2009; request No. 4, dated October 23, 2009, was granted on October 28, 2009 for sixty days, extending the suspense until December 28, 2009; request No. 5, dated December 18, 2009, was granted on December 23, 2009 for sixty days and extended the suspense until February 23, 2009; and request No. 6, dated February 19, 2010, was granted on February 25, 2010, extending the suspense for sixty days through March 29, 2010.

organizations].

U.S. Army Medical Command (MEDCOM) Mission

The Surgeon General (TSG) of the U. S Army serves in a dual role as both the U.S. Army Surgeon General and MEDCOM Commander. In executing his duties as TSG, he is responsible for the development, policy direction, organization, and overall management of an integrated Army-wide health services system. Among many other functions, TSG has responsibility for coordinating world-wide command programs to protect and enhance health by control of workplace environments and those aspects of Army environmental programs relating to the prevention of disease and preservation of health. *See* Army Regulation 40–1, *Composition, Mission, and Functions of the Army Medical Department*, dated July 1, 1983, paragraph 1-6, [Tab G-1],and, AR 10–87, *Army Commands, Army Service Component Commands, and Direct Reporting Units*, dated September 4, 2007, para 15-3. [Tab G-2].

In his role as Commander, MEDCOM, TSG exercises oversight and control of all medical centers and medical treatment facilities and activities in the U.S Army, with the exception of field units. Regional Medical Commands (RMCs) are major subordinate commands (MSCs) of MEDCOM and are multi-state command and control headquarters that allocate resources, oversee day-to-day management, and promote readiness among military treatment facilities in their geographic areas. *See* AR 10–87, Chapter 15. [Tab G-2]. Below is a diagram depicting OTSG/HQ MEDCOM staff and the RMCs prior to MEDCOM's reorganization in late 2009, the period most relevant to Mr. Gibson's allegations, as depicted in MEDCOM Regulation No. 10-1, Organization and Functions Policy, 6 May 2009, Figure 1-1.



Great Plains Regional Medical Command (GPRMC) Mission

Prior to the MEDCOM's 2009 reorganization, the GPRMC had oversight of subordinate medical facilities and clinics within the states of Arizona, Texas, Oklahoma, Louisiana, Colorado, Kansas (where Fort Leavenworth is located), and Missouri. [Tab S]. The Commanding General of the GPRMC, BG Joseph Caravalho, has been delegated command and control over the medical centers and medical activities located within the GPRMC geographic area. The GPRMC Commander provides intermediate level supervision over, and continuous evaluation of the delivery of and quality of medical care provided eligible beneficiaries throughout the region. Further responsibilities of RMCs are discussed in MEDCOM Regulation 10-1, Change 2, *Organization and Functions Policy*, dated 21 March 2000, Chapter 2. The geographic area of the GPRMC is defined by MEDCOM Regulation 40-21, *Regional Medical Commands and Regional Dental Commands*, dated October 22, 1999, Chapter 2, Section I. It is important to note that in the course of the MEDCOM realignment in late 2009, GPRMC was renamed the Southern RMC (SMRC) and MAHC and Fort Leavenworth were realigned with the Western RMC (WRMC). [Tab T].

In July 2007, for purposes of rendering subject matter expertise to the MAHC chain of command relative to Mr. Gibson's implementation of the MAHC IH program, COL [redacted] then the MAHC Commander, asked Mr. [redacted] the GPRMC Regional IHPM, to assess

Mr. Gibson's technical competency and the validity of information that Mr. Gibson had promulgated in various reports, documents and verbal assertions to the MAHC command regarding public health and safety-related matters at MAHC and Fort Leavenworth. For the three years prior to that specific request, Mr. [redacted] had been actively engaged as a technical advisor and consultant to MAHC management as well as a coach and mentor to assist Mr. Gibson in meeting his performance expectations [ROI, Tab 5/Exhibit 1, Statement of Mr. [redacted] Question 1, pp. 1-3; *see also* Tab U setting forth Mr. Bentley's qualifications and Curriculum Vitae].

Munson Army Health Clinic Mission (MAHC)

MAHC is an outpatient facility offering primary care and simple specialty care, *i.e.,* routine exams, tests and treatments for ambulatory beneficiaries at Fort Leavenworth, Kansas.[6] Prior to the 2009 MEDCOM reorganization, MAHC was funded by and received operational oversight and guidance from MEDCOM through the GPRMC [*See* Tab S organizational chart referenced above]. As a result of the MEDCOM reorganization, the GPRMC was renamed the South Regional Medical Command (SRMC) and changes were made to the states included in its area of responsibility. MAHC was realigned into the Western Regional Medical Command (Western RMC).[7]

During the period relevant to Mr. Gibson's complaint to OSC, MAHC was commanded first by COL Carmen Rinehart (2006-2008) and then by COL [redacted] (2008-Present). One of the many programs comprising the MAHC is the Preventive Medicine Program. MAHC's IH Program was a component of the MAHC Preventive Medicine Program. The staff of the Preventive Medicine Office included the Chief of Preventive Medicine, LTC [redacted] former 1LT [redacted] Chief of Environmental Health and Environmental Science Officer; and Mr. Gibson, Industrial Hygienist and the MAHC IHPM [*See* Tab V for the

[6] AR 40-4, *Army Medical Department Facilities Activities*, dated January 1, 1980, para 10, defines a United States Army Medical Department Activity (MEDDAC) facility as "an organization encompassing a USACH [United States Army Community Hospital] or designated U.S Army Health Clinic and the associated activities which are responsible for providing health services to authorized persons within an assigned Health Service Area (HSA). It normally has command and control over AMEDD facilities, activities, or units (other than TOE units) located within its HSA. The MEDDAC may also be tasked to provide administrative and logistical support to other AMEDD organizations over which it does not exercise command or operational control. These may include U.S. Army Medical Laboratories or U.S. Army Dental Activities. Para 10 also states that a MEDDAC will be designated a "U.S. Army Medical Department Activity" and identified by adding its location. For example, U.S. Army Medical Department Activity, Fort Hood, Fort Hood, Texas. The term Medical Clinic or Medical Center is generally synonymous with the acronym "MEDDAC". Additionally, para 31 defines "Health Service Area (HSA)" as a geographic area within CONUS or overseas, specified by counties or other political entities. A single Medical Center (MEDCEN) or MEDDAC provides designated health care services to authorized persons within an HSA. HSA refers solely to the geographical area for which the MEDCEN or MEDDAC has designated responsibility. The HSA assigned to a MEDCEN or MEDDAC will be as directed by the appropriate commander. An HSA is named after the installation on which the MEDCEN or MEDDAC is located. For example, the HSA assigned to Madigan Army Medical Center, Fort Lewis, Washington, is Fort Lewis Health Service Area. The HSA assigned to the MEDDAC, Fort Dix, New Jersey, is Fort Dix Health Service Area. This organizational structure is also addressed in MEDCOM Regulation 10-1, *Organization and Functions Policy*, dated May 6, 2009, Chapter 3 [Tab G].

[7] According to Mr. [redacted], Office of the MEDCOM SJA, ongoing actions and files related to Mr. Gibson were retained under the responsibility of the Southern RMC.

Organizational charts of the MAHC [Tab V-1] and the Preventive Medicine Program [Tab V-2]].

U.S. Army Public Health Command (PHC) Mission

MEDCOM relies on the expertise of one of its MSCs, the PHC (formerly known as the U.S. Army Center for Health Promotion and Preventive Medicine (USACHPPM)), as a skilled public health agency, to work collaboratively with the RMCs [Tab W]. The PHC team is a key player in providing medical support to combat forces and throughout the military managed-care system. It provides worldwide scientific expertise and services in clinical and field preventive medicine, environmental and occupational health, health promotion and wellness, epidemiology and disease surveillance, toxicology, and related laboratory sciences. It supports readiness by keeping Soldiers fit to fight, while also promoting wellness among their families and the federal civilian workforce. Professional disciplines represented at the PHC include chemists, physicists, engineers, physicians, optometrists, epidemiologists, audiologists, nurses, industrial hygienists, toxicologists, entomologists, and many others, as well as sub-specialties within these professions. *See* AR 40–5, *Preventive Medicine*, dated May 25, 2007, para 2-19 [Tab DD].

Industrial Hygiene (IH) and Medical Safety Management Program Mission

IH is a component of the Army's health mission. Industrial hygienists use technical expertise to anticipate, recognize, evaluate, and control workplace health hazards. They work with experts in other disciplines to develop economical and pragmatic solutions to prevent occupational illness, injury, and death. Industrial hygienists provide professional and technical guidance to Military Treatment Facility Commanders in planning, implementing, and assessing the effectiveness of their environments of care. Industrial hygienists are deemed to be experts by the Joint Commission on Accreditation of Healthcare Organization's Environments of Care standards and in the healthcare industry's safety and health rules. Industrial hygienists specialize in management of hospital safety, security, hazardous materials, emergency management, fire prevention, medical equipment, and utility systems programs. *See generally* DA Pam 40–503, *Industrial Hygiene Program*, dated October 30, 2000, Chapter 1. [Tab EE].

Not all industrial hygienists employed in the private and public sector are certified. The American Board of Industrial Hygiene (ABIH) is the certifying organization for industrial hygienists.[8] Of the witnesses who provided testimony in the instant investigation, only COL

[8] The American Board of Industrial Hygiene (ABIH) is the certifying organization for industrial hygienists. [Tab Y]. To qualify for admission to ABIH examinations, an applicant must comply with all regulations of the Board that are in effect at the time the application is filed. An applicant must: (1) meet academic requirements/have completed industrial hygiene coursework; (2) meet a professional industrial hygiene experience requirement supported by references; and (3) currently be involved in the practice of industrial hygiene. All applicants must agree to adhere to the ABIH Code of Ethics and be governed by the ABIH Ethics Case Procedures. Generally, fulfilling the academic requirements entails graduation from a regionally accredited college or university, or other college acceptable to the Board, with a Bachelors Degree in biology, chemistry, chemical engineering, mechanical engineering or sanitary engineering, physics or the completion of an Accreditation Board for Engineering and Technology (ABET) accredited program in industrial hygiene or safety. The ABIH will consider, and may accept, any other Bachelors Degree from an acceptable college or university so long as the degree is based upon appropriate coursework and represents at least 60 semester hours of creditable subjects, with at least 15 of those hours at the upper level (junior, senior or graduate level). Industrial hygiene coursework required for certification requires the applicant to document completion of 180 academic contact hours or 240 continuing education contact hours of specific industrial

[redacted], Mr. [redacted], Mr. [redacted], and Mr. [redacted] are Certified Industrial Hygienists (CIHs). Mr. Gibson has never received certification by the ABIH as an industrial hygienist. IO [redacted] made note of this in his AR 15-6 ROI, pp. 26-27,Ques 7.

U.S. Army Corps of Engineers (COE) Mission and Support

The U.S. Army Corps of Engineers (COE) is a Direct Reporting Unit (DRU) to the Headquarters, Department of the Army, Chief of Engineers. *See* AR 10–87, Chapter 18.[Tab X]. The COE's mission is to provide vital public engineering services in peace and war to strengthen the Nation's security, energize the economy, and reduce risks from disasters. However, one of the COE's Military Programs Missions is to provide premier engineering and construction, real estate, stability operations, and environmental management products and services for the Army, Air Force, other assigned U.S. Government agencies and foreign governments. In relation to Army facility management, the COE's Installation Support Program provides support to U.S. Army Garrisons. This support is normally fully reimbursable to the COE. Types of installation support provided by the COE include technical assistance, troubleshooting, and traditional facility management.

Over the period of April 2007 through May 2008, the GPRMC Regional IHPM, Mr. [redacted] conducted nine staff assistance visits (SAVs) to MAHC in an effort to provide mentorship and guidance to Mr. Gibson in the performance of his assigned job duties and responsibilities as MAHC's IHPM. Mr. Gibson was not receptive to the assistance offered and did not respond to the guidance provided [ROI, Tab 5/Exhibit 1, Statement of Mr. [redacted], p. 8, Question 12]. In a continued effort to assist Mr. Gibson, Mr. [redacted] recommended that COL [redacted] Commander, MAHC, contract with a local industrial hygiene group to provide Mr. Gibson with day-to-day mentorship and guidance. COL [redacted] and his staff evaluated several options and decided to request assistance from the Kansas City COE. This decision was based on several factors, to include: (1) ready availability of in-house expertise (the COE had CIHs on staff); (2) responsiveness and willing to do the requested work; (3) timely execution of work product; (4) close proximity to Fort Leavenworth (within about one half hour, by car); (5) as an Army organization, the COE was familiar to the MAHC management; (6) the COE was familiar with Department of the Army policies and procedures for conducting IH investigations; and (7) overall cost effectiveness.

Utilizing the subject matter expertise from the COE was a reasonable course of action and in accord with the provisions of regulations setting forth the basic elements of federal employee

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hygiene courses. At least half of the required coursework (90 academic or 120 continuing education contact hours) must cover the broad subjects of industrial hygiene toxicology, fundamentals of industrial hygiene, measurements and controls. To satisfy the professional hygiene experience requirement, the applicant must possess four years of employment in the professional practice of industrial hygiene acceptable to the Board. Additionally, each application must be supported by a minimum of two professional references. A reference from an applicant's current supervisor is required to document current practice in industrial hygiene. There must be a reference from the applicant's immediate supervisor(s) covering the entire time period for which the applicant requests experience credit. When an applicant is/was a principal in a business, the Board will accept references from major clients. There must also be a reference from a Certified Industrial Hygienist (CIH) who is familiar with the applicant's industrial hygiene work and can describe, from firsthand experience, the nature of the applicant's industrial hygiene responsibilities. The CIH reference may also be a supervisory reference.

occupational safety and health programs [Tab BB]. Title 29, CFR, Section 1960.8 (e) states that agency "safety and health personnel [may] utilize expertise from whatever source available, including but not limited to other agencies, professional groups, consultants, universities, labor organizations, and safety and health committees." Although MAHC management could have called in a subject matter expert from almost any other entity, for example, the University of Kansas, or the local American Industrial Hygiene Association group, the COE group seemed to fit best with MAHC's requirements.

In late May 2008, COL [redacted] initiated a Military Interdepartmental Purchase Request (MIPR) to the COE's Kansas City District to provide "independent technical and quality assurance reviews of the current processes related to [MAHC] industrial hygiene surveys". [ROI, Tab17/Exhibit 13, p. 1, para 1]. The contract with the COE was designed to provide Mr. Gibson the assistance of an independent observer and technical advisor [ROI, Tab 5/Exhibit 1, Statement of Mr. [redacted], p. 8, Question 10]. The statement of work (SOW) related to MAHC's contract with the COE detailed three work elements: (1) document review (including past Building Assessment Reports, Building Assessment Implementation Plans, Recent Assessment Reports, sampling data, and other reports); address document content, clarity and completeness, verify that the standards and/or action levels are properly identified and defined, verify that the sampling plans are adequate and appropriate to serve the purpose for which the data is intended, and verify that any conclusions or findings are supported with adequate and appropriate data and are well documented; (2) field oversight (including building inspections and walk through[9] surveys, building occupant complaint investigations and sample collection activities); review the applicable work plans or procedures with the MAHC staff industrial hygienist prior to starting any field work; and for each Field Oversight assignment completed, provide the MAHC Command Staff with a brief Memorandum for Record to summarize any comments, opinions or findings resulting from the field activity; and (3) consultation [ROI, Tab 17/Exhibit 13, pp. 2-3, para 2]. All COE work was to be performed by or under the supervision of a certified industrial hygienist [ROI, Tab 17/Exhibit 13, p. 1, para 1]. The SOW also included a provision clarifying that if a disagreement (either technical or procedural) arose between the COE staff and the MAHC staff industrial hygienist (Mr. Gibson), the COE staff was to refer the matter to the MAHC Command Staff for resolution. In the case of technical issues, the MAHC Command Staff had the option to refer the matter to the GPRMC IHPM, Mr. [redacted] [ROI, Tab 17/Exhibit 13, p. 5, Arbitration]. Mr. Gibson was afforded the opportunity to review and discuss issues and concerns with his performance of work. As required by the SOW, the COE provided Mr. Gibson and MAHC management with timely summaries of comments, opinions and/or findings based on work site observations and/or review of written reports. Examples of these COE summaries are at ROI, Tabs 18, 22, and 26/Exhibits 14, 18, and 22.

The primary point of contact for the COE on this contract/work agreement was Mr. [redacted] a CIH [ROI, Tab 17/Exhibit 13, p. 3, para 3; *see also* Tab Z for Mr. [redacted] qualifications and Curriculum Vitae]. Mr. [redacted] role included providing a program audit, providing one-on-one mentoring with the goal of improving Mr. Gibson's technical competence, providing field oversight of building assessments, walk throughs, and inspections, and providing technical oversight during sampling activities.

[9] The term "walk through" is interchangeable with the term "walk thru".

STATUTORY AND REGULATORY FRAMEWORK FOR DEVELOPING AND MAINTAINING A ROBUST INDUSTRIAL HYGIENE PROGRAM

The following statutory and regulatory references drive the Army Occupational and Safety Health, Preventive Medicine, Occupational Health, and Industrial Health (IH) programs. These references are of particular importance to the issues at hand in the instant referral from OSC—ensuring that the MAHC IH program is effective based on a robust series of assessments and testing requirements. The actual elements of an Army Installation IH Program are listed in Technical Guide (TG) 165, United States Army Environmental Hygiene Agency, Aberdeen Proving Ground, Maryland 2 10 10-5422, *Installation Industrial Hygiene Program Self-Assessment Guide* [Tab FF], and Chapter 2 of AR 40-5, *Preventive Medicine*, dated May 25, 2007 [Tab DD]. The TG is more detailed, but it dates to 1988. The AR is current, but its elements are more general and are derived mainly derived from the Occupational Health Program, of which the IH Program is but a part. While accurate, regulations are, by design, very broad and contain little or no detail regarding the day-to-day workings of an Army Installation IH Program. The "nuts and bolts" of an Army IH Program are contained in the TG.

Generally, to meet the requirement imposed by Executive Order 12196, *Occupational Safety and Health Programs for Federal Employees*, section 1-201[10] [Tab AA], that federal agencies provide employees "places and conditions of employment that are free from recognized hazards that are causing or are likely to cause death or serious physical harm," agencies must operate an occupational safety and health (SOH) program compliant with promulgated regulations and policies. It is DoD policy to hold "commanders responsible for SOH program performance. Managers, supervisors, and military personnel and civilian workers are accountable for preventing accidents and workplace illness, but the ultimate safety of human and material resources is a command responsibility." [Department of Defense Instruction (DoDI) 6055.1, *DoD Safety and Occupational Health (SOH) Program*, dated August 19, 1998, para 4.3, Tab CC]. To ensure the appropriate execution of these responsibilities, commanders may authorize their safety and health personnel to utilize expertise from appropriate agencies and organizations to include other agencies, professional groups, consultants, universities, labor organizations, and safety and health committees [Title 29, CFR, Part 1960, *Basic Program Elements For Federal Employee Occupational Safety and Health Programs and Related Matters*, Section 1960.8(e), Tab BB]. The primary goal of a commander and his support personnel is to ensure that "periodic inspections" are performed by "personnel with equipment and competence to recognize hazards." [TabAAx, Executive Order 12196]. It is DoD policy that "[c]ommanders, supervisors, and managers are responsible for protecting personnel, equipment, and facilities under the command by using the risk management process, and for the effective implementation of safety and occupational health policies." "Performance evaluations of those responsible DoD Component officials shall reflect personal accountability in this respect, consistent with the duties of the position, with appropriate recognition of superior performance, and conversely, with corrective administrative action for deficient performance." [DoDI 6055.1, para E3.1.1., Tab CC]. Further,

[10] It should be noted that though 29 U.S.C. section 668 provides that the head of each Federal agency shall establish and maintain an effective and comprehensive occupational safety and health program that is consistent with the standards promulgated under 29 U.S.C. section 665 [Tab AA-3], the more specific requirements are established by Executive Order 12196.

at least annually, "qualified SOH personnel are to visit every installation workplace, though such visits may be conducted more frequently based on such factors as the exposure to and potential severity of hazards, accident experience . . . or other events that increased risk of accidents and occupational illnesses." [DoDI 6055.1, para E3.5.3.1., Tab CC].

As part of the Army's Preventive Medicine Program, the Occupational Health Program's medical components are required to develop and provide numerous occupational health programs, services, and capabilities, including those in the IH area [Tab DD, AR 40-5, *Preventive Medicine*, dated 25 May 2007, para 1-7d(2)(k)]. The Commander, MEDCOM, has overall responsibility for the Army's Preventive Medicine and Occupational Health Programs. The Commanders of each MEDDAC ensures that his or her Director of Health Services, who serve as the principal medical advisor to the installation commander, works with the installation safety manager to provide the installation commander with a "comprehensive safety and occupational health program that includes, but is not limited to . . . industrial hygiene . . . and occupational health surveillance." [Tab DD, AR 40-5, para 2-18n(3)].

Other important IH guidance derives from DA Pam 40-503, *Medical Services, Industrial Hygiene Program* [Tab EE]. Department of the Army Pamphlets are guidance, not laws or regulations, however, they often incorporate and reference laws and regulations. DA Pam 40-503, Section 4, addresses the fundamental processes, tools, and procedures associated with a comprehensive IH program: hazard anticipation, recognition, evaluation, and control. A guiding principle of all IH programs is found in section 4-4, *Survey Frequency and Scope*, which provides "29 CFR 1960, AR 385-10, and AR 40-5 require the annual inspection of workplaces by OSH personnel who are qualified to recognize and evaluate hazards. The IHPM (Industrial Hygiene Program Manager) ensures that this annual DA workplace survey documents the IH aspects of workplace operations. Then, hazards in work places are prioritized so that the most severe hazards are given the highest priority for inspection. Lower hazards are given a lower priority and less emphasis because the risk of injury or illness from work related activities is less. Workplaces do not have to be inspected by an industrial hygienist, only by qualified occupational health and safety personnel, *i.e.*, safety personnel or Environmental Science Officers." The IH program works "cooperatively with other Army programs (such as Safety) to . . . characterize workplace exposure to potential health hazards, which facilitates exposure-based medical surveillance and occupational healthcare, to comply with OSHA and other application Federal and State laws and regulations, and to integrate established IH principles and concepts into allied programs such as Safety, Chemical Surety . . . asbestos control, and lead abatement." [Tab EE, DA Pam 40-503, *Medical Services, Industrial Hygiene Program*, dated October 30, 2000, paras 1-5, 1-6].

The Army IH program requires its industrial hygienists to use technical expertise to anticipate, recognize, evaluate and control workplace health hazards" by working with other disciplines to develop "*economical and pragmatic solutions to prevent occupational illness, injury, and death*" (emphasis added) [Tab EE, DA Pam 40-503, para 4-1a].

Installation IHPMs are required to establish and implement two critical documents: the Industrial Health Program Document (IHPD) and the Industrial Health Implementation Plan (IHIP) [Tab EE, DA Pam 40-503, paras 3-5, 3-6]. The IHPD includes a mission statement, goals

and objectives, and procedures for accomplishing them and is updated annually. The IHIP is "a. living document" generally contained in an Excel spreadsheet, which schedules IH activities for a "rolling 1-year period".[11] The installation IHPM uses the IHIP to manage systematic accomplishment of *prioritized* IH activities. These requirements are determined by assessing customer needs, obtaining the commander's emphasis, and reviewing OSHA and Army regulations [Tab EE, DA Pam 40-503, para 3-6a]. At a minimum, the IHIP should include the list of potentially hazardous operations and the health hazards associated with each, the priority action code (PAC) assigned to each health hazard, industrial hygiene evaluations necessary for each health hazard, completed evaluations, and the risk assessment codes assigned to the operation [Tab EE, DA Pam 40-503, para 3-6c].[12]

OVERVIEW OF THE ALLEGATIONS, SUMMARY OF THE EVIDENCE OBTAINED FROM THE INVESTIGATION, AND AGENCY DISCUSSION

Overview of the Allegations

The whistleblower, Mr. Karl Gibson, made the following allegations that were subsequently referred by OSC to the SA:

OSC-Referred Allegation 1: Mr. Gibson's first line supervisor, 1LT [redacted], Chief of Environmental Health and Environmental Science Officer, and his second line supervisor, LTC [redacted], Chief, Department of Preventive Medicine actively and deliberately interfered with his ability to conduct the IH Program at MAHC and with the effective operation of MAHC's IH Program. Such actions on their parts constituted an abuse of authority and created a potential for a substantial and specific danger to the public health and safety.

OSC-Referred Allegation 2: Actions by 1LT [redacted] and LTC [redacted] created a situation where adequate IH assessment and testing at Fort Leavenworth had not occurred since June 2007, resulting in violation of law, rule, and/or regulation.

Summary of the Evidence Obtained from the Investigation

Each witness interviewed in the context of the AR 15-6 investigation initiated to address the allegations referred to the SA by OSC, including Mr. Gibson, was asked to respond to an initial set of 25 questions that was developed by COL [redacted] the first IO, and was used by both he and the second IO, Mr. [redacted] to solicit specific and concrete information. This set of

[11] This means for example, that as the July tasks are completed, the workload for the following July is scheduled so that at any point in time, work is scheduled 1 year in advance.

[12] The need for clarifying information arose during the preparation of this Army narrative report. Hence, the IO, Mr. [redacted] was asked by the OGC to prepare a statement that would provide helpful background information to clarify or address matters that had previously been addressed in the AR 15-6 ROI or had surfaced during the drafting of the Army narrative report. One of the areas that Mr. [redacted] addressed was the issue of the MAHC's IHIP and the IHPD. Mr. [redacted] states that at Fort Leavenworth, there was neither an IHPD nor an IHIP after 2007. Producing these two documents was one of the tasks that Mr. Gibson failed to carry out. LT [redacted] established the "IH Project Priority List" to substitute an at least rudimentary document for the non-existent current IHIP. This is documented in 3 documents in Tab GG, Statement of Mr. [redacted], para 7; See Tab 12/Exhibit 8, para 4.

questions was expanded with each witness, as appropriate, in order to develop additional lines of relevant inquiry. The AR 15-6 Report of Investigation (ROI) and the associated exhibits contain a detailed and illuminating recitation of the events at issue.

Mr. Gibson's statement in the context of the AR 15-6 investigation detailed his perceptions that his supervisory chain prevented him from executing his role and responsibilities as the Munson IHPM. Mr. Gibson asserted that although he had been the industrial hygienist and IHPM at MAHC for the past 19 years, he had not been allowed to fully perform his duties. Mr. Gibson stated—

> ". . . I was not allowed to conduct the functional area responsibilities as the sole IH and IHPM by conducting surveys in the frequency and scope required by OSHA, DOD, and DA. I was not allowed to apply OSHA, DOD, and DA standards as the sole IH and IHPM. I was not allowed [sic] request for additional services as the sole IH and IHPM. I was not allowed to use professional judgment as the sole IH and IHPM. I was not allowed to make or provide quantitative judgments concerning health hazards and risks as the sole IH and IHPM. I was not allowed to conduct the required program relationships with other Army Medical Department Proponency and Supported Programs or Safety programs as the sole IH and IHPM. I was not allowed to perform my IH consulting role as the sole IH and IHPM. I was not allowed to perform my design review role as the sole IH and IHPM. Management's actions violate OSHA, DOD, and DA regulations and policy and did not just diminish my authority, but removed and denied my authority."

[ROI, Tab 19, Statement of Mr. Karl Gibson, p. 1]

Further, Mr. Gibson asserted that his ability to perform his duties had been adversely impacted only since COL [redacted] LTC [redacted] and 1LT [redacted] arrived at MAHC in May, June, and August of 2006, respectively [ROI, Tab 19, Statement of Mr. Karl Gibson, p. 1]. Mr. Gibson asserted that management refused to allow him to conduct IH testing in accordance with "Federal Regulations, DODI [DoD Instructions], OSHA and Army Regulations and Policies", and that this had "substantially put at risk the lives and safety of all individuals on Fort Leavenworth." [ROI, Tab 23/Exhibit19, Statement of Mr. Karl Gibson, p. 1]. Mr. Gibson provided additional examples of circumstances in which he perceived that he had been prevented by his supervisory chain from performing his duties as the IHPM. For example, he indicated that he was no longer allowed to coordinate, as he saw fit, with the Safety and Department of Public Works (DPW) Environmental Offices, or with the Fire and Police in emergency response situations. He also asserted that he was "excluded from all meetings with management LTC [redacted] on any IH issues"; was "not allowed to attend any Safety committee meeting outside MAHC—and then only when management was shown that it was required by Joint Commission standards"; and was not allowed to review design plans and specifications to generally provide industrial hygiene input to ensure compliance with applicable standards, codes, and regulations. Mr. Gibson alleged that "IH surveys have been replaced with 'walk-thrus' where I am only allowed to ask supervisors and employees if they think monitoring needs to be done and what hazards they think are present. This removes all IH professional judgment from the OSH process in violation with OSHA, DOD and DA regulations. When I completed the tasked 'walk-thrus' of

the 18 building identified by management, I was then tasked to conduct 'Assessments.' However, no occupational testing, monitoring, sampling or measurements of ventilation, noise, or lighting, etc was allowed by management of the 18 buildings." Mr. Gibson asserted that such "walk-thrus" were of only minimal value and that supervisor-imposed prohibitions on his ability to conduct more sophisticated time weighted average readings violated OSHA, DoD, and Army regulations and policies. Specifically, he noted that when a sewer-like smell in the Provost Marshal's Office was reported, repeatedly causing employees to feel sick at that work site, he was not allowed to conduct chemical testing beyond grab samples during the day, but was allowed to test only over nights and weekends, all in violation of OSHA, DoD, and Army regulations and policies [ROI, Tab 23/Exhibit19, Statement of Mr. Karl Gibson, p. 2][13].

Mr. Gibson questioned the authority of his supervisory chain to properly restrict him in the performance of his duties because of his perception that they were not competent to assess his performance, in part because he was the only "certified" industrial hygienist at Fort Leavenworth.[14] He stated that, "[i]t was not unreasonable to require the IHPM to obtain management's prior approval for conducting IH testing, surveys, occupational exposure measurements, etc. in order to ensure the IHPM is in compliance with OSHA, DODI, and DA regulatory requirements. However, seeing how the IHPM [Mr. Gibson] was being prohibited from conducting IH testing, surveying, measuring, etc by management, the agency was required to have a written exception to policy by the Head of the Agency Component Responsible Official that would have permitted IH testing to be halted. This was not done. . . .When questioned by my Union Representative as to whether management intended to obtain exceptions to policy concerning IH testing, management stated 'they have the right to assign and take away work, as is their right as a supervisor.'" [ROI, Tab 23/Exhibit 19, Statement of Mr. Karl Gibson, Question 22, page 26].

Mr. Gibson further asserted that he continuously made management fully aware that "their abuses [in] overstepping statutory and regulatory guidance, by failing to recognize his professional judgments and opinions" and "inability and unwillingness to provide clear instructions to Mr. Gibson concerning his IHPM duties demonstrates management's unreasonableness and abuse of authority. In most cases involving decisions concerning the IH program, both 1LT [redacted] and LTC [redacted] stated that they had to constantly seek Mr. [redacted] guidance instead of relying on the professional judgment of their hired IHPM, the COE, and the Union. In order to manage a Army IH Program. . . . [o]utside of Mr. Karl Gibson, no other person in the Munson Army Health Command Structure possessed the necessary qualifications to manage or administer the IH Program. . . .Because Mr. Karl Gibson has met these requirements and personnel within the Munson Army Health Center Command Structure have not, it was an unreasonable expectation and local Command policy that required Mr. Karl Gibson to have to always have to obtain the Command prior approval before being allowed to conduct [time weighted averages]" and other tests he deemed necessary [ROI, Tab 23/Exhibit 19, Statement of Mr. Karl Gibson, page 27, Answer 22].

[13] The sewer smell incident is more fully discussed in footnote 23, pp. 31-32.

[14] The OSC referral document includes the statement that "Mr. Gibson further objects to this need for permission based on the fact that he is the only certified Industrial Hygienist at Ft. Leavenworth and the only individual adequately trained to make a determination as to whether testing is warranted." As previously stated on pp. 8-9. Mr. Gibson has never received certification by the American Board of Industrial Hygiene.

To summarize, from Mr. Gibson's perspective, he was more than able to perform his responsibilities as the IHPM. He thus perceived that he should be able to run the MAHC IH Program as he felt was appropriate in his professional judgment, that he was the only individual qualified to run the IH Program, and he should have been able to run the Program unfettered by his supervisors' oversight and management directives.

On the other hand, a different picture of the state of the MAHC IH Program emerges from the remaining testimonial and documentary evidence gathered during the AR 15-6 investigation. The unanimous testimony of all other witnesses supports a conclusion that Mr. Gibson was unable to perform his duties and responsibilities as the MAHC IHPM, and that the MAHC management team responded properly to Mr. Gibson's real and documented performance shortcomings while at the same time diligently continuing its efforts to maintain the integrity of the MAHC IH Program.

A reading of the AR 15-6 ROI clearly reflects that it was an undertaking that was very thorough, detailed, and complete in its scope and content. Yet, none of the testimonial and documentary evidence gathered during the AR 15-6 ROI supported Mr. Gibson's allegations. The evidence gathered included testimonial and documentary evidence from witnesses up and down the local command lines of responsibility for the IH Program, from subject matters experts located throughout various support elements of MEDCOM, as well as from another independent Army command, the COE. All of these individuals had intimate knowledge of the MAHC IH Program and its deficiencies. Most witnesses attributed the Program's deficiencies to Mr. Gibson's own failure to properly and competently execute an effective IH program. Pursuant to the mandates placed upon them by law and regulation, MAHC Commanders, those individuals "ultimately responsible" for the occupational health and safety of their personnel, each assembled a team of subject matter experts to assist them in fulfilling their responsibility for maintaining a fully IH Program fully compliant with law and regulation, even in the face of Mr. Gibson's inability, or in some cases, unwillingness, to perform his duties as the MAHC IHPM.

The evidence gathered in the AR 15-6 investigation leaves no doubt that Mr. Gibson's allegations of his supervisors' wrongdoing reflected only his personal perceptions and were not grounded in fact. The ROI is replete with examples of Mr. Gibson's inability to perform his duties and responsibilities at a fully competent level. Further, all of the evidence reflects that for the first time in 19 years, Mr. Gibson was called to account for his substandard performance when a new set of supervisors and managers converged at the MAHC at the same time. Together, these new supervisors concluded that Mr. Gibson's performance deficiencies needed to be corrected; that Mr. Gibson required strong mentorship and supervision by a team of trained subject matter experts whose only goal was to improve his performance, not hamper him in performing his duties and responsibilities; and that they needed to procure outside professional help to immediately improve enhance the level of MAHC IH Program compliance with statutory and regulatory requirements and to improve overall Program effectiveness. To the credit of the entire MAHC management chain and the entities that supported management by providing subject matter expertise in regard to IH Program requirements[15] all of the evidence

[15] Hereinafter, where appropriate, these subject matter experts who jointly advised the MAHC management team will be referred to as the "mentoring/support team."

overwhelmingly reflects that the appropriate assessments and testing occurred as required. Throughout the period at issue, there were no OSHA findings of violations of law, rule and/or regulation associated with the MAHC IH Program.[16]

[16] OSHA reports found at ROI, Tab 15, Exhibit 11 reflect fairly typical OSHA responses to complaints about a Federal facility. It is important to note that none of the OSHA citations issued in the context of the 2008 inspection regard IH issues; the "serious" violations apply to safety and fire problems, such as machine guarding, fire extinguishers, and energy hazards, while the "Other" citations are administrative, mainly referring to lack of paper documentation. The OSHA inspection made no findings regarding industrial hygiene that would support the allegation of a potential for a substantial and specific danger to the public health and safety. It is also important to note that the installation Safety Director is the designated OSH official for the purposes of interacting with OSHA. KG has no assigned duties in this regard. [Note, IO [redacted] discusses these OSHA related matters in his ROI, pp. 12]. At this point in the report, it is important to draw attention to the following information that is included as background to provide the reader with a clearer understanding of various programs located at an Army installation such as Fort Leavenworth. The need for this clarifying information arose during the preparation of this Army narrative report. Hence, the IO, Mr. [redacted] was asked by the OGC to prepare a statement that would provide helpful background information to clarify or address matters that had previously been addressed in the AR 15-6 ROI or had surfaced during the drafting of the Army narrative report. One of these issues included a discussion of the various health and safety related programs located at Fort Leavenworth/MAHC [Tab GG, Statement of Mr. [redacted] Mr. [redacted] described the features of the Army's Preventive Medicine Program and two of its components, the IH program and the Safety and Occupations Health (S&OH) Program. Mr. [redacted] explained that "[t]he overarching responsibility of the Preventive Medicine department at any military treatment facility (MTF) is to provide preventive medicine services to support installation commanders in preventing disease and injury throughout the MTF's health services support area. This would include conducting comprehensive, coordinated military health surveillance activities such as medical surveillance and occupational and environmental health (OEH) surveillance for Army personnel. Included as a subset of OEH is IH, which is defined as, "The science and art devoted to anticipation, recognition, evaluation, and control of those environmental factors or stresses, arising in or from the workplace, that may cause sickness, impaired health and well-being, or significant discomfort and inefficiency among workers." Further, Mr. [redacted] explained that "[t]he U.S. Army has organized its IH and safety functions through two separate and very different chains of command. IH is a medical function, while safety is an installation staff function. Therefore, an installation industrial hygienist generally works for a tenant organization, in this case MAHC, with his/her chain of command rising up to the level of The Surgeon General of the Army. In contrast, the Fort Leavenworth Safety Office ultimately reports to the Training and Doctrine Command's Commanding General. IH is . . . a generic term for industrial hygiene, but can be used in the upper case sense, as in the "Army IH Program". As a hybrid program in the Army, it fits into two hierarchical schemes: Safety and Medical. On the Safety side is the Army Safety and Occupation Health (S&OH) Program (please note that "health" is limited to "occupational health", but safety is not so limited, and includes traffic safety, safety at home, etc.) . At MAHC, the IHPM works for the Chief, Environmental Health (1LT [redacted] at other MEDDACs the IHPM might work for Chief, OH, or directly under the Chief, Preventive Medicine. Individuals may be heard to say, "the Army OSH Program", or, "the Army OSHA Program", but these are misnomers. Properly, it is the umbrella under which the Army S&OH Programs fall. . . . As stated above, "the installation Safety Director is the designated OSH official for the purposes of interacting with OSHA. The whistleblower had no assigned duties in this regard. To elaborate, every Army installation has named its Safety Director as OSHA's designated OSH official (required by AR 385-10). This means that for any official interaction with OSHA, the Safety Director (in Fort Leavenworth's case, Ms. [redacted] is the official "voice" of the installation; whatever the Safety Director says, writes, responds, etc., to OSHA is the official reply. Although, during an OSHA inspection, the IH might be interviewed, his/her responses would be viewed as informational only; anything the Safety Director says would take precedence. So, although the whistleblower may have been invited to and attended the OSHA inspection's closing conference (OSHA terminology for "exit brief"), where the findings are discussed with installation management, his role would have been advisory, at most, but more likely merely as an observer. Also . . . the whistleblower did not work for Fort Leavenworth; he worked for one of its tenants; this removes him even further from any Fort Leavenworth/OSHA interaction . . . ." [Tab GG, Statement of Mr. [redacted] pp. 1-3, paras 1, 2, and 3].

Perhaps no one but Mr. [redacted] can best put into perspective and capture the "state" of the MAHC IH Program under Mr. Gibson, roughly from 1999 (when Mr. [redacted] became the GPRMC IHPM) forward. What follows are excerpts from Mr. Bentley's testimony to the AR 15-6 IOs, in which Mr. [redacted] discussed in great detail the many deficiencies he encountered in Mr. Gibson's performance over the years. Throughout his involvement with Mr. Gibson and the MAHC IH Program, Mr. [redacted] exhibited patience and the highest level of professionalism and dedication to ensuring that the Program was compliant with all statutory and regulatory requirements. It is evident that Mr. [redacted] had only three goals in mind when he was asked by the MAHC command to provide them with his subject matter expertise--to be objective and constructive in his assessments of Mr. Gibson's implementation of the MAHC IH Program, to take appropriate corrective actions with regard to any public health and safety issues that may have been present at Fort Leavenworth, and to ensure preventive actions were taken to prevent future instances in which the public's health and safety could be threatened.

> "In my role as the Great Plains Regional Medical Command (GPRMC) Industrial Program Manager I provide professional advice and consultation on matters related to industrial hygiene program management, program planning, resource management and technical services. . . . I have 28 years federal service and have 26 years experience as a supervisor.
>
> I view my primary role in the matters involving Mr. Gibson as that of a consultant and technical advisor to Command, managers, supervisors and Mr. Gibson. My biggest challenge has been helping management to recognize what 'right' looks like. Mr. Gibson has experienced a great deal of autonomy over the past 17 years while performing his duties and responsibilities as Industrial Hygienist at Ft. Leavenworth, KS. I have been in my role as the GPRMC Regional Industrial Hygiene Program Manager since 1999. Over the years, I can recall at least four (4) instances, where Mr. Gibson's previous supervisors 'questioned' the validity and accuracy of information contained in Mr. Gibson's written reports. The supervisor/manager would send me a copy of the report in question, I would provide a technical review along with format adjustments and editorial enhancements and return the document to the supervisor/manager for follow-up. When appropriate, I would forward the report(s) to other technical experts (USACHPPM, AMEDD C&S) for peer review/comment; formulate a collective response and make recommendations to the supervisor/manager. I am not in the direct line of command for Mr. Gibson and assumed that the managers/supervisors handled the situation appropriately. I viewed these isolated requests from direct supervisors/managers as 'hiccups' in the program - they appeared to be cyclical in nature - whenever a new Service Chief or supervisor would change - Mr. Gibson would pop-up on the radar again.
>
> Over the past three (3) years I have been actively engaged in as a technical advisor and consultant to MAHC management as well as a coach and mentor to Mr. Gibson in meeting his performance expectations...[in] a a cluster of IH issues between July 2006 through January 2007 . COL [redacted], Commander arrived at Munson Army Health Clinic (MAHC) late spring 2006,

LTC [redacted], Chief, Preventive Medicine arrived in July 2006 and 1LT [redacted] Environmental Science Officer (ESO) arrived in August 2006. The stage was set when COL [redacted] took immediate and decisive action to remove employees from Bell Hall based on Mr. Gibson's reported 'documented' overexposures to asbestos on 12 JUN 2006. It is reported that Mr. Gibson conducted air monitoring in Bell Hall to determine asbestos exposure levels on non-asbestos workers (i.e., casual office workers, teaching staff, etc.) I am unclear as to how long this sampling protocol was followed - I anticipate that quarterly air sampling was conducted for at least 5-6 years. COL [redacted] contacted the COE and requested the findings be validated.

During their review of the 12 JUN 06 sampling set, the COE CIH made the following determinations:

(1) Mr. Gibson failed to have the collected samples analyzed by TEM. All analyses and recommendations were based on PCM determinations.

(2) Mr. Gibson failed to follow prescribed sampling methods and protocols (e.g., did not maintain the integrity of the sample(s) by allowing janitorial staff [to] monitor the air sampling devices, calibration issues, etc).

(3) Mr. Gibson failed to properly document calibration information and start and stop times.

(4) Mr. Gibson made false and misleading statements in the report regarding the Secretary of the Army statements regarding a 'waiver' . . ..

(5) Mr. Gibson misinterpreted and applied the OSHA PEL . . .standard to a non-occupational workforce (casual office workers); and

(6) There was evidence to show possible 'overloading' and/or 'tampering' with the sample cassettes. . . ..

The Corp[s] of Engineers (COE) contracted with an outside industrial hygiene firm (APEX) to resample the entire work area. . . . It was my initial impression that accepted the recommendations made as 'constructive criticism; and would move forward. COL [redacted] LTC [redacted] Mr. Gibson and I sat down afterwards and discussed specific industrial hygiene program issues and areas where Command could help. Mr. Gibson requested some technical equipment needs (i.e., digital camera and color printer) - I provided Mr. Gibson funding to purchase the requested equipment. . . .Mr. Gibson did indeed 'challenge' the independent contractor's laboratory results and findings through an MFR.

During the period of 1 September 2006 and 30 December 2006, Command responded to three (3) similar industrial hygiene issues/concerns. Specifically, (1) B 275 Trolley where Mr. Gibson reportedly exercised poor professional judgment in his response to a potential carbon monoxide situation; (2) MAHC Command Suite where Mr. Gibson did not follow proper protocol for determining occupancy clearance after a water leak event in the Commander's Office, MAHC and (3) SAAF [Sherman Army Airfield] Building 132 where Mr. Gibson failed to demonstrate best practices and techniques in evaluating potential lead exposures

in the aircraft hangar building.

. . .

At the Commander's request, I provided direct technical assistance to LTC [redacted] and LT [redacted] in . . . helping them recognize what 'right looks like.' Collectively we reviewed the basic IH Program requirements as outlined in AR 40-503 and 40-11. We specifically worked on IH program elements...

In late spring, 2007, Mr. Gibson submitted approximately 32 industrial hygiene reports to Command for final approval...Most of the reports ranged between 20 and 40 pages in length. From a technical review perspective, I found the reports to lack clarity and organization - not to mention the technical aspects. Up to this point, management had taken an active role in supporting Mr. Gibson's recommendations, later to discover that the methodology used, laboratory results, and/or interpretation of findings have been inaccurate and/or misleading. During the first 4-5 months of 2007, Mr. Gibson was issued five counseling statements addressing various aspects of his work performance and conduct. I was in constant telephonic and/or email contact with 1LT [redacted] LTC [redacted] and COL [redacted] during this period. I discussed issues and concerns with the management and offered suggestions for improvements and/or resolution.

It became increasingly apparent to me that Mr. Gibson had compromised his credibility with Command and management. Mr. Gibson's inaccurate, misleading and often inflammatory representations had placed a significant operational and economic burden on Command. In addition, I sensed Command felt Mr. Gibson's actions had tarnished their professional reputations. COL Rinehart discussed with me several scenarios where she received negative feedback from COL [redacted] Garrison Commander and others regarding Mr. Gibson and his role as the 'technical expert' for industrial hygiene matters on Ft. Leavenworth. At the request of COL [redacted] through GPRMC, I conducted a formal investigation to determine Mr. Gibson's technical competency and validity of information presented in the 32 industrial hygiene survey reports generated between April and July 2007. . . .

During the investigation, I reviewed and discussed with Mr. Gibson the 32 submitted IH reports; the IH program document and the IHIP. My findings and recommendation are outlined in a letter to COL [redacted] entitled 'Management Staff Assistance Visit (MAV) - MAHC Industrial Hygiene Service - 15-20 July 2007' (Tab 2). A copy of this memo was provided to LTC [redacted] and 1LT [redacted][17]

This visit was not designed as a 'FAULT-FINDING' mission. My goal

[17] As stated in footnote 12, Mr. [redacted] addressed the issue of the MAHC's IHIP and the IHPD. Mr. [redacted] stated that at Fort Leavenworth, there was neither an IHPD nor an IHIP after 2007. Producing these two documents was one of the tasks that Mr. Gibson failed to carry out. LT [redacted] established the "IH Project Priority List" to substitute an at least rudimentary document for the non-existent current IHIP. This finding was documented in Tab GG, Statement of Mr. [redacted], para 7 and its three documents, as well as in Tab 12/Exhibit 8, para 4.

(and that of the Commander) was to validate the information contained in the reports . . . assess Mr. Gibson's technical competencies through field observation; and provide recommendations to improve/enhance Mr. Gibson's work performance.

REPORTS: During the review process, I discussed with Mr. Gibson where he provided inaccurate and misleading information to his customers. In many reports, Mr. Gibson failed to exercise sound professional judgment and critical thinking in his application/interpretation of standards and/or guidelines. In his reports, Mr. Gibson demonstrated a profound inability to distinguish between various levels of risk. In the majority of his reports, he inappropriately identified the Risk Assessment Codes. . . . As demonstrated in his reports, Mr. Gibson fails to recognize scientific practices (i.e., standard sampling and collection methods) which are accepted by OSHA, research agencies like NIOSH, or by consensus standard-setting organizations. In addition, Mr. Gibson demonstrated a lack of understanding of basic IH principles and practices.. . .

I visited face-to-face with four (4) of Mr. Gibson's key customers. It appears as if Mr. Gibson, through his actions, both direct and indirect, has alienated himself from many of his customers. During an interview with Mr. [redacted], Chief of Staff [Executive Director], U.S. Disciplinary Barracks, he described several past incidents where Mr. Gibson was requested to perform industrial surveys. Mr. [redacted] explained that on two separate occasions, Mr. Gibson purposely manipulated survey date and reported the areas surveyed as noncompliant. Mr. [redacted] has 'banned' Mr. Gibson from performing industrial hygiene services for the DB.[18] Similar experiences were described by Ms. [redacted], MAHC Safety, Mr. [redacted], MAHC Facility Engineer and [redacted], Chief, Operations and Maintenance.

My focus during this visit was to assess Mr. Gibson's technical competencies and to determine what would be needed to bring him to full performance level. Mr. Gibson and I visited the Health Clinic and I asked him to show me around and tell me about the hazards associated with various processes within the Clinic. Mr. Gibson was able to articulate the process but had difficult[y] expressing the hazard severity (HS) associated with each process. In reviewing Mr. Gibson's reports, I noted an enormous amount of sampling was being conducted for the facility. I . . . discovered evidence to support allegations

[18] In a February 8, 2006 e-mail, Mr. [redacted], the USDB Chief Executive Director, asserted that Mr. Gibson was continuously citing to [IH] standards that were incorrect. Mr. [redacted] concluded "I am recommending to COL [redacted] [the USDB Commander] that Mr. Gibson be barred from the USDB until the two Colonels meet to determine the validity of Karl's reports and method of measurement." [ROI. Tab 27/Exhibit 23, p. 2, para 2]. The USDB Commander refused to allow the Whistleblower to even enter the facility as an observer. Faced with this situation, the GPRMC IHPM, Mr. [redacted] rather than Mr. Gibson, was asked by MAHC to perform the IH surveys at the USDB, the largest facility on the installation. It should be noted that Mr. Gibson cited to his "inability" to perform IH testing in the USDB as an example of his supervisors not allowing him to perform his duties [ROI, Tab 23/Exhibit 19, Statement of Mr. Karl Gibson, p. 2, 3d para]. In fact, it was Mr. Gibson's customer, not his supervisory chain, that made this decision. IO [redacted] also addresses the USDB incident in his ROI, pp. 4-5.

that Mr. Gibson has produced (1) *false or misleading statements*; and (2) *concealment of that which should be disclosed.* This evidence was collected through direct employee interviews, review of previous reports/correspondence, email traffic and general workplace observations. Specifically, Mr. Gibson fails to (1) recognize basic industrial hygiene practices and principles; (2) provide accurate and truthful representations; and (3) apply sound professional judgment in several of his workplace assessments/evaluations. . . .

We [Mr. [redacted] and Mr. Gibson] walk[ed] through each area and I asked him to identify potential health and safety hazards—which he did with some competency. The problem is – that when he went to apply what he saw to the IHIP (Industrial Hygiene Implementation Plan) – he was unable to determine the level of risk – everything was a PRIORITY 1. Mr. Gibson is unable to differentiate between levels of risk.

When asked to explain his rationale on various findings and/or recommendations, Mr. Gibson was unable (or unwilling) to clearly communicate his rationale. Mr. Gibson appears to be very rigid in his thought processes and does not demonstrate willingness to accept recommendations for improvement. Mr. Gibson 'knows what he knows' and is quick to discount other perspectives.

Mr. Gibson is unable to replicate scenarios identified as 'noncompliant' either through actual sampling data or rationale. . . .

NOTE: I recognize the issues addressed during this investigation have been longstanding with regard to Mr. Gibson's conduct and performance. Documentation shows that numerous military supervisors identified similar issues/concerns with Mr. Gibson as far back as 1999. After repeated counseling, Mr. Gibson was given the opportunity to modify his conduct and/or performance. Trending does show Mr. Gibson rating of record fluctuated between '1' and '2'. This coincides with military change of raters...

I felt Mr. Gibson needed to overcome both professional and personal obstacles in order to maintain a satisfactory job performance level. To that end, I strongly recommended that Mr. Gibson be placed on a formal Performance Improvement Plan (PIP).

ROI, Tab 5/Exhibit 1, Statement of Mr. [redacted] dated May 21, 2009, pp. 1-7.[19]

Mr. [redacted] was called upon to render assistance in assessing Mr. Gibson's ability to adequately perform his responsibilities as the MAHC IHPM but also to advise the MAHC management group how to best ensure that the MAHC IP Program was compliant with all statutory and regulatory requirements. Hence, in addition to Mr. [redacted] recommendation that

[19] Mr. [redacted] testimony was provided in the context of COL [redacted] AR 15-6 investigation. Mr. [redacted] testimony was based primarily on what he included in his memorandum, dated August 3, 2007, Subject: Management Staff Assistance Visit (MAV) - MAHC Industrial Hygiene Services - 15-20 July 2007, attached to the AR 15-6 ROI at Tab 6, Exhibit 2.

Mr. Gibson's supervisory chain place him on a PIP, Mr. [redacted] also recommended that Mr. Gibson's supervisory chain "curtail" or "defer", until further notice, Mr. Gibson's independent authority to conduct Indoor Air Quality and occupational health exposure testing.[20] Mr. Gibson was authorized to perform such testing only after consulting with, and receiving the approval of, his supervisors. Mr. [redacted] based these recommendations on his determination, "[a]fter careful review and consideration," that "Mr. Gibson lack[ed] the technical competence and professional judgment required to interpret sampling data collected during routine industrial hygiene surveys." [ROI, Tab 5/Exhibit 1, Statement of Mr. [redacted], dated May 21, 2009, p. 7]. Mr. [redacted] further explained the rationale for his recommendation to curtail testing: "[o]ne of the problems, as I see it, is that Karl Gibson has acted autonomously and really has not had someone to actually sit down and technically review his reports. I feel based on the date reviewed during the B 136 survey, that Karl has achieved a reasonable skill level (technician) for collecting data. Our problem comes to the interpretation of that data. . . . I recommend that we curtail/defer Mr. Gibson from performing environmental air sampling until we can fully assess his competency levels." [ROI, Tab 7/Exhibit 3, dated 29 August 2007, pp. 8-9, paras 5a-b].

To further ensure that the MAHC IH Program was not being compromised by Mr. Gibson's performance deficiencies, Mr. [redacted] also explained that he had recommended that a USACHPPM representative visit Fort Leavenworth in mid-September 2007 "to provide Mr. Gibson technical guidance and recommendations for improvement. Command had also looked into providing Mr. Gibson additional training through AIHA and local education offerings." [ROI, Tab 5/Exhibit 1, Statement of Mr [redacted], dated May 21, 2009, Answer 9; Tab 7/, Exhibit 3, p. 9]. Additionally, Mr. [redacted] testified that he also worked with '[redacted], [redacted], [redacted], [redacted], and [redacted] -all at CHPPM, and Ms. [redacted], JMC. In addition I provided GPRMC IH Program dollars ($60K) to support the initial COE contracts to assist with Mr. Gibson." [ROI, Tab 5/Exhibit 1, Statement of Mr. [redacted], dated May 21, 2009, Answer 10]. Mr. [redacted] testified that additional resources to support MAHC's ability to ensure the MAHC IH Program was meeting its compliance requirements were brought to bear when management hired outside contractors to perform required routine IH monitoring. Mr. [redacted] arranged to provide basic IH services for MAHC, and "[i]f I was unable to meet the requirement, MAHC contracted with outside IH firms to conduct the required sampling." [ROI, Tab 5/Exhibit 1, Statement of Mr. [redacted], dated May 21, 2009, Answer 13]. Additionally, when asked if there were any instances when the Fort Leavenworth IH Program created the potential for a "substantial and specific" danger to the public health, Mr. [redacted] answered to the contrary, adding that [it was] Mr. Gibson's "falsified survey reporting [that had] resulted in expensive unnecessary remediation." [ROI, Tab 5/Exhibit 1, Statement of Mr. [redacted], dated May 21, 2009, Answer 37].

Unfortunately, Mr. Gibson viewed the command's efforts to provide constructive and meaningful assistance as interfering with his intentions to implement the MAHC IH Program as he believed appropriate. Mr. [redacted] testified that "[e]veryone involved who attempted to provide Mr. Gibson guidance, support, assistance, mentoring, counseling, education was rejected out-of-hand by Mr. Gibson. The actions taken were appropriate and I do not see any alternative." [ROI, Tab 5/Exhibit 1, Statement of Mr. [redacted], dated May 21, 2009,

[20] Mr. Gibson was notified of the curtailment of his independent authority to conduct such testing by memorandum dated August 28, 2007 [ROI, Tab 25]..

Answer 12]. It appears that Mr. [redacted] worked diligently to determine whether Mr. Gibson's assessments of public and safety hazards could be corroborated. Mr. [redacted] related to COL [redacted] that he had attempted to learn from Mr. Gibson of any specific instances that may have created a public health or safety concern or violated law or regulation. Mr. [redacted] told COL [redacted] that "During a SAV in July 2007, Mr. Gibson did tell me that he felt Command was not providing support and was trying to cover-up safety and health issues. I directly asked Mr. Gibson to explain his rationale and he was unable to provide specific information. In subsequent conversations, we discussed Command's concerns regarding Mr. Gibson's inaccurate and misleading information contained in his industrial hygiene survey reports." [ROI, Tab /Exhibit 1, Statement of Mr. [redacted] dated May 21, 2009, Answer 7, p. 7].

Mr. [redacted] concluded his testimony to the AR 15-6 IO with the following observation: "I do not believe that there was any miscommunication between Mr. Gibson and MAHC staff. After spending considerable time with Mr. Gibson, I have arrived to the conclusion that Mr. Gibson has his own sense of reality. We all know someone who refuses to acknowledge their mistakes or short-coming—Mr. Gibson is one of those individuals. MAHC management has been patient and afforded Mr. Gibson ample opportunity for improvement. I feel Mr. Gibson could improve his communications skills by being more direct and concise; be clear and confident in what he is trying to communicate; listen, think before he speaks and not be overly negative. I feel a reasonable person would have taken the recommendations, observations, assistance under advisement and attempted to take corrective action(s). Mr. Gibson gave too much push-back and took things to the extreme. Mr. Gibson through his actions and words, made it very clear where he stood on any given issue/concern. It is right and there is no room for compromise. In my opinion, Mr. Gibson's has not demonstrated the characteristics required to effectively manage the IH Program at FT Leavenworth. These characteristics include technical competency, team building skills, effective communication and personal integrity. Mr. Gibson will need to take an active role in building credibility and fostering work relationships/alliances." [ROI, Tab 5/Exhibit 1, Statement of Mr. [redacted] dated May 21, 2009, Answer 7, p. 15].

Mr. [redacted] was not the only witness whose testimony supported the MAHC command's concerns with the level of competence at which Mr. Gibson executed his responsibilities as the MAHC IHPM. The testimony of all of the other witnesses corroborated Mr. [redacted] conclusions. In addition to seeking Mr. [redacted] expert assistance in identify any deficiencies in Mr. Gibson's performance as the MAHC IHPM, to mentor Mr. Gibson, to validate any of Mr. Gibson's findings of actual or perceived threats to the health and safety of the personnel at Fort Leavenworth, to recommend corrective actions as appropriate, and to ensure that the MAHC IH Program was in compliance with all statutory and regulatory requirements, including those required for testing and assessments, the MAHC command requested and received assistance from other subject matter experts, all of which reached conclusions about Mr. Gibson's duty performance that mirrored those of Mr. [redacted]

COL [redacted] described in great detail how and why she became alarmed with Mr. Gibson's implementation of the MAHC IH Program and the circumstances that led to her belief that the command needed to conduct "an intense review and scrutiny of Mr. Gibson's performance as the MAHC Industrial Hygienist." [ROI, Tab13/Exhibit 9, Statement of COL [redacted] p. 1]. COL [redacted] testified generally as follows—

"I assumed Command of MAHC in June 2006. Shortly after assuming Command I began to receive IH reports where much attention was focused on Bell Hall and the extensive amount of IH testing that was being performed. In fact Resource Management brought to my attention the significant increase in funds being utilized by IH to conduct air sampling and testing. I began meeting with Mr. Gibson, LTC [redacted] and COL [redacted] about the negative reports on air quality for Bell Hall and their concerns that the occupants and other were being exposed to asbestos. The reports generated by Mr. Gibson indicated that exposure to unsafe air conditions existed in numerous locations and that areas needed to be shutdown, cleaned and personnel moved to an alternate location. MAHC generated a report and met with CGSC and Garrison personnel, recommending closure of certain areas of the building. I also recommended that they hire a Professional Environmental firm to come in and test the areas more extensively. The Garrison had to go to IMCOM to obtain an unfinanced requirement under emergency conditions to obtain a significant amount of funding to hire an environmental firm to conduct this testing. The results of the testing were alarming and primarily contradicted the findings of Mr. Gibson stating that the building air conditions were not unsafe. Our report required relocation of personnel, the shutdown of air handling units to prevent unsafe air circulation, and extensive dollars spent to hire the environmental firm and cleaning of the area. I also found out that Mr. Gibson's test did not do the extensive drill down which defined levels of harmful fibers which could have precluded this testing. Our credibility as a reputable source of legitimate information was severely impacted. As a Commander I started to scrutinize all of Mr. Gibson's reports and notice that many of his reports raised questions and lacked accuracy. Not being a qualified IH, I called upon regional support to review Mr. Gibson's reports and discrepancies were noted in his testing procedures and inaccuracies in his information. Mr. [redacted] was the regional IH that we utilized to review and validate Mr. Gibson's reports. He [Mr. [redacted] has several reports that show how Mr. Gibson's information was not accurate, he also conducted several one-on-one sessions with Mr. Gibson and determined he did not demonstrate the level of expertise required to be an independent IH. I was very concerned that we as a command had issued reports that had caused in my mind reported unsafe conditions that did not in fact exist, therefore causing [undue] alarm and stress on employees and thousands of dollars expended on unnecessary testing and cleaning as well as encouraging duty sections to purchase equipment for air filtering that might not have been required. When we tried to explain where Mr. Gibson's techniques and reports were inaccurate he became defensive and never would acknowledge any misreporting or inaccuracies. . . .We also brought CPAC in at this point to discuss putting Mr. Gibson on a Performance Improvement Plan (PIP);[21] however, after many meetings the CPAC advised us that Mr. Gibson's standards were too vague and until the standards where clearly defined and measured and failures noted we could not do a PIP. We went through extensive reviews and coordination to establish clear and concise standards and determine how to evaluate and determine success in meeting these standards. We did nothing without checking with the region for

[21] Ultimately, MAHC did issue a PIP for Mr. Gibson, [Tab C,; ROI, Tab 21/Exhibit 17].

accuracy and CPAC to ensure we were being fair in our assessments on Mr. Gibson's performance. Our goal was to attempt to get Mr. Gibson's technical performance in compliance with policies and standards. . . .[22]

After the Bell Hall incident, I consulted with the Region immediately to assess the best way to handle the IH program. Mr. [redacted] from GMRMC came to Fort Leavenworth and reviewed many of the reports that Mr. Gibson had conducted, where he found significant discrepancies." [ROI, Tab 13/Exhibit 9, Statement of COL [redacted] pp. 1-2].

COL [redacted] commented that though initially she relied on Mr. Gibson for IH advice, when she found that Mr. Gibson's reports contained inaccuracies, she began to rely on the IH advice and services of the regional IHPM, Mr. [redacted] his staff, including COL [redacted] the Preventive Medicine Officer at GPRMC, and the environmental firm with which she had contracted to provide IH recommendations and testing. Additionally, for safety matters she relied on Ms. [redacted] the MAHC Safety Officer [ROI, Tab 13/Exhibit 9, Statement of COL [redacted] p. 2, Answer 2]. COL [redacted] reliance on others to provide IH Program support to MAHC increased, even as Mr. [redacted] proceeded with his efforts to assist Mr. Gibson "improve his skills. I routinely discussed with the region what needed to be accomplished and we coordinated for regional support to perform any testing and inspections. I am not aware of any non-compliance with Federal and Army rules and regulations and ensured any concerns from the installation were addressed. When OSHA came in April 2008, we were fully inspected, reports, regulations all items were fully disclosed and we did not have any IH violations." [ROI, Tab 13/Exhibit 9, Statement of COL [redacted] p. 3, Answer 3; *see also* COL [redacted] Answer 13, p. 6, regarding OSHA finding no discrepancies during the Spring 2008 "no notice" inspection.]. Consequently, once COL [redacted] had identified Mr. Gibson's performance deficiencies, and subsequently became aware of significant inaccuracies in Mr. Gibson's IH assessments and reports, she became very engaged in ensuring that the MAHC IH Program was being run in a professional and reliable manner. When the AR 15-6 IO asked COL [redacted] if there "was any evidence or occurrence of abnormal increases in the clinic's injuries, illnesses, or complaints resulting from industrial hygiene related issued from June 2007 to present," COL [redacted] responded, "No and this was fully disclosed during the OSHA inspections; all 300 logs were inspected and there was no abnormal increase[] in clinic injuries, illnesses or complaints [that] resulted from industrial hygiene related issues." [ROI, Tab 13/Exhibit 9, Statement of COL [redacted] p. 3, Answer 5; *see also* COL [redacted] answer on OSHA matters in Answer 8, p. 4].

COL [redacted] also testified that based on Mr. Gibson's seeming inability to conduct legitimate testing and assessments, a new requirement was imposed, limiting the autonomy Mr. Gibson had previously enjoyed to decide for himself when and why to conduct IH tests and

[22] Ms. [redacted] Human Resources Specialist at the Fort Leavenworth CPAC, consulted with the chain of command on the development of Mr. Gibson's PIP. Ms. [redacted] stated, "The supervisor has overall responsibility for the effectiveness of their organization. Accordingly, the supervisor may decide which duties and responsibilities within the employee's official position description are to be assigned and to determine how such work is to be performed." [ROI, Tab 8/Exhibit 4, Statement of Ms. [redacted] p. 2, Answer 7]. In her view, the PIP and the duty limitations placed on Mr. Gibson were within the supervisors' lawful authority [ROI, Tab 8/Exhibit 4, Statement of Ms. [redacted] p. 2, Answers 6, 7]

assessments. COL [redacted] explained that Mr. Gibson was ordered not to conduct any IH assessment, test, or survey unless he had received prior supervisory approval to do so because "his results and testing procedures were proving inaccurate. Mr. Gibson prior to this would determine what testing he needed to do and when with no prior approvals or coordination from the Command. This was discovered with his increased budget expenditures for testing that was later found to be not required. He also was conducting mold testing and assessment that we were not supposed to be testing for and outside our funding supported guidelines. He was also restricted due to using inaccurate standards and on many occasions not conducting the specific testing that would have supported safe and compliant standards. I could not allow him to continue to operate with autonomy and without supervision until we could establish his technical proficiencies and understanding of IH procedures and standards." [ROI, Tab 13/Exhibit 9, Statement of COL [redacted], p. 3, Answer 6].

For the rest of COL [redacted] tour as the MAHC Commander, she relied on LTC [redacted] and 1LT [redacted] with assistance from Mr. [redacted] to closely supervise Mr. Gibson so they could "monitor the IH issues and maintain the IH Program elements." COL [redacted] elaborated, stating "[d]uring this process we found that Mr. Gibson did not have a tracking and monitoring program in place that alerted when testing needed to be performed. I consulted with the maintenance section to build into the DMLSS program, when air quality test were necessary for ORs, pharmacy, etc. We found many discrepancies in the industrial hygiene records and there was no established program in place to ensure more than one person knew when PM services and inspections were required for the installation. It appeared that Mr. Gibson did not want anyone else to have a full understanding of when and where IH requirements were needed for evaluation and review. We relied on the region intensely to help keep us in compliance and not in violation of any requirements. As I departed command, the COE was being hired to work with Mr. Gibson to ensure testing and compliance was conducted IAW policies and regulations. All of these extra measures required increased man-hours on others and increased resources and funding to support; however, there was no hesitation as no one wanted to compromise the safety and well-being of any employees or patrons by not doing the due diligence to meet IH compliance standards." [ROI, Tab 13/Exhibit 9, Statement of COL [redacted], p. 4, Answer 7].

COL [redacted] closing remarks summarized her approach to working toward improving Mr. Gibson's competency so that he could regain his credibility as an IH professional in the eyes of the MAHC management and workforce communities. COL [redacted] efforts reflect her sincere and profound attempts to steer Mr. Gibson toward a path of success and ensure the integrity of the MAHC IH Program. When asked by the AR 15-6 IO if there were any actions within the last three years that created the potential for a substantial and specific danger to the public health and safety involving industrial hygiene at Fort Leavenworth, COL [redacted] responded, "Not to my knowledge, however, many of Mr. Gibson's reports lead to undue stress and concerns of employees, required use of Government dollars that were not warranted, and caused relocations of employees unnecessarily. As a result of this and other inaccuracies in Mr. Gibson's reports, I felt it was my responsibility to obtain services from other industrial hygienists so as not to cause any further hardships on the installations or employees. We addressed any Garrison concerns when they were brought to us and I relied upon regional assistance to conduct the inspections required. I wanted Mr. Gibson to get assistance and correct his deficient technical skills;

however, at no time did he accept any suggestion that he was not conducting his technical assessments accurately. The more we tried to work with him, the more he rejected our attempts and viewed all corrective actions as 'attacks' on him personally. . . . As the Commander, safety was my primary concern and I would never intentionally disregard any unsafe condition or allow employees to be exposed to any unsafe condition. I believe I tried very hard to support Mr. Gibson on improving his technical standards.. . . My overall goal was to ensure SAFE conditions were in place but also to ensure what we did report was accurate and conveyed conditions as they existed with no misrepresentation of data." [ROI, Tab 13/Exhibit 9, Statement of COL [redacted], p. 6, Answer 14].

COL [redacted] assumed command of the MAHC when COL [redacted] departed in 2008. Upon assuming command, COL [redacted] "vetted" the MAHC IH Program with Mr. [redacted] She testified that Mr. Gibson's perception that his previous ability to run the MAHC IH Program as he saw fit had been changed was an accurate description of what transpired under her command given her belief that "the program . . . had drifted seriously off course. The previous command group, in conjunction with the PM staff, GPRMC staff, the Army Corps of Engineers, and OSHA all attempted to assist Mr. Gibson . . . to no avail. My assessment is that Mr. Gibson continues to refuse to take the reasonable advice, mentoring and redirection offered by a host of valid and qualified sources," including OSHA, the Army COE, and Mr. [redacted] [ROI, Tab14/Exhibit 10, Statement of COL [redacted], p. 1, Answer 1]. Similar to what COL [redacted] had done, COL [redacted] assembled a team to help her execute her responsibilities to ensure a compliant IH Program; the team comprised [redacted], MAHC Safety Officer; [redacted] Post Safety Officer; [redacted] GPRMC IHPM; the COE; and OSHA [ROI, Tab14/Exhibit 10, Statement of COL [redacted], p. 1, Question 3]. COL [redacted] testified that Mr. Gibson was never "prevented" from ensuring compliance with Federal and Army rules and regulations related to conducting regular IH assessments and appropriate testing at Fort Leavenworth buildings and facilities; however, he was "not permitted to select inappropriate rules and regulations and apply them to this setting as has been his habit for many years." [ROI, Tab14/Exhibit 10, Statement of COL [redacted], p. 2, Answer 4].

COL [redacted] detailed how ineffective Mr. Gibson had become in competently performing his duties as the MAHC IHPM. She explained that when Mr. Gibson received a complaint to investigate, "[t]he complaints were not routed through managers or supervisors, nor through Post Safety. He entered work spaces and performed every test he could purchase equipment for on every building, resulting in a budget for Fort Leavenworth twice that of Corpus Christi Army Depot, and 40 page IH reports. He additionally compared his test results to the most stringent standards he could find, regardless of appropriateness, with an end result of IH feedback to the community that was skewed to create alarm, and unreasonable recommendations for mitigation against risks that do not exist. Command review of his reports arose when his inability to adequately synthesize and perform higher level analysis of his test results, as well as his inability to appropriately communicate risk to the community without creating undue concern or fear, became apparent to the previous command. Upon this review, Command discovered the discrepancy between instrument measurements and the data in Mr. Gibson's reports. Mr. Gibson was only approved as having competency in basic instrumentation through the Army Corps of Engineers in September 2008. It is further my understanding the Mr. Gibson was never forbidden to perform surveys, but he refused to perform surveys unless he was allowed to also

perform a wide range of instrumental testing." [ROI, Tab14/Exhibit 10, Statement of COL [redacted] p. 2, Answer 7].

COL [redacted] further testified that whereas previously both the Environmental Safety Officer and Mr. Gibson were jointly monitoring IH issues and maintaining the IH Program elements, once she lost confidence in Mr. Gibson's abilities, especially "once falsified data was suspected in the IH reports, GPRMC also became involved in monitoring." [ROI, Tab14/Exhibit 10, Statement of COL [redacted] p. 2, Answer 8]. Additional expertise was provided to COL [redacted] by the COE. She testified that MAHC contracted with the COE and spent $90,000 for the COE to assist Mr. Gibson "in retooling his approach to his IH inspections. At the end of the FY08, the ACOE felt that Mr. Gibson was competent in basic instrumented testing but that he still required supervision, and that he was not yet competent in higher level analysis of that data, nor of basic risk communication back to the community." [ROI, Tab14/Exhibit 10, Statement of COL [redacted] p. 3, Answer 12].

Based on her assessment that "for many years adequate IH was not performed. Results were tampered with, skewed, or outright falsified. Workers were frightened through scare tactics, supervisors were circumvented, there was not rationale for the testing performed, and there was no crosswalk with post safety or even Munson Occupational Health," and that "Mr. Gibson has lost significant credibility with the managers and supervisors on this Garrison," COL [redacted] acknowledged that adequate IH assessment and testing may not have occurred during the period that Mr. Gibson was responsible for execution of the MAHC IH Program. However, COL [redacted] noted that "based on the work done by OSHA, the ACOE and Mr. [redacted] this changed and MAHC became a very safe work environment." [ROI, Tab14/Exhibit 10, Statement of COL [redacted] p. 4, Answers 14, 15].

Mr. Gibson's first and second line supervisors, 1LT [redacted] and LTC [redacted] respectively, echoed the comments provided by Mr. [redacted] COL [redacted] and COL [redacted] 1LT [redacted] provided detailed testimony as to his efforts to determine the validity of Mr. Gibson's test and assessment results, noting that he too turned to Mr. [redacted] from the GPRMC for his technical evaluation of Mr. Gibson's competence and to assist in monitoring the successful execution of the MAHC IH Program and the Program's compliance with all statutory and regulatory requirements. 1LT [redacted] testified that as a result of Mr. [redacted] assessments, and after consultation with his civilian personnel and legal offices, [ROI, Tab 11/Exhibit 7, Statement of LT [redacted] p. 2, Answer 7], he conducted an August 28, 2007 counseling session with Mr. Gibson. In the course of this counseling session, he directed Mr. Gibson to "defer" all Indoor Air Quality (IAQ) Occupational Exposure sampling/testing until further notice and that if a need arose that required some kind of sampling/testing, Mr. Gibson was to secure supervisory approval prior to initiating such a test. However, 1LT [redacted] explained that "[t]his deferment, in no way, was an instruction for Mr. Gibson to stop performing his duties as the Ft. Leavenworth Industrial Hygienist or to stop performing assessment of the Ft. Leavenworth building and facilities. Simply put, if Mr. Gibson needed to perform sampling/testing, it first required supervisory approval." [ROI, Tab 11/Exhibit 7, Statement of LT [redacted] p. 1, Answer 2; see also Answer 3].

Results from several "major" incidents involving Mr. Gibson's testing and assessments

created the impetus for MAHC to closely review Mr. Gibson's work and to consult with other IH experts for advice and assistance. 1LT [redacted] stated that Mr. Gibson's findings at Bell Hall concerning asbestos[23]; detection of carbon monoxide at the Trolley Station[24]; assertions with regard to the Indoor Air Quality in the MEDDAC Commander's office; the sewer smell incident that Mr. Gibson alleged occurred[26]; and another incident that Mr. Gibson alleged occurred when

[23] **The Bell Hall situation (June 2006).** Bell Hall is the main academic building for the Command and General Staff College (CGSC). It provides class facilities for approximately 1,000 students as well as office and work space for the staff and faculty. COL [redacted] assumed command of MAHC in June 2006. Shortly thereafter, Resource Management brought to COL [redacted] attention the significant increase in funds being expended by IH to conduct air sampling and testing in this building. COL [redacted] met with Mr. Gibson and LTC [redacted] about the negative reports on air quality for Bell Hall and their concern that the occupants and others were being exposed to asbestos. Mr. Gibson's testing indicated that exposure to unsafe air conditions existed in numerous locations and that areas needed to be shutdown, cleaned, and personnel moved to an alternate location. MAHC generated an IH report and met with CGSC and Garrison personnel to recommend closure of certain areas of the building [ROI, Tab 13/Exhibit 9, Statement of COL [redacted] p. 1]. COL [redacted] also recommended hiring a professional environmental firm to test the areas more extensively. The Garrison sought emergency funding from IMCOM to hire an environmental firm to conduct this testing [ROI, Tab 13/Exhibit 9, Statement of COL [redacted] p. 1]. The COE contracted with an outside certified IH firm to resample the entire work area [ROI Tab 13/Exhibit 9, Statement of COL [redacted], p. 1, Answer 2]. A synopsis of the analysis performed by the COE certified industrial hygienist on Mr. Gibson's testing samples is found at Tab 5/Exhibit 1, Statement of Mr. [redacted] p. 2. The results of the retesting were disturbing and contradicted Mr. Gibson's findings. According to the outside firm's analysis, there were no documented overexposures; in fact, there was no evidence to support Mr. Gibson's reported findings of asbestos exposure [ROI, Tab 13/Exhibit 9, Statement of COL [redacted] p. 2, Answer 2]. Mr. Gibson's report had required relocation of personnel, the shutdown of air handling units to prevent unsafe air circulation, and the expenditure of significant funds to hire the environmental firm and clean Bell Hall. COL [redacted] stated that MAHC's credibility as a reputable source of information was adversely and severely affected as the result of Mr. Gibson's flawed report [ROI, Tab 13/Exhibit 9, Statement of COL [redacted] p. 3,]. After the negative findings of asbestos in Bell Hall, as determined by the outside firm, Directorates began questioning Mr. Gibson's testing methods and results [ROI, Tab 16/ Exhibit 12, Statement of LTC [redacted] p. 5, Answer 25]. In addition, COL [redacted] started to scrutinize Mr. Gibson's reports and noticed that many of them appeared to be questionable and inaccurate [ROI, Tab 13/Exhibit 9, Statement of COL [redacted] p. 1]. OI [redacted] discusses the Bell Hall incident in his ROI, Tab 1, p. 13.

[24] **The Trolley Station incident (2006).** Mr. [redacted] references the Trolley Station incident in his testimony when he referred to it as an example where "Mr. Gibson reportedly exercised poor professional judgment in his response to a potential carbon monoxide situation; ..." [ROI, Tab 5/Exhibit 1, Statement of Mr. [redacted] p. 2]. Mr. [redacted] also addressed this incident in his memorandum, Subject, "Management Staff Assistance Visit (MAV) - MAHC Industrial Hygiene Services - 15-20 July 2007," dated 3 August 2007 [ROI, Tab 6/Exhibit 2, para 2f] wherein he statee: "2f. On 25 May 2007, Mr. Gibson issued a MFR outlining his rebuttal to questions asked about Bell Hall (Asbestos); Trolley Station (Asbestos); Commander's Office (Asbestos) and Sherman Airfield (Lead). Mr. Gibson provides statements on his viewpoint and his assertion that "command does not like his results". Mr. Gibson has repeatedly stated that he feels that there is a "cover-up" conspiracy in play at Ft. Leavenworth. When directly questioned about this theory, Mr. Gibson states that he 'does not have the support of command' and they 'do not like the results.'" Additionally, 1LT [redacted] testified t the Trolley Station incident by stating "In these situations, Mr. Gibson performed the initial IH assessments and testing. The results were ultimately reviewed by GPRMC and determined that independent validation of Mr. Gibson's sampling/testing was necessary. The independent sampling/testing indicated that Mr. Gibson had performed inappropriate sampling, applied the wrong industry consensus standards, and misinterpreted his results. [Tab 11/Exhibit 7, Question 8, p.2].

[26] **Sewer smell in Provost Marshal's Office.** Mr. Gibson described an incident in the Provost Marshal's Office Building involving a "sewer smell" as providing an example of what he was not allowed to do: "... I was not allowed to do chemical testing beyond grab samples when the employees/soldiers were present." [ROI, Tab 23/ (Exhibit 19, Statement of Mr. Karl Gibson, p. 22, para 19]. LTC [redacted] described the situation in greater detail:

a worker collapsed and was taken to the hospital due to formaldehyde being dispersed from newly installed carpet[27]; and reports of lead exposure in the hangar at Sherman Army Airfield,[28] ultimately prompted the MAHC management team to refer Mr. Gibson's results to GPRMC for review and validation. 1LT [redacted] testified that the independent sampling/testing by GPRMC indicated that Mr. Gibson had performed "inappropriate sampling, applied the wrong industry consensus standards, and misinterpreted his results. Where he had indicated that there were serious IH problems, there, in fact, were none." [ROI, Tab 11/Exhibit 7, Statement of 1LT [redacted] p. 2, Answer 2; *see also* Answer 8].

Now required to perform his duties under closer supervision, Mr. Gibson challenged his supervisors' direction to execute the IH Program in the order of priority they had developed

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"If I recall correctly, the incident with the Provost Marshal building, occupants were complaining of a foul smell. 1LT [redacted] and Mr. Gibson both went over to the building to assess the situation. It was on the guidance of 1LT [redacted] that the occupants be removed until the odor could be located and the problem fixed. I believe the problem was found to be stockings of some sort which was stuck in the drain and was causing a back up which lead to the foul smell. The problem was remedied with the removing of the blockage." [ROI, Tab 16/Exhibit 12, Statement of LTC [redacted] addendum]. When a problem can be alleviated by a simple response action, there is generally no need to conduct "chemical testing". 1LT [redacted] refuted Mr. Gibson's claim that he was not allowed to conduct chemical testing beyond grab samples, stating "Yes, I am aware of this incident. Basically, the people in the Provost Marshal's Office (PMO) were getting a nasty sewage smell in the mornings and we were called in to take some measurements to see if there were any health hazards associated with the smell. Mr. Gibson tested for a gamut of compounds - some that offered immediate results and others which were sent away for analysis - on three different occasions; the first two being in the morning when the complaints were being logged, and the third time over a weekend when we expected the smell had the chance to accumulate due to office inactivity. On all three occasions, I relayed the measurements that Mr. Gibson took at the PMO to Mr. [redacted] of the Department of Public Works (DPW), so that DPW would have instantaneous feedback from our measurements and could take appropriate action. The first two occasions did not evince any health hazards within the scope of the tests performed, and the third occasion (over the weekend) recorded some hazards that would have endangered workplace occupants, but because it was the weekend no personnel were exposed. Those hazards were easily mitigated before office occupation the next official workday." [ROI, pp. 23-24].

[27] **Formaldehyde carpet incident.** Mr. Gibson cited to a June 14, 2008 incident in which he alleged that a worker had collapsed due to formaldehyde "off gassing" from newly-installed carpet and was transported to the hospital [ROI, Tab 23/Exhibit 19, Statement of Mr. Karl Gibson, p. 23, para 19]. Mr. [redacted] the AR 15-6 IO "contacted the Fort Leavenworth Safety Director, Ms. [redacted]. She has no record of any such event, either in her OSHA 300 log, which tracks occupational injuries and illnesses, nor in her Workers' Compensation records" [ROI, Tab 29/Exhibit 25, Statement of Ms. [redacted]]. To confirm whether or not a Workers' Compensation claim had been filed, Mr. [redacted] also contacted Ms. [redacted], the Fort Leavenworth Civilian Personnel Advisory Center (CPAC) Director, who would have maintained a record of any incident in which a Fort Leavenworth worker was transported to a hospital by ambulance. Ms. [redacted] was not able to locate a record of any such incident [ROI, Tab 30/Exhibit 26, Statement of Ms. [redacted]]. Accordingly, Mr. [redacted] concluded that the alleged incident, at least as described by Mr. Gibson, never occurred [ROI, Tab 1, p. 24].

[28] **The Sherman Army Airfield (SAAF) Hangar situation (January 2007).** In late January 2007, Mr. Gibson performed Indoor Air Quality) testing that he asserted indicated that extraordinarily high levels of lead were present in the SAAF Hangar (Building 132). Although to that time, no employee had shown any ill effect from exposure to these alleged high levels of lead, the laboratory results procured by Mr. Gibson showed lead exposure levels as being 10 to 12 times the OSHA Permissible Exposure Limit. Due to these results, the Hangar was placed off limits to the general population. However, after retests by an independent environmental firm contravened Mr. Gibson's findings of asbestos in Bell Hall, a decision was made to retest the Hangar in an effort to confirm Mr. Gibson's findings. Retests were conducted by an independent IH company and also by MAHC. The final results of the retests revealed no detectable levels of lead. The cost of the retests was $3,787.00 [ROI, Tab 16/Exhibit 12, Statement of LTC [redacted], p. 5, Answer 25]. In addition, medical surveillance of SAAF employees revealed no elevated lead levels in their blood [ROI, Tab 5/Exhibit 1, Statement of Mr. [redacted] p. 12, Answer 28].

pursuant to DA Pam 40-503, para 3-6 [ROI, Tab 11/Exhibit 7, Statement of 1LT [redacted], p. 2, Answer 9]. 1LT [redacted] testified that after Mr. Gibson was presented with his new performance standards in January 2008 [ROI, Tab 12/Exhibit 8], he stopped performing all IH workplace hazard assessments. Because Mr. Gibson contended that "he did not understand what Management was asking him to do," the IH Program "was falling behind on its work." A "priority list of 25 buildings . . . developed from IH assessments that needed to be redone and customer service requests that had come up" remained unaddressed [ROI, Tab 11/Exhibit 7, Statement of 1LT [redacted], p. 2, Answer 9]. Contrary to Mr. Gibson's assertions that he was "unreasonably limited in scope by both LT [redacted] and LTC [redacted] by restricting him to ask only seven questions of the occupants of each of the 18 buildings," 1LT [redacted] explained that in most cases, a less involved "walk through" method was sufficient to determine if there was a hazard, particularly given that "most of the workplaces on Fort Leavenworth are strictly office spaces," and thus do not require more intricate sampling/testing methods. This distinction is recognized and provided for by AR 40-503, which allows discretion to "perform all tasks and procedures inherent and fundamental to an appropriate IH assessment of a given operation." The "walk through" was a reasonable assessment method given that the level of health risk to personnel conducting operations in the surveyed buildings was "relatively low. On Ft. Leavenworth there are primarily office spaces with very few hazards. In 2008, there was a wall-to-wall OSHA inspection of the few workplaces with industrial-type operations (most Dept of Public Works shops) and no uncontrolled hazards were found . . . just a couple of safety violations that were easily fixed, but that's about it." [ROI, Tab 11/Exhibit 7, Statement of 1LT [redacted], p. 3, Answers 10, 11]. 1LT [redacted] further emphasized that the MAHC command was now executing the IH program using the appropriate sampling/testing methods as evidenced by the fact that "if there were unchecked hazards and risks on Ft. Leavenworth, people would be getting injured or sick" but "Occupational Health has not seen an increase of injuries or sickness in the Ft. Leavenworth employee population." [ROI, Tab 11/Exhibit 7, Statement of 1LT [redacted], p. 3, Answer 11].

As explained above, Mr. Gibson expressed great concern at how his previous autonomy in choosing more complex and involved sampling/testing methods from among a "menu" of methods now was now being limited by his supervisors. Mr. Gibson was not pleased that he now was required to start any assessment with a "walk through," and, if this initial screening method warranted further sampling/testing, then, and only then, could he ask his supervisors to employ more involved methods. 1LT [redacted] and LTC [redacted] believed this these requirements were reasonable, however, given Mr. Gibson's "inability to display that he understood the appropriate use of time weighted testing" [ROI, Tab 11/Exhibit 7, Statement of 1LT [redacted], pp. 4-5, Answers 14, 15]. In contrast, Mr. Gibson asserted that he should be able to use "time weighted" measurements rather than less complicated sampling/testing methods such as "walk throughs, "direct-read" or "spot testing."[29] 1LT [redacted] testified that although Mr.

[29] The definitions of these terms are technical in nature. In some instances, these definitions can be found in technical manuals [Tab GG, Statement of Mr. [redacted], para 6], while in other instances, there is no readily available technical definition available. Hence, Mr. [redacted]man provided the following layman's definitions [Tab GG, Statement of Mr. [redacted], para 6, for the following terms: (1) **Walk-through:** Industrial Hygiene is often described as "The recognition, evaluation, and control of occupational health hazards". "Walk-thru" is shorthand for a walk through survey of a building or facility. It is the recognition phase of the process, where the industrial hygienist decides which operations require further evaluation, and by what means. (2) **Direct read instruments:** These are sampling devices that provide real-time data. For example, a carbon monoxide (CO) monitor provides

Gibson may have asserted that he had requested permission to use the time weighted measurement in 40 instances, Mr. Gibson was given permission only once in 2008 to perform that test. 1LT [redacted] noted that this was based on several factors, including that Mr. Gibson had spent the "greater part of 2008 refusing to perform IH surveys under the guise of not understanding his IPS. Second, the workplace assessments that were actually performed were generally of office spaces and did not require further testing. Third, if there were instances where Mr. Gibson felt that additional sampling/testing was required, he did not request it." [ROI, Tab 11/Exhibit 7, Statement of 1LT [redacted] p. 5, Answer 16]. The AR 15-6 IO noted that a review of "all paper trails and email traffic from Mr. Gibson during 2008 shows that not one request for time weighted measurements was submitted, and furthermore, the one time that he was permitted to perform the testing, the request was submitted directly to Management by the Safety department of the customer's office and not Mr. Gibson." [ROI, Tab 11/Exhibit 7, Statement of 1LT [redacted], p. 5, Note after Answer 16].

Additionally, 1LT [redacted] explained that he grew increasingly more reliant on the mentoring/support team (GPRMC Certified CIHs, COE CIHs, and APEX Environmental) to provide advice to the MAHC management team regarding its IH Program [ROI, Tab 11/Exhibit 7, Statement of 1LT [redacted], p. 5, Answer 18]. This was particularly evident once the mentoring/support team determined that Mr. Gibson had, more often than not, conducted more complex and expensive assessments/testing than warranted by conditions and provided for by his new performance standards [ROI, Tab 12/Exhibit 8, July 8, 2008 MFR, p. 2, para 3a(7); ROI, Tab 11/Exhibit 7, Statement of 1LT [redacted], p. 4, Answer 12].[30] 1LT [redacted] testified that time weighted measurements were an "essential part of any properly conducted industrial hygiene program," and would be used "[a]bsolutely, if necessary." [ROI, Tab 11/Exhibit 7, Statement of 1LT [redacted] p. 4, Answer 13]. However, 1LT [redacted] explained that the COE agreed with the MAHC management team's approach to what Mr. Gibson referred to as the "two step (walk-thru followed by assessment) approach to IH. According to 1LT [redacted] time weighted measurements "should not be automatically performed for every workplace or operation, and that testing should only be performed where appropriate. We worked closely with the COE in the fall of 2008 in the hopes of providing Mr. Gibson remedial training as to 'what right looks like' in terms of IH services and reports, and to have a colleague available for Mr. Gibson to bounce questions off of." [ROI, Tab 11/Exhibit 7, Statement of 1LT [redacted], p. 6, Answer 19]. 1LT [redacted] testified that the COE did recognize that other test methods in addition to the walk through, such as direct read measurements, could be appropriately utilized when required in the

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instantaneous readouts of what CO level exists at any moment at a given location. These instantaneous data points can be integrated to provide exposure levels for an hour, a shift, an entire day, or any other defined time period. (3) **Spot measurement**: Similar to what is provided by direct read instrumentation, but may also be collected by more primitive means, such as a swipe test, using swabs, or wipes designed just for such activity. Often used for surface sampling, such as settled lead dust in a firing range. This results in a "spot check" for the amount of contaminant present at a specific time and location. (4) **Time-weighted average (TWA)**: A technique of data manipulation used to compare collected analytical results with applicable standards. For example, if an individual is exposed to 20 parts per million (ppm) benzene vapor for 4 hours and 10 ppm for the other 4 hours of an 8-hour shift, the TWA for the individual that entire shift is 15 ppm. This value can then be compared to the applicable 8-hour standard for benzene exposure.

[30] These performance standards called for Mr. Gibson to "[p]erform all tasks and procedures inherent and fundamental to an appropriate IH assessment of a given operation (this includes, but is not limited to: instantaneous direct reading measurements, proper surveying of employee populations with accurate interpretation of statistical data, etc.)." Mr. Gibson's new performance standards were completely consistent with DA Pam 40-503.

"professional judgment of qualified individuals" [ROI, Tab 11/Exhibit 7, Statement of 1LT [redacted] p. 7, Answer 22. See also Tab 26/Exhibit 22, para 4b]. However, "since Mr. Gibson's judgment and interpretation of risk and hazards in workplace had previously been found to be lacking . . . management required that, if necessary, Mr. Gibson take these direct read measurements to aid in the justification for any occupational exposure testing that Mr. Gibson may recommend." [ROI, Tab 11/Exhibit 7, Statement of 1LT [redacted] p. 7, Answer 22. See also Tab 17, 22, and 26]. The COE's mentoring/support team member, Mr. [redacted] made the observation in his August 26, 2008 report that Mr. Gibson's real time sampling was such that the quantity of real time sampling performed and Mr. Gibson's sole reliance on sample results may not reflect DoD's intent for the annual facility inspections (surveys) (DA Pam 40-503 4-4.b.). [ROI, Tab 26/Exhibit 22, para 4b].

LTC [redacted], Mr. Gibson's second line supervisor, provided testimony consistent with that of other witnesses, Mr. Gibson excepted. As the Chief of Preventive Medicine, the MACH IH Program feel directly within LTC [redacted] ambit of responsibility; it was incumbent upon her to ensure that the IH Program was executed consistent with the Preventive Medicine Program and other governing authorities. Like other witnesses, LTC [redacted] also noted that it was deemed necessary to curtail Mr. Gibson's authority to conduct certain tests as a result of his "incorrect and inaccurate data and reporting of findings" in the four buildings that were later the subject of independent testing, "with drastic differences in the result findings," and given Mr. Gibson's inability to explain his testing procedures and result findings. LTC [redacted] testified that Mr. Gibson's reports were "causing increase anxiety and elevated alarm to the employees" at Fort Leavenworth [ROI, Tab 16/Exhibit 12, Statement of LTC [redacted], p. 2, Answer 5; *see also* App. 5, Answer 25 regarding the situation at Sherman Army Airfield]. She testified that in consultation with the mentoring/support team, and with particular reliance on Mr. [redacted] the GPRMC CIH, the chain of command was able to ensure that the MAHC IH Program was being properly executed. Further, LTC [redacted] emphasized that although "Mr. Gibson's [a]ssessments were never stopped nor were surveys," his authority to arbitrarily perform IAQ testing was stopped until assessment was performed by Mr. Gibson and he determined IAQ was needed. Then with approval from his first line supervisor, 1LT [redacted] or me, he was allowed to perform the test. It was the commander's decision to defer Mr. Gibson's ability to conduct testing without supervisory approval. This was made in conjunction with Mr. [redacted] [ROI, Tab 16/Exhibit 12, Statement of LTC [redacted] p. 2, Answer 7]. Like 1LT [redacted] LTC [redacted] also testified that there was no increase in the numbers of injuries, illnesses or complaints at MAHC, except during flu season and during peak allergy season [ROI, Tab 16/Exhibit 12, Statement of LTC [redacted] p. 1, Answer 4]. Additionally, LTC [redacted] also testified that the "level of health risk to personnel conducting operations in the buildings surveyed was minimal to none from an IH perspective," [ROI, Tab 16/Exhibit 12, Statement of LTC [redacted] p. 2, Answer 12], and there were no "life threatening issues" that would need to be reported to her so she could inform the Command [ROI, Tab 16/Exhibit 12, Statement of LTC [redacted] p. 2, Answer 9]. Further, she also testified that the restriction placed on Mr. Gibson's ability to unilaterally conduct time weighted testing in the absence of prior supervisory approval was based on the COE's assessment of Mr. Gibson's techniques and understanding, in that his understanding of the results of such testing "was not sufficient to properly think through the building processes and risks." [ROI, Tab 16/Exhibit 12, Statement of LTC [redacted] p. 3, Answer 16].

The final member of the MAHC mentoring/support team was Mr. [redacted], a CIH with the COE. With subject matter expertise in industrial hygiene, particularly with respect to asbestos, lead, mold and other occupational health related issues, Mr. [redacted] role was to provide independent industrial hygiene support with a primary focus on facility inspections, as outlined in the SOW of the contract between MAHC and the COE [ROI, Tab 17/Exhibit 13; ROI, Tab 9/Exhibit 5, Statement of Mr. [redacted] p. 1, Answers 1, 2]. Mr. [redacted] testified that the goal of the mentoring/support efforts was "to increase the effectiveness of the IH program." [ROI, Tab 17/Exhibit 13; ROI, Tab 9/Exhibit 5, Statement of Mr. [redacted] p. 1, Answer 4]. To that end, Mr. [redacted] testified that he had many opportunities to assess Mr. Gibson's "technical skills and capabilities in relation to facility inspection processes and assessment of lead standards. "I observed during these activities that Mr. Gibson was technically skilled in sample collection using real-time and personal integrated sampling methods. However significant issues were noted related his ability to identify occupational hazards, appropriate standards, selection and use of appropriate sampling strategies, interpretation of results, and identification of appropriate controls." [ROI, Tab 9/Exhibit 5, Statement of Mr. [redacted] p. 2, Answer 6]. Mr. [redacted] relayed that one corrective action that the MAHC management hoped to accomplish through this mentoring/support initiative was to "improve the existing program and . . . prioritize [IH] assessment activities"; although all facilities were to be inspected, that "did not require that all hazards be assessed by industrial hygiene sampling during the inspection process." Rather, Mr. [redacted] recommended that a "prioritization of assessment of identified hazards be established using [a] hazard inventory that should encompass the entire facility." [ROI, Tab 9/Exhibit 5, Statement of Mr. [redacted], p. 2, Answer 9]. After reviewing industrial hygiene reports previously issued by Mr. Gibson, Mr. [redacted] testified that "[i]n general significant issues were noted in relation to identification and application of appropriate occupational standards and interpretation of sampling results." [ROI, Tab 9/Exhibit 5, Statement of Mr. [redacted], p. 2, Answer 13]. Mr. [redacted] testimony appears to be contrary to Mr. Gibson's assertion that the COE agreed with his methods, findings and conclusions [*See* ROI, Tab 22/Exhibit 18 and Tab 26/Exhibit 22; see also ROI, Tab 9/Exhibit 5, Statement of Mr. [redacted], p. 3, Answer 16]. On behalf of the COE, Mr. [redacted] validated LTC [redacted] and 1LT [redacted] approach to the MAHC IH Program—an approach grounded in an inventory of hazards and prioritization of hazard assessment—emphasizing the importance of documenting a comprehensive hazard inventory for the entire facility to assist in prioritizing industrial hygiene activities [ROI, Tab 10/Exhibit 6, Statement of Mr. [redacted] p. 1, Answer 15]. Based on advice from Mr. [redacted] and the other members of the mentoring/support team, the MAHC management team had directed Mr. Gibson to generate such an inventory [ROI, Tab 17/Exhibit 13; ROI, Tab 9/Exhibit 5, Statement of Mr. [redacted] p. 2, Answer 13; *see also* Answer 9].[31] In labeling Mr. Gibson's failure to comply with this requirement as "problematic," Mr. [redacted] noted that the lack of an inventory meant that "the facility hazards had not been consolidated and therefore [were] unavailable for planning purposes." In this context, Mr. [redacted] also viewed the "two-step" process to which Mr. Gibson objected, as being of significant value to establishing the requisite inventory. "It was recommended that the facility walk through process would be an effective and timely means to

[31] This requirement had been conveyed to Mr. Gibson by memorandum of August 26, 2008, which enumerated the steps the command believed necessary for Mr. Gibson to undertake to improve the effectiveness of the MAHC IH Program.

verify and compile identified hazards into the comprehensive hazard inventory. . . . walk through inspections [should] be completed prior to assigning additional industrial hygiene assessment tasks." [ROI, Tab 10/Exhibit 6, Statement of Mr. [redacted], p. 1, Answer 14]. The purpose of a walk through is "to confirm that identified hazards . . . and established controls are adequate. This may or may not require sampling." [ROI, Tab 9/Exhibit 5, Statement of Mr. [redacted], p. X, Answer X].

Mr. [redacted] testimony also countered another of Mr. Gibson's assertions: that testing without using time weighted measurements renders an IH hygiene program essentially useless and creates a danger to public health and safety. Mr. [redacted] validated the testimony of other witnesses, noting that time weighted measurement "is one component of a comprehensive program. Particularly given that "some chemicals have biological indicators that can be used to directly assess exposure," other types of sampling methods are often appropriate, especially to assist in identify[ing] potential hazards," to include determining the cumulative effect of a suspected toxin on the occupants of a building or facility over an extended period of time [ROI, Tab 9/Exhibit 5, Statement of Mr. [redacted], p. 4, Answers 19, 20].

Agency Discussion

OSC-Referred Allegation 1: Mr. Gibson's first line supervisor, 1LT [redacted], Chief of Environmental Health and Environmental Science Officer, and his second line supervisor, LTC [redacted], Chief, Department of Preventive Medicine actively and deliberately interfered with his ability to conduct the IH Program at MAHC and with the effective operation of MAHC's IH Program. Such actions on their part constituted an abuse of authority and created a potential for a substantial and specific danger to the public health and safety.

Army Findings as to Allegation 1: The allegation is unsubstantiated. A preponderance of the evidence, as set forth in the AR 15-6 ROI, leads to the conclusion that LTC [redacted] and 1LT [redacted] acted properly, within the scope of their supervisory responsibilities. Their actions did not constitute an abuse of authority, nor did they create the potential for a substantial and specific danger to the public health and safety. Rather, all actions they took were efforts to effectively manage the MAHC IH Program at Fort Leavenworth.

OSC-Referred Allegation 2: Actions by 1LT [redacted] and LTC [redacted] created a situation where adequate IH assessment and testing at Fort Leavenworth had not occurred since June 2007, resulting in violations of law, rule, and/or regulation.

Army Findings as to Allegation 2: This allegation is unsubstantiated. A preponderance of the evidence, as set forth in the AR 15-6 ROI, leads to the conclusion that adequate industrial hygiene assessment and testing has continuously occurred at Fort Leavenworth in accordance with law, rule and/or regulation.

Discussion: The AR 15-6 investigation initiated by the Army in response to the OSC referral of allegations in this case demonstrates that the MAHC Commanders, COL [redacted] and later COL [redacted] together with Mr. Gibson's first and second line supervisors, 1LT [redacted] and LTC [redacted] respectively, were extremely mission-oriented and professional in their approach to

Mr. Gibson. All members of Mr. Gibson's chain of command maintained as their primary focus the success of the MAHC IH Program. All perceived that in his role as the IHPM for MAHC, Mr. Gibson was critical to that Program's success.

The conclusions reached by IO [redacted] in his AR 15-6 Report of Investigation (ROI) are thoroughly grounded in the record evidence. [ROI, Tab 1]. Without repeating the extensive discussion IO [redacted] provided in his ROI addressing the evidence gathered during the AR 15-6 Investigation for each of the allegations and their sub-elements, the conclusions reached for each of those allegations and their sub-elements are significant and should be recognized for the overwhelming nature of their ultimate bottom line, specifically, that none of the allegations were substantiated.[32] Based on his evaluation of the record evidence, IO [redacted] reached the following conclusions:

1. there is no evidence that Mr. Gibson's authority as Fort Leavenworth's Industrial Hygienist has been diminished since June 2007 by 1LT [redacted] and LTC [redacted] actions. Mr. Gibson's experience in managing the IH program should have been sufficient to be able to understand the customers' and Management's expectations for workplace health and safety; however, his analysis of sampling data and identification of appropriated health based standards often fell short. Contrary to diminishing his authority, his supervisors and the chain of command went out of their way to give him ample opportunities to improve his technical, writing, and communication skills.
2. no evidence of Mr. Gibson being prevented, by LTC [redacted] or LT [redacted] from ensuring compliance with applicable laws, regulations, or standards. Regular assessments and appropriate testing were conducted by Mr. Gibson when conditions warranted. Given Mr. Gibson's loss of credibility, his supervisors took the necessary steps to improve his capabilities and have him produce validated results in order to comply with federal regulations and Army rules. Mr. Gibson was not able to demonstrate a violation of federal and/or Army regulations and rules because of his inability to produce reproducible, valid results.
3. Mr. Gibson was not ordered to stop all industrial hygiene assessments, testing and surveys. He was given specific direction as to the procedures he needed to follow in order to conduct testing and assessments. There was no evidence to demonstrate that Mr. Gibson was given additional responsibilities outside of those expected of an installation industrial hygienist and documented in his IPS. Given Mr. Gibson's identified weakness, his supervisors exercised the appropriate level of supervisory authority in the restriction of his sampling and assessments. LT [redacted] and LTC [redacted] acted within their supervisory responsibilities and did not abuse their authority.

[32] For ease of reading Mr. [redacted] AR 15-6 ROI and its detailed and lengthy discussion of the record evidence and also all of the testimonial and documentary evidence that Mr. Gibson provided to both IOs in furtherance of the subject AR 15-6 investigation, it would be helpful to note that both Mr. [redacted] ROI and Mr. Gibson's testimony follow the same order and presentation of specific questions. [See Tab L for list of IO COL [redacted] questions that were used both IOs]. The IO discussion entails a recitation of all of the record evidence gathered during the investigation that is relevant to each of the posed questions. In turn, Mr. Gibson provides his answers to these same specific questions. Additionally, the other witnesses' testimony is also provided in this question and answer format and essentially answer the same questions with some tailoring as appropriate.

4. LT [redacted] was exercising his supervisory responsibilities when he established priorities for the hazard assessment surveys for an employee who was unwilling to execute his job-related duties. LT [redacted] and LTC [redacted] acted within their supervisory responsibilities and did not abuse their authority.

5. Mr Gibson was not unreasonably limited in scope. Since Mr. Gibson was not unreasonably limited, no associated abuse of authority took place.

6. Mr. Gibson's insistence on conducting time- weighted testing for every hazard and/or every complaint is not in accordance with best management practices of industrial hygiene. Time-weighted testing should absolutely be conducted if the hazard and the circumstances warrant it, and the conditions at Fort Leavenworth do occasionally warrant this level of testing. However, excessive time-weighted testing when it is not warranted wastes valuable resources. When it was found to be necessary by Management, time-weighted testing was performed at Fort Leavenworth either by Mr. Gibson or by independent third parties. Once again, LT [redacted] and LTC [redacted] acted within their supervisory responsibilities and did not abuse their authority.

7. Mr. Gibson was permitted to follow the Corps of Engineers' approach to inspecting buildings and still prohibited from performing time weighted testing without first receiving prior supervisory approval; however, these circumstances do not constitute an abuse of authority by LTC [redacted] or LT [redacted] See the abuse of authority discussion, above (paragraph 2.a.2).

8. Mr. Gibson is correct that Federal Law requires federal agencies to provide a safe and healthy environment. However, he is incorrect in assuming this statement extends to the determination of when and how time-weighted testing should be performed. The execution of the Munson Industrial Hygiene Program fell under the purview of the Chief of Preventive Medicine (LTC [redacted] and the Environmental Science Officer (LT [redacted] Therefore, I conclude that it was clearly reasonable and within LTC [redacted] and LT [redacted] s authority to determine when time-weighted testing should be performed, especially given the Commander's concerns about Mr. Gibson's inaccurate, flawed, and potentially manipulated results. LTC [redacted] and LT [redacted] acted in a reasonable and responsible manner.

9. LTC [redacted] and LT [redacted] were not arbitrary in denying requests to conduct time weighted sampling; rather, they appropriately prioritized limited resources so that they would be most effectively and efficiently utilized.

10. The Corps of Engineers did not object to 1LT [redacted] and LTC [redacted] two step (walk-thru followed by assessment) approach.

11. Conducting a multi-step approach to assessing work place hazards is consistent with industrial hygiene best practices and appropriate when determining how to utilize limited resources. I find no evidence that Corps of Engineers officials determined that the walk-thru step alone was of minimal value and that the walk-thru and assessment steps should be combined.

12. Corps of Engineers officials did not specifically determine that assessments should include limited testing of the parameters cited. They did, however, state in general

terms that limited testing can be beneficial to identifying and assessing hazards.

13. Mr. Gibson was overly concerned with conducting time-weighted sampling, which was often unnecessary and expensive. His overemphasis on sampling demonstrates his lack of understanding of the components of a good industrial hygiene program, which uses both qualitative and quantitative information to maintain a safe and healthful work environment. The purpose of an IH Program is to anticipate, recognize, evaluate, and control hazards in the workplace. Properly performed time-weighted measurements are one aspect of the evaluation portion of the program, but the lack of time-weighted measurements does not render an IH program useless, nor does it necessarily present a danger to public health and safety.
14. Munson Army Health Center officials have conducted the necessary hazard assessments and monitoring to address potential exposures to significant health hazards. When conditions warranted, the MAHC Command demonstrated its willingness to take decisive action if hazards were shown to present unhealthful conditions for the workforce. The workforce is better served by the changes that were instituted to eliminate unnecessary testing, misapplication of standards, and inaccurate reporting of work place hazards.

Based on the above conclusions, IO Berckman recommend that the actions taken by Mr. Gibson's Command chain be recognized as appropriate and legitimate based upon the findings and conclusions of this investigation.

In line with the above conclusions, the discussion of the evidence previously presented in this Army narrative report, coupled with the discussion that follows, reveals the overwhelming nature of the evidence supporting all of the IO's conclusions that failed to substantiate any of Mr. Gibson's allegations. Any issues or problems that may have arisen in the MAHC IH Program were the result of Mr. Gibson being unable to properly execute a robust and credible IH Program.

Unfortunately, in 2006 and early 2007, several highly visible instances: Mr. Gibson's findings of asbestos exposure at Bell Hall; his detection of carbon monoxide at the Trolley Station; assertions of unsafe Indoor Air Quality in the MEDDAC Commander's office; and his reports of lead exposure in the hangar at Sherman Army Airfield, Mr. Gibson was found to have performed inappropriate sampling, applied the wrong industry standard, or misinterpreted his results. In all cases in which Mr. Gibson had indicated that there were serious industrial hygiene problems, independent third-party testing revealed that, in fact, no such problems existed.

Mr. Gibson's inaccurate findings of unsafe conditions caused significant disruption of work in the affected facilities, and created undue alarm among, and unwarranted stress on employees who were relocated to alternate duty locations after having been informed that they had been working in contaminated areas. The command's discovery of these deficiencies in Mr. Gibson's duty performance coincided generally with its receipt of resource management reports, drawing attention to the significant increase in funds being expended by IH to conduct air sampling and testing on Fort Leavenworth. In addition, when Mr. Gibson provided information indicating a potential health risk, the MAHC command worked with installation officials to remove

employees and patrons from those areas that presented a potential health risk and to clean those areas, notwithstanding the resulting cost and significant inconvenience. As it turned out, in response to Mr. Gibson's flawed reports, Fort Leavenworth expended thousands of dollars on unnecessary IH re-testing, facility clean-up, and in some cases, on the purchase of special air filtering equipment that was not actually required.

In addition, because of concerns as to the validity of Mr. Gibson's IH reports, inappropriate methods of measurement, and misapplication of IH standards, the leadership of the USDB at Fort Leavenworth, banned Mr. Gibson from entering the facility, the largest on Fort Leavenworth, and one of MAHC's most important IH customers. Note that Mr. Gibson cited his "inability" to perform IH testing in the USDB as an example of what he deemed to be inappropriate restrictions on his performance of duty placed on him by his supervisors. However, it was customer, the USDB, not Mr. Gibson's chain of command, who banned him from the facility and curtailed his ability to provide his IH services there.

These mistakes, and the disruption they caused, led to the IH Program's, and to Mr. Gibson's, loss of credibility on the Fort Leavenworth installation.

The MAHC chain of command, in whom DoD and Army doctrine vested responsibility for the Fort Leavenworth IH Program, was committed to operating an effective and efficient IH Program, fully compliant with law and regulation, and to restoring the Program as reliable in the eyes of their Fort Leavenworth customers. Given Mr. Gibson's role as the Fort Leavenworth IHPM, the chain of command viewed him as an integral component in ensuring the Program's success.

COL [redacted] the MAHC Commander, consulted with the GPRMC IHPM, Mr. [redacted] a respected CIH on whom MAHC and other organizations had often called in the past for assistance in IH matters. COL [redacted] asked Mr. [redacted] for advice and assistance in assessing the MAHC IH Program, remediating any deficiencies found, and restoring it to full functionality. Mr. [redacted] whose qualifications as a CIH and reputation in the IH community are of the highest caliber, traveled to Fort Leavenworth. Through an assessment of at least 32 of Mr. Gibson's IH reports, other correspondence, and e-mail traffic; the conduct of direct employee interviews; and general workplace observations, Mr. [redacted] concluded that Mr. Gibson did not comprehend basic IH practices and principles; provided inaccurate and untruthful representations—in some cases making false or misleading statements and in others concealing information that should have been disclosed; and failed to apply sound professional judgment in interpreting the results of IH sampling data he had collected. In particular, Mr. [redacted] noted that Mr. Gibson demonstrated a profound inability to distinguish between various levels of risk posed by IH hazards, frequently assigning a PRIORITY 1 (most serious) "Risk Assessment Code" to routine workplace hazard conditions that were often readily easily controlled or remediated. In addition, Mr. [redacted] determined that Mr. Gibson failed to understand and employ scientific practices (*i.e.*, standard sampling and collection methods) that had been accepted by OSHA, research agencies, and other standard-setting organizations. Subsequent review of Mr. Gibson's reports by the COE CIH, Mr. [redacted] determined that Mr. Gibson had long relied on inapplicable standards and questionable sampling techniques, findings completely consistent with Mr. [redacted] assessment. In summary, the weight of the

evidence shows that Mr. Gibson produced IH information and reports that were unreliable and unverifiable.

Based on Mr. [redacted] determination that Mr. Gibson lacked the technical competence and professional judgment required to interpret accurately the sampling data he routinely collected advice, COL [redacted] decided to "defer" Mr. Gibson's ability to conduct IH testing without prior approval from his supervisory chain. Mr. Gibson was directed to use a "two step" process—beginning with a "walk through" of each work area to assess potential hazards and the controls currently in place, ***before*** moving on to the second step of sampling or testing. Mr. [redacted] deemed this approach was fully consistent with Army doctrine and that, in most cases, beginning the IH assessment process with a "walk through" was sufficient to determine if a hazard existed, particularly given that most of the workplaces on Fort Leavenworth were office spaces and light industry that did not require more intricate technical sampling/testing methods. Once an accurate "walk through" assessment had been made, Mr. Gibson was to provide his supervisors with a proposed sampling or testing strategy for that specific work process or area. In COL [redacted] view—a view shared by Mr. [redacted] it was reasonable to presume that implementing a prerequisite for supervisory review and approval of Mr. Gibson's sampling proposals would eliminate much of the unnecessary testing that had been occurring and give the command a means of overseeing Mr. Gibson's interpretations of any testing that did occur.

Mr. Gibson's supervisory chain of command, to include 1LT [redacted] and LTC [redacted] began to supervise him more closely. 1LT [redacted] and LTC [redacted] counseled Mr. Gibson, to assist him in improving his skills and abilities in areas that had been identified as weakness. During an August 28, 2007 counseling session, 1LT [redacted] ordered Mr. Gibson to "defer" all Indoor Air Quality Occupational Exposure sampling/testing until further notice and that if a need arose that required some kind of sampling/testing, Mr. Gibson was to secure supervisory approval prior to initiating such a test. However, 1LT [redacted] was careful to explain to Mr. Gibson that this "deferment," was in no way a directive for Mr. Gibson to stop performing his duties as the Fort Leavenworth industrial hygienist or to stop performing IH assessments of Fort. Leavenworth building and facilities. Simply put, if Mr. Gibson needed to perform sampling/testing, it first required supervisory approval. And, Mr. Gibson was to begin his IH assessments of Fort Leavenworth facilities with a "walk though," or preliminary survey of a building or facility, as opposed to immediately initiating technical sampling.

Mr. Gibson was not pleased that he now was required to start any of his IH assessments with a "walk through," and, if this initial screening method warranted further sampling/testing, then, and only then, could he ask his supervisors to employ more involved technical methods.

In late 2007, COL [redacted] enlisted the assistance of the local CPAC and Mr. [redacted] to establish well-defined performance standards that would allow Mr. Gibson to do his job, while facilitating appropriate chain of command supervision and oversight of his work, all with a view to ensuring compliance with established IH laws, regulations, and standards, and minimizing the likelihood of further errors. 1LT [redacted] testified that after Mr. Gibson was presented with his new performance standards in January 2008, he stopped performing all IH workplace hazard assessments. Now required to perform his duties under even closer supervision, Mr. Gibson

challenged his supervisors' direction to execute the MAHC IH Program in the order of priority 1LT [redacted] had developed in accordance with Army policies and doctrine. Mr. Gibson contended that he did not understand what management was asking him to do and the priority list of approximately 25 buildings, developed by the chain of command from IH assessments that needed to be redone and customer service requests that had arisen, remained unaddressed. Mr. Gibson's new performance standards also required him to establish and implement the 2008 Fort Leavenworth IHPD (program document) and IHIP (implementation plan), both of which were required by Army doctrine. But by the end of February 2008, Mr. Gibson still had not generated either document.

Mr. Gibson asserted that in imposing controls on his performance of duty as the Fort Leavenworth IHPM, 1LT [redacted] and LTC [redacted] unreasonably restricted his ability to do his job properly and effectively. For example, Mr. Gibson claimed that he had requested to use a time weighted measurement testing and analytical technique in 40 instances throughout 2008, but was authorized by his supervisors to perform the test only once. 1LT [redacted] noted that this was based on several factors, including that Mr. Gibson had spent the greater part of 2008 refusing to perform IH surveys under the guise of not understanding his individual performance standards. Second, the workplace assessments that Mr. Gibson actually performed were generally of office spaces and did not require further testing or application of time weighted measurement or analytical techniques. Third, if there were instances where Mr. Gibson felt that additional sampling/testing was required, he did not request it. In fact, a review of all paper trails and email traffic from Mr. Gibson during 2008 shows that he submitted not one request to perform time weighted measurements; on the one occasion Mr. Gibson was permitted to perform such testing, the request had been submitted directly to management by the customer's safety department (and not by Mr. Gibson).

COL [redacted] the successor in command to COL [redacted] continued the course of action initiated by her predecessor, noting that her efforts to redirect Mr. Gibson's efforts were ". . . part of a larger plan to correct a program that had drifted seriously off course." Yet, all of the evidence seems to indicate that Mr. Gibson was unable or unwilling to respond to the command's efforts to assist him in improving his duty performance. COL [redacted] noted that Mr. Gibson continued to refuse to take the reasonable advice, mentoring, and redirection offered by a host of valid and qualified sources, most notably Mr. [redacted] and the Mr. [redacted] a CIH from the Army COE, with which MAHC had contracted at a cost of $90,000 to assist Mr. Gibson in retooling his approach to IH inspections and assessments.

Contrary to the allegation that his supervisors sought only to diminish Mr. Gibson's authority, the evidence shows that Mr. Gibson's direct supervisors, 1LT [redacted] and LTC [redacted] and the entire MAHC chain of command went out of their way to accord Mr. Gibson ample opportunity to improve his technical, writing, and communication skills with a view to improving the overall efficiency and effectiveness of the MAHC IH Program. The actions of the chain of command to more closely supervise and mentor Mr. Gibson were neither arbitrary nor capricious. Further, at no time did 1LT [redacted] LTC [redacted] or any other member of the chain of command, place restrictions or limitations on Mr. Gibson that should have interfered with his performance of his duties as the IHPM at Fort Leavenworth. Rather, the evidence of record reflects that beginning in 2006, and for the first time in his 19 years of

federal service, Mr. Gibson was called to account for his substandard performance when a new set of supervisors and managers converged at the MAHC at the same time. Together, these new supervisors concluded that Mr. Gibson's performance deficiencies needed to be corrected; that Mr. Gibson required strong mentorship and supervision by a team of trained subject matter experts whose only goal was to improve his performance, not hamper him in performing his duties and responsibilities; and that they needed to procure outside professional help to immediately improve enhance the level of MAHC IH Program compliance with statutory and regulatory requirements and to improve overall Program effectiveness.

There is no evidence that the limitations placed on Mr. Gibson by his supervisors created the potential for a substantial and specific danger to the public health and safety at Fort Leavenworth. In the context of the Army's investigation of the allegations referred by OSC, both of the CIHs who audited the IH Program at Fort Leavenworth (Mr. [redacted] of GPRMC and Mr. [redacted] of the Army COE) affirmed that they were not aware of any substantial and specific danger to the public as a result of the command's actions vis-à-vis Mr. Gibson. In fact, the requirements imposed on Mr. Gibson's performance of his duties rendered it more likely that he would render accurate IH assessments that were more likely to enhance public health and safety at Fort Leavenworth.

There is no evidence that the limitations placed on Mr. Gibson by his supervisors curtailed requisite IH assessment and testing at Fort Leavenworth so as to result in violations of law, rule, or regulation. Throughout the period relevant to Mr. Gibson's allegations to OSC, the MAHC chain of command used assets from the GPRMC and USACHPPM IH staffs to provide basic IH services to keep the Fort Leavenworth IH Program in compliance with all statutory and regulatory requirements. When GPRMC was unable to meet all of Fort Leavenworth's requirements, MAHC management contracted with outside IH firms to conduct necessary sampling. Further, MAHC contracted with the COE to work with Mr. Gibson to ensure that assessment and testing was conducted in accordance with established regulations, policies, and standards. These extra measures required increased man-hours and the commitment of additional resources and funding on the part of Fort Leavenworth, but across the board, all members of the MAHC staff deemed these additional commitments to be a necessary component of the due diligence required to meet IH compliance standards. It is uncontroverted that the MAHC command was united in its desire not to compromise in any way the safety or well-being of any Fort Leavenworth employee or patron.

To the credit of the entire MAHC management chain and the people and organizations that supported them by providing subject matter expertise in regard to IH Program requirements, the evidence overwhelmingly reflects that appropriate IH assessments and testing occurred on Fort Leavenworth as required. Both Mr. [redacted] and Mr. [redacted] stated that they were not aware of any "substantial and specific" danger to the public associated with the MAHC IH Program. And, neither Mr. [redacted] nor Mr. [redacted] was aware of any violation of laws or regulations. In fact, when Mr. [redacted] questioned Mr. Gibson directly about his assertion that the Command was trying to cover-up safety and health issues, Mr. Gibson was unable to provide specific information to back up his claims. Neither COL [redacted] nor COL [redacted] was aware of any IH-based non-compliance with Federal, DoD and Army rules and regulations. COL [redacted] stated that Mr. Gibson had never brought any suspected violation to her attention.

COL [redacted] stated that Mr. Gibson's visit to her on February 18, 2009, pursuant to her "open door policy" was the only occasion on which he brought any suspected violations to her attention. According to COL [redacted] she addressed all of the allegations with Mr. Gibson at that time. Moreover, Mr. Gibson was unable to provide COL [redacted] with original or complete documents, specific names, or any other actionable information supporting his allegations.

In fact, it appears that in each of the circumstances in which Mr. Gibson informed the command about potentially legitimate violations of federal law (*e.g.*, findings of asbestos exposure in Bell Hall and inorganic lead in the Sherman Army Airfield Hangar), Mr. Gibson's findings were subsequently overturned through testing by an independent third party; his assertions of violations of law, rule, and regulation were grounded solely in findings that were later determined to be inaccurate. It is reasonable to presume that Mr. Gibson's documented inability to correctly apply the appropriate standards and assess industrial hygiene risk calls into question his ability to assess IH-related violations of law and regulation. Rather, it appears that Mr. Gibson viewed any decision not to act on his assessments to constitute such a violation.

From April to August 2008, OSHA conducted a comprehensive inspection of the Fort Leavenworth work place. None of the resulting OSHA citations pertained to IH issues; the "serious" violations applied to safety and fire problems, such as machine guarding, fire extinguishers, and energy hazards, while the "other" citations were administrative in nature, mainly referring to a lack of paper documentation. The OSHA inspection made no findings regarding industrial hygiene that would support the allegations of a potential for a substantial and specific danger to the public health and safety. Neither did OSHA find any violation of law, rule, and/or regulation applicable to the MAHC IH Program.

Finally, both COL [redacted] and COL [redacted] affirmed that there were no abnormal increases in the MAHC clinic's injury, illness, or complaint rates resulting from IH-related concerns at any time during their respective tenures at MAHC. Occupational Health had not seen an increase of injuries or sickness in the Fort Leavenworth employee population, which would be expected were unsafe and unchecked hazards and risks in existence as alleged. Thanks to hard work on the part of Mr. Bentley, USACHPPM, the COE, and the MAHC command, Fort Leavenworth appears to have continuously performed all of the IH assessment and testing required by law, rule, and regulation and maintained a very safe work environment throughout the period at issue.

VIOLATIONS OR APPARENT VIOLATIONS OF LAW, RULE, OR REGULATION: The Army investigation revealed no violations or apparent violations of law, rule, or regulation in this matter.

CORRECTIVE ACTIONS UNDERTAKEN: No corrective actions are required or appropriate in this matter.

CONCLUSION

The Department of the Army takes very seriously its responsibility to address, in a timely, thorough fashion, the concerns of the OSC. In this case, the Army conducted a comprehensive investigation in response to OSC's referral. This investigation revealed the allegations to be unsubstantiated.

The investigation determined that the actions of the whistleblower's supervisors were within the scope of their supervisory responsibilities and that they neither abused their authority nor created the potential for a substantial and specific danger to the public health and safety at Fort Leavenworth, Kansas. Further, appropriate and adequate industrial hygiene assessments and testing occurred at Fort Leavenworth, Kansas, in accordance with law, rule and/or regulation.

I am satisfied that this is the correct outcome in this matter. Accordingly, the Army has made no referral of an alleged criminal violation to the Attorney General pursuant to Title 5, USC, Section 1213(d)(5)(d).

This letter, with enclosures, is submitted in satisfaction of my responsibilities under Title 5, USC, Section 1213(c) and (d). Please direct any further questions you may have concerning this matter to Ms. [redacted], at [redacted].

Sincerely,

THOMAS R. LAMONT
Assistant Secretary of the Army
(Manpower and Reserve Affairs)

Enclosures
as

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Federal Register

Privacy Act

66 FR 36611, *

FEDERAL REGISTER

Vol. 66, No. 134

Notices

OFFICE OF SPECIAL COUNSEL

Privacy Act of 1974, System of Records

66 FR 36611

DATE: Thursday, July 12, 2001

ACTION: Notice of technical revisions to system of records and proposed revision of system descriptions and routine uses.

[*36611]

SUMMARY: Pursuant to the provisions of the Privacy Act of 1974, *5 USC 552a*, notice is given that the U.S. Office of Special Counsel (OSC) is making non-substantive technical revisions to the Privacy Act system notice for the system of records designated "OSC/GOVT-1, OSC Complaint, Litigation and Political Activity Files," proposing to change descriptions of certain features of the system of records; and proposing the amendment of two current routine uses, and the addition of a new routine use. The affected system of records is maintained in connection with OSC program responsibilities under *5 U.S.C. 1212, et seq.*, and *38 U.S.C. 4324*.

DATES: The non-substantive technical revisions described in this notice are effective upon publication. Other changes proposed in the notice will become effective on [30 days after publication of this notice], unless comments received by OSC before then warrant further changes

FOR FURTHER INFORMATION CONTACT: Erin M. McDonnell, U.S. Office of Special Counsel, at (202) 653-8971.

OSC/GOVT-1

SYSTEM NAME:

OSC/GOVT-1, OSC Complaint, Litigation and Political Activity Files.

SYSTEM LOCATION:

Human and Administrative Resources Management Branch, U.S. Office of Special Counsel, 1730 M Street, NW, Suite 201, Washington, DC 20036-4505.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

The principal categories of individuals covered by the system are persons filing allegations of prohibited personnel practices, improper political activity, or other prohibited activities; persons identified as engaging or participating in such practices or activities; persons filing disclosures of alleged wrongdoing by federal agencies, and persons identified as engaging or participating in such wrongdoing; persons requesting advisory opinions on political activity, persons

charged by OSC in disciplinary action complaints filed by OSC with the Merit Systems Protection Board (MSPB), and plaintiffs seeking remedies against OSC in litigation related to the performance of its official functions

CATEGORIES OF RECORDS IN THE SYSTEM:

Correspondence with persons (or their representatives) filing allegations of prohibited personnel practices, improper political activity, or other prohibited activities, correspondence with other agencies, entities, or individuals referring matters to OSC for review and/or investigation, exhibits and other documentation from complainants, governmental entities or other third parties; interview records, including notes, summaries, or transcripts; affidavits, reports or other summaries of investigation, factual and legal summaries and analyses; administrative determinations; referrals to other agencies for appropriate action; records created or compiled in connection with litigation by or against OSC, or pertinent to OSC operations; requests and decisions under the Freedom of Information and/or Privacy Acts; and other correspondence and documents arising out of the performance of official OSC functions under *5 U.S.C. 1211*-1221, 1501-1508, and 7321-7326; *38 U.S.C. 4324*, and other applicable law or regulation.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. 552, 552a, 1211-1221, 1501-1508, and 7321-7326; and *38 U.S.C. 4324*

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

a. To disclose the fact that an allegation of prohibited personnel practices or other prohibited activity has been filed;

b. To disclose information to the Office of Personnel Management (OPM) pursuant to Civil Service Rule 5.4 (5 CFR 5.4), or to obtain an advisory opinion concerning the application or effect of civil service laws, rules, regulations or OPM guidelines in particular situations;

c. To disclose to the Equal Employment Opportunity Commission or any other agency or office concerned with the enforcement of the anti-discrimination laws, information concerning any allegation or complaint of discrimination based on race, color, religion, sex, national origin, age, or handicapping condition;

d. To disclose information to the MSPB or the President upon the filing or referral of a disciplinary action complaint against an employee on the basis of an OSC investigation,

e. To disclose information to an agency, the MSPB, OPM, and the President reporting, under *5 U.S.C. 1214*, the results of investigations which disclose reasonable grounds to believe a prohibited personnel practice has occurred, exists, or is to be taken;

f. To disclose information to Congress in connection with the submission of an annual report on activities of the Special Counsel,

g. To disclose information to any agency or person regarding allegations of prohibited personnel practices or [*36613] other prohibited activity or prohibited political activity filed against an agency or any employee thereof, for the purposes of conducting an investigation, in transmitting information to an agency under *5 U.S.C. 1213*(c)(1) and the OSC procedures established thereunder, or to give notice of the status or outcome of the investigation,

h. To disclose information to any source from which additional information is requested (to the extent necessary to identify the individual, inform the source of the purpose(s) of the request, and to identify the type of information requested), where necessary to obtain information relevant to an agency decision concerning the hiring or retention of an employee, the issuance of a security clearance, the conducting of a security or suitability investigation of an individual, the letting of a contract, or the issuance of a license, grant, or other benefit;

i. To disclose information to the Office of Management and Budget (OMB) at any stage in the legislative coordination and clearance process in connection with private relief legislation, as set forth in OMB Circular No. A-19;

j. To provide information to a congressional office from the record of an individual in response to an inquiry from that congressional office (made at the request of that individual);

k. To furnish information to the National Archives and Records Administration (NARA) in records management inspections conducted under authority of *44 U.S.C. 2904* and 2906;

l. To produce summary descriptive statistics and analytical studies in support of the function for which the records are collected and maintained or for related work force studies;

m. To disclose records to the Department of Justice (DOJ) when:

(1) The OSC, or

(2) Any employee of the OSC in his or her official capacity, or

(3) Any employee of the OSC in his or her individual capacity where the DOJ has agreed to represent the employee, or

(4) The United States, where the OSC determines that litigation is likely to affect the OSC, is a party to litigation or has an interest in such litigation, and the use of such records by the DOJ is deemed by the OSC to be relevant and necessary to the litigation, provided, however, that the OSC determines that disclosure of the records to the DOJ is a use of the information contained in the records that is compatible with the purpose for which the records were collected;

n. To disclose records maintained by the OSC in a proceeding before a court or adjudicative body before which the OSC is authorized to appear, when:

(1) The OSC, or

(2) Any employee of the OSC in his or her official capacity,

(3) Any employee of the OSC in his or her individual capacity where the OSC has agreed to represent the employee, or

(4) The United States, where the OSC determines that litigation is likely to affect the OSC, is a party to litigation or has an interest in such litigation, and the OSC determines that use of such records is relevant and necessary to the litigation, provided, however, that the OSC determines that disclosure of the records is a use of the information contained in the records that is compatible with the purpose for which the records were collected;

o. To disclose information to the MSPB to aid in the conduct of special studies by the Board under *5 U.S.C. 1204*(a)(3);

p. To disclose information to the Office of Inspector General (OIG) or comparable internal inspection, audit, or oversight office of an agency for the purpose of facilitating the coordination and conduct of investigations and review of allegations within the purview of both the OSC and the agency OIG or comparable office;

q. To disclose information to the news media and the public when (1) the matter under investigation has become public knowledge, (2) the Special Counsel determines that disclosure is necessary to preserve confidence in the integrity of the OSC investigative process or is necessary to demonstrate the accountability of OSC officers, employees, or individuals covered by this system, or (3) the Special Counsel determines that there exists a legitimate public interest (e.g., to demonstrate that the law is being enforced, or to deter the commission of prohibited personnel practices, prohibited political activity, and other prohibited activity within the OSC's jurisdiction), except to the extent that the Special Counsel determines in any of these situations that disclosure of specific information in the context of a particular case would constitute an unwarranted invasion of personal privacy, and

r. To disclose information to the U.S. Department of Labor (DOL) about OSC's referral of a complaint alleging a violation of veterans preference requirements to DOL for further action under the Veterans' Employment Opportunities Act of 1998 further; action under the Veterans' Employment Opportunities Act of 1998 (VEOA); to disclose information to DOL or any agency or person as needed to develop relevant information about matters referred by DOL to OSC under *38 U.S.C. 4324* (the Uniformed Services Employment and Reemployment Rights Act of 1994)the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA); to disclose information to DOL or any agency or person as needed to advise on the status or disposition of matters referred by DOL to OSC for disciplinary action under *5 U.S.C. 1215*, or corrective action litigation under *538 U.S.C. 4324*.

POLICIES AND PRACTICES FOR STORAGE, RETRIEVAL, ACCESS CONTROLS, RETENTION AND DISPOSAL OF RECORDS IN THE SYSTEM:

Storage:

These records are stored in a variety of media, primarily consisting of file folders, and computer storage equipment

RETRIEVABILITY:

Files in this system of records are retrievable by the names of key individuals or agencies involved (e.g., complainants or requesters, subjects identified in corrective action or disciplinary proceedings, warning letters, or other determinations, legal, congressional, or other representatives or points of contact; or key witnesses), although files are generally retrieved by the name of: (a) The complainant alleging a prohibited personnel practice, or other prohibited activity, (b) the alleged subject of a complaint about prohibited political activity; (c) the person filing an allegation through the OSC whistleblower disclosure channel; (d) the name of the person filing a request for an advisory opinion on political activity, (e) the name of the person on whose behalf OSC seeks corrective action, or the person against whom OSC seeks disciplinary action, in litigation before the MSPB, and (f) the plaintiff in litigation against OSC

SAFEGUARDS:

These records are located in lockable file cabinets or in secured areas The required use of computer password protection identification features and other system protection methods also restrict access. Access is limited to those agency personnel who have an official need for access to perform their duties.

RETENTION AND DISPOSAL:

NARA keeps records about prohibited personnel practices and other prohibited activity for three years after the matter or case is closed, or for six years if the file has been the subject of a Freedom of Information Act request [*36614] NARA is responsible for disposal of OSC records pursuant to law and regulation.

SYSTEM MANAGER(S) AND ADDRESS:

The official responsible for records management functions associated with OSC program and administrative files, including those in the OSC/GOVT-1 system of records, is the Records Management Officer, Human and Administrative Resources Management Branch, U.S Office of Special Counsel, 1730 M Street, NW, Suite 201, Washington, DC 20036-4505

NOTIFICATION PROCEDURE:

Individuals who wish to inquire whether this system contains information about them should contact the system manager. To assist in the process of locating and identifying records, individuals should furnish the following:

a. Name and address;

b. Date and place of birth;

c. Social Security number;

d. A description of the circumstances under which records may have been included in the system

RECORD ACCESS PROCEDURES:

Same as notification procedure, above.

CONTESTING RECORD PROCEDURES:

Individuals who wish to contest records about them should contact the system manager, identify any information they believe should be corrected, and furnish a statement of the basis for the requested correction along with all available supporting documents and materials

RECORD SOURCE CATEGORIES:

Information in this system of records is obtained from a variety of sources, consisting of complainants or others on whose behalf allegations, or requests for information, have been submitted or referred to OSC; legal, congressional, or other representatives or points of contact, other government bodies, witnesses and subjects in matters under review,

principals involved in litigation matters, including parties and their representatives, and other persons or entities furnishing information pertinent to the discharge of functions for which OSC is responsible

EXEMPTIONS CLAIMED FOR THE SYSTEM:

a. Complaint, Litigation and Political Activity files containing investigatory material compiled by OSC for law enforcement purposes are exempt to the extent allowed under subsections (k)(2) and (5) of the Privacy Act. This exemption is necessary to protect confidential sources and facilitate the voluntary cooperation of witnesses during inquiries into allegations of prohibited personnel practices or other prohibited activities.

b. Testing or examination material compiled by OSC solely to determine individual qualifications for appointment or promotion in the Federal service is exempt to the extent allowed under subsection (k)(6) of the Privacy Act. This exemption is necessary to prevent the disclosure of information that would potentially give an individual an unfair competitive advantage or diminish the utility of established examination procedures.

c. OSC reserves the right to assert exemptions for records received from another agency that could be properly claimed by that agency in responding to a request, and OSC may refuse access to information compiled in reasonable anticipation of a civil action or proceeding, pursuant to subsection (d)(5) of the Privacy Act.

Dated: June 29, 2001

Elaine Kaplan,

Special Counsel

[FR Doc. 01-17418 Filed 7-11-01; 8:45 am]

BILLING CODE 7405-01-P

SUPPLEMENTARY INFORMATION: OSC is an independent investigative and prosecutorial agency. Its responsibilities include investigation of allegations of: (a) Prohibited personnel practices under *5 U.S.C. 2302*(b), and other prohibited employment practices under *5 U.S.C. 1216*, (b) prohibited political activity by federal and District of Columbia employees under *5 U.S.C. 7321*-7326, and by certain state and local government employees under *5 U.S.C. 1501*-1508; and (c) prohibited personnel practices in cases referred to OSC by the Merit Systems Protection Board (MSPB) under *5 U.S.C. 1221*(i)(3). OSC is authorized to seek appropriate corrective and/or disciplinary action in these matters through litigation before the MSPB. Under *5 U.S.C. 1213*, OSC operates a hotline channel for confidential whistleblower disclosures by current and former federal employees or former federal employees. Section 1212(f) of title 5 authorizes OSC to provide advisory opinions on request to government employees and others about whether or not they may engage in specific political activities under the Hatch Act. Finally, OSC is authorized to represent claimants in cases arising under provisions of the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), at *38 U.S.C. 4311, et seq.*

Information developed in connection with these OSC responsibilities is maintained in the OSC/GOVT-1 system of records, which includes certain records subject to the Privacy Act. These include records in complaint files, disclosure files, Hatch Act advisory opinion files, and litigation files (in connection with litigation filed by or against OSC or its employees). The last full notice of the system was published at *64 FR 63359-63361* (November 19, 1999); minor numbering corrections were published at *65 FR 6436* (February 9, 2000).

OSC is revising the OSC/GOVT-1 system notice to: (1) Make non-substantive technical revisions; (2) propose changes in the descriptions of certain features of the system of records to update information shown in prior system notices, and (3) propose the amendment of current routine uses "p" and "q," and the addition of a new routine use "r," addressing disclosures in furtherance of OSC and U.S. Department of Labor (DOL) responsibilities for the protection of federal employment rights of veterans and reservists.

Non-substantive technical revisions are made in this notice to correct editorial errors in the November 1999 system notice, add useful citations, reflect changes in the administrative location of the system manager and the system of records; update OSC's official mailing address; and correct the description of routine use "o" by restoring the word "under" in place of "use." ("[U]nder" had appeared in prior system notices, but was inadvertently changed to "use" in the November 1999 notice.)

This notice also proposes to change descriptions of categories of individuals covered by the system of records, retrievability of records in the system, and system safeguards, to update information shown in prior system notices.

Finally, this notice proposes to amend current routine use "p." by deleting "and" at the end of the text, and current routine use "q," by striking the period at the end and adding "; and". The notice also proposes a new routine use "r," to disclosures of information by OSC to DOL and others, in furtherance of OSC and DOL responsibilities for protection of federal employment rights under USERRA and the Veterans' Employment Opportunities Act of 1998 (VEOA) (amending title 5). Current routine uses cover OSC disclosures during the processing of all complaints within its jurisdiction, including for investigative and litigation purposes. OSC believes, however, that a routine [*36612] use tailored to certain responsibilities of OSC and DOL in processing alleged violations of veterans' and reservists' federal employment rights will facilitate implementation of those responsibilities, consistent with procedures agreed to by OSC and DOL. A brief summary of the responsibilities addressed by the proposed new routine use follows:

Violations of veterans' preference requirements (5 U.S.C. 2302(b)(11)). OSC initially refers alleged violations of veterans' preference requirements to DOL for further action under the VEOA. (The MSPB lacks authority to order corrective action for violations alleged under *5 U.S.C. 2302*(b)(11), which makes it a prohibited personnel practice to knowingly take, recommend, or approve, or fail to take, recommend, or approve any personnel action, if doing so would violate a veterans' preference requirement.) OSC has agreed to notify DOL of each such referral. DOL, in turn, will refer matters as appropriate to OSC for possible disciplinary action under *5 U.S.C. 1215*.

Violations of employment/re-employment rights (USERRA). Upon request by a claimant, DOL refers unresolved complaints alleging violations of veterans' rights to OSC pursuant to *38 U.S.C. 4324*. If OSC is reasonably satisfied that the claimant is entitled to relief under USERRA, it may represent that person in litigation seeking corrective action before the MSPB (and, as necessary, the Federal Circuit Court of Appeals). In reviewing issues identified in the initial referral, OSC may contact DOL or any agency or person as needed to obtain relevant information on the claimant's entitlement to relief, and may consult with DOL on representation issues. If OSC declines representation, it notifies the claimant. OSC may also notify the agency involved. (No information about the basis for OSC's decision or OSC's assessment of the case is provided to the agency.)

For ease of reference by other government entities and the public, the entire system notice is printed below. It includes all non-substantive technical revisions, proposed changes to descriptions of system features listed above, proposed revisions to routine uses "p" and "q," and the proposed new routine use "r."

In accordance with *5 U.S.C. 552a*(r), OSC has provided a report to the Office of Management and Budget (OMB) and the Congress on significant changes proposed in this notice.

COMMENTS: In accordance with *5 U.S.C. 552a*(e)(4) and (11), members of the public are given a 30-day period in which to comment. (OMB, which has oversight responsibility under the Privacy Act, also requires an opportunity for its review of significant changes proposed in the notice.) Any comments should be submitted to OSC in writing by August 13, 2001. Comments should be sent by mail to Erin M. McDonnell, Planning and Advice Division, U.S. Office of Special Counsel, 1730 M Street, NW, Suite 201, Washington DC 20036-4505; comments may also be sent to the same addressee by fax, at (202)-653-5161.

3

DOD

Policy Memoranda

OFFICE OF THE SECRETARY OF DEFENSE
1950 DEFENSE PENTAGON
WASHINGTON, DC 20301-1950

ADMINISTRATION AND MANAGEMENT

SEP 1 2005

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS
CHAIRMAN OF THE JOINT CHIEFS OF STAFF
UNDER SECRETARIES OF DEFENSE
ASSISTANT SECRETARIES OF DEFENSE
GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
DIRECTOR, OPERATIONAL TEST AND EVALUATION
INSPECTOR GENERAL OF THE DEPARTMENT OF DEFENSE
ASSISTANTS TO THE SECRETARY OF DEFENSE
DIRECTOR, ADMINISTRATION AND MANAGEMENT
DIRECTOR, PROGRAM ANALYSIS AND EVALUATION
DIRECTOR, NET ASSESSMENT
DIRECTOR, FORCE TRANSFORMATION
DIRECTORS OF THE DEFENSE AGENCIES
DIRECTORS OF THE DOD FIELD ACTIVITIES

SUBJECT: Withholding of Information that Personally Identifies DoD Personnel

This guidance was previously issued on February 3, 2005, but its importance mandates that it be published again to reinforce significant security considerations.

Organizations outside the Federal Government often approach DoD personnel to obtain updated contact information for their publications, which are then made available to the general public. The information sought usually includes names, job titles, organizations, phone numbers, and sometimes room numbers.

The Director, Administration and Management, issued a policy memorandum on November 9, 2001 (attached) that provided greater protection of DoD personnel in the aftermath of 9/11 by requiring information that personally identifies DoD personnel be more carefully scrutinized and limited. Under this policy, personally identifying information may be inappropriate for inclusion in any medium available to the general public. A December 28, 2001, memorandum from the Assistant Secretary of Defense for Command, Control, Communications and Intelligence (attached) issued a policy limiting publication of personally identifying information on web sites.

The following policy augments the above cited memoranda and is in effect with regard to publication of information that personally identifies DoD personnel in publications accessible by the general public. In general, release of information on DoD personnel will be limited to the names, official titles, organizations, and telephone numbers for personnel only at the office director level or above, provided a determination is made that disclosure does not raise security or privacy concerns. No other information, including room numbers, will

OSD 17746-05

normally be released about these officials. Consistent with current policy, as delineated in the referenced memoranda issued in 2001, information on officials below the office director level may continue to be released if their positions or duties require frequent interaction with the public.

Questions regarding this policy should be directed to Mr. Will Kammer, Office of Freedom of Information, at 703-696-4495.

Howard G. Becker
Deputy Director

Attachments:
As Stated

cc: Secretary of Defense
Deputy Secretary of Defense

OFFICE OF THE SECRETARY OF DEFENSE
1950 DEFENSE PENTAGON
WASHINGTON, DC 20301-1950

ADMINISTRATION AND MANAGEMENT

FEB 0 3 2005

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS
CHAIRMAN OF THE JOINT CHIEFS OF STAFF
UNDER SECRETARIES OF DEFENSE
ASSISTANT SECRETARIES OF DEFENSE
GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
DIRECTOR, OPERATIONAL TEST AND EVALUATION
INSPECTOR GENERAL OF THE DEPARTMENT OF DEFENSE
ASSISTANTS TO THE SECRETARY OF DEFENSE
DIRECTOR, ADMINSTRATION AND MANAGEMENT
DIRECTOR, PROGRAM ANALYSIS AND EVALUATION
DIRECTOR, NET ASSESSMENT
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DIRECTORS OF THE DEFENSE AGENCIES
DIRECTORS OF THE DOD FIELD ACTIVITIES

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may continue to be released if their positions or duties require frequent interaction with the public.

Questions regarding this policy should be directed to Will Kammer, Office of Freedom of Information, at 703-697-1171.

Raymond F. DuBois
Director

Attachments:
As Stated

cc: Secretary of Defense
Deputy Secretary of Defense

ASSISTANT SECRETARY OF DEFENSE
6000 DEFENSE PENTAGON
WASHINGTON, DC 20301-6000

December 28, 2001

COMMAND, CONTROL,
COMMUNICATIONS, AND
INTELLIGENCE

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS
CHAIRMAN OF THE JOINT CHIEFS OF STAFF
UNDER SECRETARIES OF DEFENSE
DIRECTOR, DEFENSE RESEARCH AND ENGINEERING
ASSISTANT SECRETARIES OF DEFENSE
GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
INSPECTOR GENERAL OF THE DEPARTMENT OF DEFENSE
DIRECTOR, OPERATIONAL TEST AND EVALUATION
ASSISTANTS TO THE SECRETARY OF DEFENSE
DIRECTOR, ADMINISTRATION AND MANAGEMENT
DIRECTOR, NET ASSESSMENT
DIRECTORS OF THE DEFENSE AGENCIES
DIRECTORS OF THE DOD FIELD ACTIVITIES

SUBJECT: Removal of Personally Identifying Information of DoD Personnel from Unclassified Web Sites

In accordance with DoD 5400.7-R, "DoD Freedom of Information Act Program," unclassified information which may be withheld from the public by one or more Freedom of Information Act (FOIA) exemptions is considered For Official Use Only (FOUO). DoD Web Site Administration policy (www.defenselink.mil/webmasters), issued by Deputy Secretary of Defense memorandum, December 7, 1998, prohibits posting FOUO information to publicly accessible web sites and requires access and transmission controls on sites that do post FOUO materials (see Part V, Table 1).

The attached November 9, 2001, memorandum from the Director, Administration and Management (DA&M), citing increased risks to DoD personnel, states that personally identifying information regarding all DoD personnel may be withheld by the Components under exemption (b)(6) of the FOIA, 5 USC §552. This action makes the information which may be withheld FOUO and inappropriate for posting to most unclassified DoD web sites.

Thus, all personally identifying information regarding DoD personnel now eligible to be withheld under the FOIA must be removed from publicly accessible web pages and web pages with access restricted only by domain or IP address (i.e., .mil restricted). This applies to unclassified DoD web sites regardless of domain (e.g., .com, .edu, .org, .mil, .gov) or sponsoring organization (e.g., Non-Appropriated Fund/Morale, Welfare and

Recreations sites; DoD educational institutions). The information to be removed includes name, rank, e-mail address, and other identifying information regarding DoD personnel, including civilians, active duty military, military family members, contractors, members of the National Guard and Reserves, and Coast Guard personnel when the Coast Guard is operating as a service in the Navy.

Rosters, directories (including telephone directories) and detailed organizational charts showing personnel are considered lists of personally identifying information. Multiple names of individuals from different organizations/locations listed on the same document or web page constitutes a list. Aggregation of names across pages must specifically be considered. In particular, the fact that data can be compiled easily using simple web searches means caution must be applied to decisions to post individual names. If aggregation of lists of names is possible across a single organization's web site/pages, that list should be evaluated on its merits and the individual aggregated elements treated accordingly.

Individual names contained in documents posted on web sites may be removed or left at the discretion of the Component, in accordance with the DA&M guidance. This direction does not preclude the discretionary posting of names and duty information of personnel who, by the nature of their position and duties, frequently interact with the public, such as flag/general officers, public affairs officers, or other personnel designated as official command spokespersons. Posting such information should be coordinated with the cognizant Component FOIA or Public Affairs office.

In keeping with the concerns stated in the referenced memorandum and in the October 18, 2001, DepSecDef memorandum, "Operations Security Throughout the Department of Defense," the posting of biographies and photographs of DoD personnel identified on public and .mil restricted web sites should also be more carefully scrutinized and limited.

Sites needing to post contact information for the public are encouraged to use organizational designation/title and organizational/generic position e-mail addresses (e.g., office@organization.mil; helpdesk@organization.mil; commander@base.mil).

Questions regarding Web Site Administration policy may be directed to Ms. Linda Brown. She can be reached at (703) 695-2289 and e-mail Linda.Brown@osd.mil. Questions regarding Component-specific implementation of the DA&M memorandum should be directed to the Component FOIA office.

John P. Stenbit

Attachment
As stated

Encl 4

Mudd Case

OFFICE OF THE SECRETARY OF DEFENSE
1950 DEFENSE PENTAGON
WASHINGTON, DC 203014950

ADMINISTRATION &
MANAGEMENT

November 9, 2001

Ref: 01-CORR-101

MEMORANDUM FOR DOD FOIA OFFICES

SUBJECT: Withholding of Personally Identifying Information Under the Freedom of Information Act (FOIA)

The President has declared a national emergency by reason of the terrorist attacks on the United States. In the attached memorandum, the Deputy Secretary of Defense emphasizes the responsibilities all DoD personnel have towards operations security and the increased risks to US military and civilian personnel, DoD operational capabilities, facilities and resources. All Department of Defense personnel should have a heightened security awareness concerning their day-to-day duties and recognition that the increased security posture will remain a fact of life for an indefinite period of time.

This change in our security posture has implications for the Defense Department's policies implementing the Freedom of Information Act (FOIA). Presently all DoD components withhold, under 5 USC § 552(b)(3), the personally identifying information (name, rank, duty address, official title, and information regarding the person's pay) of military and civilian personnel who are assigned overseas, on board ship, or to sensitive or routinely deployable units. Names and other information regarding DoD personnel who did not meet these criteria have been routinely released when requested under the FOIA. Now, since DoD personnel are at increased risk regardless of their duties or assignment to such a unit, release of names and other personal information must be more carefully scrutinized and limited.

I have therefore determined this policy requires revision. Effective immediately, personally identifying information (to include lists of e-mail addresses) in the categories listed below must be carefully considered and the interests supporting withholding of the information given more serious weight in the analysis. This information may be found to be exempt under 5 USC § 552(b)(6) because of the heightened interest in the personal privacy of DoD personnel that is concurrent with the increased security awareness demanded in times of national emergency.

- Lists of personally identifying information of DoD personnel: All DoD components shall ordinarily withhold lists of names and other personally identifying information of personnel currently or recently assigned within a particular component, unit, organization or office with the Department of Defense in response to requests under the FOIA. This is to include active duty military personnel, civilian employees, contractors, members of the National Guard and Reserves, military dependents, and Coast Guard personnel when the Coast Guard is operating as a service in the Navy. If a particular request does not raise

security or privacy concerns, names may be released as, for example, a list of attendees at a meeting held more than 25 years ago. Particular care shall be taken prior to any decision to release a list of names in any electronic format.

- Verification of status of named individuals: DoD components may determine that release of personal identifying information about an individual is appropriate only if the release would not raise security or privacy concerns and has been routinely released to the public.

- Names in documents that don't fall into any of the preceding categories: Ordinarily names of DoD personnel, other than lists of names, mentioned in documents that are releasable under the FOIA should not be withheld, but in special circumstances where the release of a particular name would raise substantial security or privacy concerns, such a name may be withheld.

When processing a FOIA request, a DoD component may determine that exemption (b)(6) does not fully protect the component's or an individual's interests. In this case, please contact Mr. Jim Hogan, Directorate of Freedom of Information and Security Review, at (703) 697-4026, or DSN 227-4026.

This policy does not preclude a DoD component's discretionary release of names and duty information of personnel who, by the nature of their position and duties, frequently interact with the public, such as flag/general officers, public affairs officers, or other personnel designated as official command spokespersons.

D. O. Cooke
Director

Attachment:
As stated

4

James Mudd

v.

United States Army

FILED

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

05 APR -1 PM 2:26

JAMES V. MUDD,

Plaintiff,

vs.

UNITED STATES ARMY, UNITED STATES OFFICE OF SPECIAL COUNSEL, and UNITED STATES DEPARTMENT OF DEFENSE,

Defendants.

CASE NO. _____

2:05-cv-137-FtM-29DNF

COMPLAINT AND JURY DEMAND

Plaintiff JAMES V. MUDD (hereinafter "MUDD"), by and through his undersigned attorneys, sues Defendants, the UNITED STATES ARMY, the UNITED STATES OFFICE OF SPECIAL COUNSEL, and the UNITED STATES DEPARTMENT OF DEFENSE (hereinafter individually, "ARMY", "SPECIAL COUNSEL", and "DOD", and collectively, "Defendants"), and alleges as follows:

PARTIES

1. MUDD is an individual residing in Collier County, Florida who retired honorably as a Colonel in the United States Army after serving the United States of America with distinction for 26 years.

2. ARMY is a department of the United States Government with its principal location in Alexandria, Virginia.

3. SPECIAL COUNSEL is a department of the United States Government with its principal location in Washington, D.C.

4. DOD is a department of the United States Government with its principal location in Alexandria, Virginia.

JURISDICTION AND VENUE

5. This Court has jurisdiction over the claims in this complaint pursuant to 28 U.S.C. § 1331.

6. This Court has venue over the claims in this complaint pursuant to 28 U.S.C. § 1402.

GENERAL ALLEGATIONS

7. MUDD graduated from the United States Military Academy at West Point and was commissioned as a Second Lieutenant in the ARMY in 1974.

8. MUDD served in the ARMY with distinction rising to the rank of Colonel until his retirement on September 1, 2000, having served his country faithfully for 26 years.

Upper Mississippi River Navigation Study

9. The Upper Mississippi River is a portion of the Mississippi River which extends from Minneapolis, Minnesota, to the confluence of the Ohio River just north at Cairo, Illinois. The Upper Mississippi River is 854 miles long and has 29 locks and dams located on it. The Illinois Waterway which serves as the connecting link between the Great Lakes, the Saint Lawrence Seaway, and the Mississippi River has 8 locks and dams located on it. The system of locks and dams on the Upper Mississippi River and the Illinois Waterway is referred to as the Upper Mississippi River-Illinois Waterway navigation system. The Upper Mississippi River-Illinois Waterway navigation system provides a transportation network linking the upper Midwestern United States to domestic and overseas markets.

10. During the 1980s, the U.S. Army Corps of Engineers (the "Corps") was given Congressional authorization to undertake a formal study of the Upper Mississippi River-Illinois Waterway navigation system.

11. As part of the Corps' Civil Works Project Development Process, separate reconnaissance studies of the Illinois Waterway and the Upper Mississippi River were undertaken from 1989 to 1991. The results of these studies indicated that major capital improvements would be needed on at least five locks in the navigation system.

12. A single Upper Mississippi River – Illinois Waterway Navigation Study (the "Study") was initiated by the Corps beginning in 1993 to describe and evaluate alternative project plans, assess environmental impacts and determine if a solution could be economically beneficial.

13. From the beginning, the Study was not without controversy. Environmental and taxpayer organizations argued that major capital improvements to the system were neither cost effective nor environmentally sound for the Mississippi River ecosystem. The navigation industry, on the other hand, argued that system modernization was vital to protecting the economic well being of the Upper Mississippi River basin.

14. By the year 2000, the estimated cost for the Study was almost $21 million over the original estimate.

Involvement of Dr. Sweeney in the Study

15. The Economic Work Group (the "EWG") for the Study was responsible for determining the economic benefits of the various project alternatives. To fulfill its mission, the EWG's technical manager, Dr. Donald Sweeney, who was also referred to as the Study's lead economist, devised a new economic modeling technique for the Study.

16. According to the lead economist, his new modeling technique was a distinct improvement over the modeling technique utilized by the Corps for years because it, for the first time, attempted to account for the willingness of the navigation system users to continue using the system as user costs increase.

17. Under the new modeling technique, the elasticity of demand, or the willingness of the users to use the system as costs increase, is a vitally important component which was referred to as the "N" value.

Involvement of MUDD in Study

18. In April 1997, as a result of a Corps wide restructuring, the Mississippi Valley Division of the Corps became the division directly responsible for the Study. Prior to this time, responsibility had been shared between two different divisions within the Corps. The Rock Island District maintained the lead district status for the Study throughout the restructuring.

19. In July 1997, MUDD took over as Commander of the Rock Island District, Mississippi Valley Division of the U.S. Army Corps of Engineers.

20. After assuming command of the Rock Island District and familiarizing himself with the current status of the Study, MUDD became concerned with the apparent repeated failure of the lead economist and his team to meet deadlines.

21. MUDD also became concerned regarding some of the assumptions being made by the lead economist particularly as those assumptions related to the "N" value in the economic model.

22. MUDD asked the lead economist and the EWG for the fundamental basis surrounding the proposed N-value of 1.5 and was informed that the various economists could not determine an absolute N-value. The EWG informed MUDD that some economists had argued

for a value of 2.0 (very elastic) and others had argued for a value of 1.0 (very inelastic), and so ultimately they had compromised by consensus on the value of 1.5.

23. MUDD informed the lead economist and the EWG that as the N-value was a key component to the economic model, the Corps needed an N-value that could be logically defended and empirically supported during the public review process that followed the release of the draft and final reports. MUDD then asked the EWG to come up with a N-value that could be defended and supported.

24. Around this time, MUDD, in consultation with his Division Commander, had the lead economist reassigned off of the Study due to the repeated failures of he and his team to meet deadlines.

25 While the EWG was exploring options for a new N-value for the economic model, MUDD also approached experts in the area regarding the historical elasticity of grain on the Mississippi River and was advised that approximately 70% of the grain transported on the navigation system which originated in Iowa, the only state for which such data existed, was derived from eastern Iowa, 20% was derived from central Iowa, and 10% was derived from western Iowa, and was also informed that the elasticity of demand for use of the navigation system would depend in large measure on where the grain to be shipped was derived. MUDD presented this information, including some proposed elasticities derived from the experts and from the Iowa Grain Flow Survey, to the new lead economist and suggested that perhaps a more defensible position was to take a weighted average of the elasticities of the grain.

26. Shortly thereafter, the new lead economist approached MUDD and suggested an N-value of 1.2, which was the weighted average of the elasticities obtained by MUDD. In June

of 1999, MUDD accepted this recommendation and ordered that an N-value of 1.2 be utilized by the EWG in its efforts to utilize the economic model developed by Dr. Sweeney.

Sweeney Whistleblower Claims

27. After his removal from the Study in February 2000, the former lead economist, and the creator of the economic modeling system that is contingent on an appropriate N-value, filed an affidavit with the U.S. Office of Special Counsel accusing Corps officials of altering Study data in order to justify major capital improvements to the navigation system.

28. Specifically, the former lead economist charged that MUDD and others had intentionally altered the proposed N-value of 1.5 to 1.2 in order to support additional capital improvements on the navigation system.

29 Based solely upon this affidavit, the U.S. Office of Special Counsel found a substantial likelihood that the Corps violated regulations and wasted millions of dollars of taxpayer funds and requested that the Department of Defense investigate the allegations contained in the affidavit.

Investigations

30. In the Spring of 2000, the Department of the Army Inspector General ("DAIG") began an investigation into the alleged misconduct of Corps officials.

31. Also during this time, various environmental groups, who generally opposed any major capital improvements to the navigation system, assisted the lead economist in gaining wide media coverage of his allegations.

32. This large media coverage lead to hearings being called by Congress regarding the Study in the Spring of 2000 The Congressional hearings did not yield any allegations of fraud or criminal intent by any Corps officials, including MUDD. In fact, subsequent

Congressional findings indicate the exact opposite that Corps officials acted appropriately in attempting to fix a fundamentally flawed economic model.

33 In June of 2000, the National Academy of Sciences initiated a review of the Corps' methodology for the conduct of the Study, particularly the methodology being utilized in the economic model proposed by the former lead economist, which was initially scheduled to be released in November of 2000.

34. On September 1, 2000, MUDD retired from the Army and received an honorable discharge.

Release of the Report

35. On September 28, 2000, the Secretary of the Army approved the DAIG Report of Investigation (the "DAIG Report") and forwarded the same to the Secretary of Defense. Clearly printed at the bottom of each page of the DAIG Report was the language "For Official Use Only. Dissemination Is Prohibited Except As Authorized By AR 20-1."

36. The Report indicated among other things that MUDD took or directed actions which he knew, or reasonably should have known, would contribute to the production of a feasibility study failing to meet standards established in law and regulation.

37. On November 13, 2000, the Secretary of Defense forwarded the DAIG Report to the Office of the Special Counsel with an admonition that the Report contained information that may be considered as a basis for adverse actions against individuals and therefore it should only be distributed to those whose duties and official responsibilities required access to it in order to protect the privacy of those individuals and witnesses who requested confidentiality.

38 On November 17, 2000, the Department of the Army responded to an inquiry from the Office of Special Counsel regarding the timeline for the release of the National

Academy of Sciences review and informed the Office of the Special Counsel that the National Academy of Sciences had requested a three month extension within which to release the results of its investigation. Consequently, the National Academy of Sciences was not going to release the results of its investigation until February of 2001 at the earliest.

39. On November 20, 2000, the Office of Special Counsel gave a copy of the DAIG Report to Dr. Sweeney for his review and comments, which he placed in writing on December 1, 2000.

40. MUDD was not given a copy of the DAIG Report prior to its release, nor was he given the opportunity to comment on all of the allegations against him contained in the DAIG Report prior to it being released to the media.

41. On December 6, 2000, the Office of Special Counsel held a press conference whereby it released copies of the complete DAIG Report to all of the members of the press that were present and the Office also posted a complete copy of the DAIG Report on the Internet on its web-site.

42. By correspondence dated December 12, 2000, MUDD received a Memorandum of Admonishment from General John M. Keane, the Vice Chief of Staff for the Army. According to the Memorandum of Admonishment, MUDD was admonished for improperly taking or directing actions which he knew, or reasonably should have known, would contribute to the production of a feasibility study that would fail to meet standards established in law and regulation. General Keane did not officially admonish MUDD because he believed that MUDD's decision to change the N-value in the study was based on methodology that MUDD believed was more appropriate and reasonable.

43. By correspondence dated December 14, 2000, MUDD was informed by the DAIG that the investigation was concluded, that the findings had been approved by the Secretary of the Army and that the Vice Chief of Staff for the Army would be taking action that he deems appropriate.

44. In February of 2001, the National Academy of Sciences released its report finding that the economic model developed by Dr. Sweeney was fundamentally flawed.

MUDD Follow-Up

45. Both before its release by the Office of Special Counsel, and after, MUDD filed four separate requests with ARMY to receive a copy of the completed Report and copies of the transcripts of his own testimony in the investigation. Each of these requests were forwarded also to the Office of Special Counsel. Ultimately, MUDD was informed that the DAIG could not provide him with a copy of the Report, but was directed by a representative of ARMY to download a copy of the Report from the web-site for SPECIAL COUNSEL. Copies of these requests and responses are attached hereto at Tabs D and E of Composite Exhibit "1".

46. By correspondence dated January 28, 2001, MUDD informed ARMY that the Report was posted on the web-site for the Office of Special Counsel. ARMY did nothing to protect MUDD's rights to privacy regarding the improper dissemination of his private information. A copy of this correspondence is attached hereto at Tab G of Composite Exhibit "1".

47. By correspondence dated March 10, 2001, MUDD appealed his admonishment and the findings of the DAIG Report to the Vice Chief of Staff of the Army, in light of the findings of the National Academy of Sciences and provided additional materials that appeared to have been overlooked by the DAIG during its investigation. A copy of this correspondence is

attached hereto at Tab A of Composite Exhibit "1". As the issuing officer of the Memorandum of Admonishment and the individual in the chain of command that oversees the activities of the DAIG, the Vice Chief of Staff of the Army is the appropriate individual to receive MUDD's appeal. MUDD received no response to his appeal.

48. By correspondence dated January 3, 2003, MUDD advised the Vice Chief of Staff of the Army that he had received no response to his earlier appeal and requested a response. MUDD received no response to his appeal. A copy of this correspondence is attached hereto at Tab B of Composite Exhibit "1".

49. By correspondence dated April 16, 2003, MUDD, by and through the undersigned counsel, again appealed his admonishment and the findings of the DAIG Report to the Vice Chief of Staff of the Army. A copy of this correspondence is attached hereto at Tab H of Composite Exhibit "1".

50. By correspondence dated June 6, 2003, ARMY finally responded to MUDD's appeal with notice that his concerns were being reviewed. A copy of this correspondence is attached hereto at Tab I of Composite Exhibit "1".

51. By correspondence dated July 31, 2003, MUDD provided ARMY with additional support for his appeal in the form of notice that after two years of study and review, the Corps had determined that MUDD's N-value of 1.2 was an appropriate value for the elasticity of grain on the navigation system. A copy of this correspondence is attached hereto at Tab J of Composite Exhibit "1".

52. By correspondence dated October 2, 2003, MUDD provided ARMY with additional support for his appeal which corroborated the information contained in the July 31,

2003 correspondence. A copy of this correspondence is attached hereto at Tab K of Composite Exhibit "1".

53. After receiving no updates from ARMY since June 6, 2003, MUDD again contacted ARMY by correspondence dated December 9, 2003, requesting an update on the status of the appeal. A copy of this correspondence is attached hereto at page 1 of Tab L of Composite Exhibit "1".

54. By correspondence dated December 16, 2003, ARMY finally responded that the DAIG had completed its review of MUDD's appeal on September 26, 2003, but in light of the additional information provided in October, there was a delay in responding as they considered the additional evidence. A copy of this correspondence is attached hereto at page 2 of Tab L of Composite Exhibit "1".

55. Finally, by correspondence dated January 26, 2004, ARMY responded that the information provided by MUDD did not merit a change in the findings of the DAIG Report. A copy of this correspondence is attached hereto at page 3 of Tab L of Composite Exhibit "1".

56. MUDD attempted to informally achieve a resolution of this matter, but his efforts were rebuffed.

57. By correspondence dated August 10, 2004, because he had never received any response from the Vice Chief of Staff of the Army, the only individual who could effect a change in his admonishment and/or the DAIG Report findings, MUDD attempted one last effort to appeal the findings to the Vice Chief of Staff of the Army. A copy of this correspondence is attached hereto as Composite Exhibit "1".

58. By correspondence dated October 1, 2004, ARMY again denied MUDD's attempts to appeal his Memorandum of Admonishment and the DAIG Report findings. A copy of this correspondence is attached hereto as Exhibit "2".

59. As demonstrated by the above correspondence, MUDD has exhausted his administrative remedies.

Additional Studies

60. In August of 2003, the United States Department of Agriculture released a study of the elasticity of grain on the navigation system and found it, contrary to the assumptions of Dr. Sweeney and the EWG prior to the questioning by MUDD, to be highly inelastic.

61. In April of 2004, the Tennessee Valley Authority also released the results of a study that examined the economic model developed by Dr. Sweeney, and particularly his concept of the elasticity of grain on the navigation system, and found that the elasticity assumptions of Dr. Sweeney and the EWG, prior to the questioning by MUDD, were inaccurate.

62. Also in April of 2004, the Corps released its draft Study Report. Interestingly, despite the admonition of the National Academy of Sciences in February of 2001, the Corps continued to utilize the economic model developed by Dr. Sweeney. Moreover, the elasticity values utilized by the Corps in the draft Study Report are exactly the same as the N-value of 1.2 adopted by MUDD, and for which he was admonished.

63. In late 2004, after the appropriate public comment periods, the Corps issued its Final Report which continues to utilize the N-value adopted by MUDD.

Review Process

64. Once a draft feasibility report is issued by the Corps district responsible for the study, there is a two to three month public review and comment period for the draft report.

65. Once the public review and comment period is completed, the Corps then reviews the public comments and make appropriate adjustments, if any are required, to the draft and a final report is issued by the Corps district responsible for the study.

66. Upon issuance of a final report by the district, there is a second public review and comment period for one to two months. During this time, there are additional reviews of the final report by various state and federal agencies.

67. At the conclusion of the two review phases, the Corps Division Commander submits a final report to Corps headquarters, where it undergoes yet another review before the Chief of Engineers for the Corps issues a final report containing recommendations for improvement to the navigation system.

68. This final report is then reviewed by the Department of the Army, the Department of Defense and the Office of Management and Budget prior to any recommendations arising out of the report are submitted to the Congress.

69. Consequently, in 2000, when Dr. Sweeney first raised his claims, the Corps had not even begun to prepare its draft report, nor had any of the work been subjected to any public review or comments.

70. MUDD has retained the law firm of Porter, Wright, Morris & Arthur, LLP to represent him with regard to his claims in this action and is responsible to pay it fees for the services it provides in connection with the representation.

COUNT I – VIOLATIONS OF PRIVACY ACT

71. This is an action for violations of the Privacy Act, 5 U.S.C. § 552a, for damages.

72. MUDD realleges the allegations set forth in paragraphs 1 through 70 as if fully set forth herein.

73. On December 6, 2000, SPECIAL COUNSEL held a press conference where it released the complete DAIG Report to members of the media and posted the complete report on its web-site.

74. The DAIG Report contained personal information of MUDD's that is protected by the Privacy Act.

75 SPECIAL COUNSEL did not request prior permission from MUDD to release the protected information contained in the DAIG Report, nor has MUDD ever given SPECIAL COUNSEL permission to release his personal information to any third-party.

76. SPECIAL COUNSEL improperly released this personal information for the express purpose of injuring MUDD's reputation.

77 Prior to its release, SPECIAL COUNSEL was advised by the Secretary of Defense that disclosure of the DAIG Report should be limited to protect MUDD's personal information.

78. At all times relevant herein, the employees of SPECIAL COUNSEL were acting within the scope of their employment.

79. As a direct result of SPECIAL COUNSEL's improper release of MUDD's personal information, MUDD has suffered damages and continues to suffer damages.

WHEREFORE, Plaintiff JAMES V. MUDD demands judgment against Defendant UNITED STATES OFFICE OF SPECIAL COUNSEL pursuant to 5 U.S.C. § 552a for damages, attorneys' fees and costs, and for such other and further relief as this Court deems just and proper.

COUNT II – VIOLATIONS OF PRIVACY ACT

80. This is an action for violations of the Privacy Act, 5 U.S.C. § 552a, for damages.

81. MUDD realleges the allegations set forth in paragraphs 1 through 70 and 73 through 79 as if fully set forth herein.

82 After SPECIAL COUNSEL released MUDD's personal information in violation of the Privacy Act, DOD and ARMY were advised by MUDD that his personal information was being improperly disseminated by SPECIAL COUNSEL.

83. Shortly thereafter, ARMY notified MUDD that it could not release the DAIG Report to him, nor could it release its investigation materials to him pursuant to the Privacy Act, but that he could obtain the complete DAIG Report containing his personal information on the Internet on the SPECIAL COUNSEL's web-site.

84. Upon receiving notice of this improper release of MUDD's personal information, neither DOD nor ARMY took any actions to halt the unauthorized release of the information.

85. DOD and ARMY refused to halt the improper release of MUDD's personal information with the intent of injuring MUDD's reputation.

86. At all times relevant herein, the employees of DOD and ARMY were acting within the scope of their employment and/or acting in the line of duty.

87. As a direct result of DOD's and ARMY's refusal to stop the improper release of MUDD's personal information, MUDD has suffered damages and continues to suffer damages.

WHEREFORE, Plaintiff JAMES V. MUDD demands judgment against Defendants UNITED STATES ARMY and the UNITED STATES DEPARTMENT OF DEFENSES pursuant to 5 U.S.C. § 552a for damages, attorneys' fees and costs, and for such other and further relief as this Court deems just and proper.

COUNT III – FAILURE TO FOLLOW ARMY REGULATIONS

88. This is an action for damages for failure to follow Army Regulations.

89. MUDD realleges the allegations set forth in paragraphs 1 through 70 as if fully set forth herein.

90. Pursuant to paragraph 8-6 of Army Regulation 20-1, a suspect or subject is entitled to be told of any unfavorable information uncovered during the Inspector General's investigation and is to be given the opportunity to comment on the unfavorable information.

91. MUDD was never told of the unfavorable information contained in the DAIG Report, nor was he given an opportunity to comment on the unfavorable information prior to its being improperly released to the media.

92. Moreover, pursuant to Army Regulation 20-1, the DAIG report was not to be distributed beyond those individuals whose duties and official responsibilities require access to it to protect the privacy of the individuals and witnesses who requested confidentiality.

93. Contrary to Army Regulation 20-1, ARMY allowed the DAIG report to be released to the general public and did not protect the privacy of MUDD.

94. As a direct result of ARMY's failure to allow MUDD to comment on the unfavorable information prior to it being issued in final form, or to provide additional information to the investigators prior to the DAIG Report being issued in final form, MUDD has suffered and continues to suffer damages to his personal and professional reputation.

95. As a direct result of ARMY's failure to protect MUDD's privacy, he has suffered damages and continues to suffer damages to his personal and professional reputation.

WHEREFORE, Plaintiff JAMES V. MUDD demands judgment against Defendant UNITED STATES ARMY for damages, and for such other and further relief as this Court deems just and proper.

JURY DEMAND

Plaintiff JAMES V. MUDD hereby demands a trial by jury on all issues so triable.

Dated this 1st day of April, 2005.

Porter, Wright, Morris & Arthur LLP

By: _____

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