



INSPECTOR GENERAL
DEPARTMENT OF DEFENSE
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JUN - 4 2010

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

Re: OSC File No. DI-08-2096

Dear Mr. Reukauf:

We believe the attached report completes the requirement of section 1213, title 5, United States Code concerning allegations that employees at the Defense Technical Information Center (DTIC) improperly used fees collected for Information Analysis Center (IAC) programs for activities that were unrelated to the IAC programs and failed to properly report the use of those fees. My letter of October 9, 2009, provided the audit report that substantiated allegations concerning improper collection and use of fees and noted that our Deputy Inspector General for Administrative Investigations was conducting a separate review to determine whether the actions of DTIC senior officials constituted "gross mismanagement and an abuse of authority." The enclosed report presents the results of that investigation.

Our Audit Reviews D-2010-001 and D-2010-023 established that in FY 2007 and 2008, DTIC may have collected \$20 million in excess fees from its customers and, in violation of the Economy Act, augmented its budget with these fees. Mr. R. Paul Ryan, Member of the Senior Executive Service, served as Administrator of DTIC during this period and was the subject of the follow-on investigation.

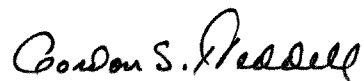
We determined that in failing to establish a process for accumulating actual costs and assenting to established DTIC practices regarding collection and use of surplus fees, Mr. Ryan left DTIC in violation of the Economy Act and, in doing so, created risk of adverse impact to the DTIC mission. Accordingly, we conclude that Mr. Ryan's actions in administering the collection and use of fees by DTIC constituted gross mismanagement as defined by applicable standards. However, we found insufficient evidence to substantiate the allegation of abuse of authority.

Following established protocol, we provided Mr. Ryan's senior management official, Mr. Zachary J. Lemnios, the Director, Defense Research and

Engineering, our report for consideration of corrective action with respect to Mr. Ryan. Such corrective actions usually take 60 to 90 days to process. We will provide you the results of that process when it has been completed.

Please contact me, or have your staff contact Mr. John R. Crane at (703) 604-8234, should you have any questions.

Sincerely,

A handwritten signature in cursive script that reads "Gordon S. Heddell".

Gordon S. Heddell

Enclosure: As stated

cc: Deputy Secretary of Defense

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Report No. H09L112939219

June 4, 2010

Inspector General

United States
Department of Defense



ALLEGED MISCONDUCT:
MR. R. PAUL RYAN,
ADMINISTRATOR,
DEFENSE TECHNICAL INFORMATION CENTER

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ALLEGED GROSS MISMANAGEMENT AND ABUSE OF AUTHORITY:
MR. R. PAUL RYAN
ADMINISTRATOR, DEFENSE TECHNICAL INFORMATION CENTER

I. INTRODUCTION AND SUMMARY

We initiated this investigation to address allegations that Mr. R. Paul Ryan, Administrator, Defense Technical Information Center (DTIC), engaged in gross mismanagement and abuse of authority.

By letter to the Secretary of Defense dated February 3, 2009, the Acting Special Counsel, U.S. Office of General Counsel, referred for investigation a whistleblower disclosure that employees at DTIC engaged in a violation of law, rule or regulation, gross mismanagement and an abuse of authority. The disclosure concerned the alleged improper use of fees collected for Information Analysis Center (IAC) programs to fund DTIC functions and activities unrelated to IAC programs. Based on the authority delegated by the Secretary of Defense to the DoD IG to respond to requests for investigation under Title 5, United States Code, Section 1213, (5 U.S.C. 1213) "Provisions Relating to Disclosures of Violations of Law, Gross Mismanagement, and Certain Other Matters," the DoD IG Deputy Inspector General for Audits initiated a review of the matter.

On October 9, 2009, DoD IG published Report D-2010-001, "Review of Whistleblower Disclosure Regarding the Defense Technical Information Center," which concluded that during Mr. Ryan's tenure as Administrator, DTIC may have overcharged customers in excess of \$20 million in IAC fees in violation of 31 U.S.C. 1535, "The Economy Act," and DoD Instruction (DoDI) 4000.19, "Interservice and Intergovernmental Support," dated August 9, 1995. The audit report also concluded that DTIC used the fee surpluses to augment its budget and finance DTIC-wide unfunded investment opportunities, rather than IAC specific programs, in violation of Federal accounting principles.

Based on the conclusions in the audit report, we focused our investigation on whether, as Administrator, DTIC, Mr. Ryan engaged in gross mismanagement by improperly charging IAC fees and augmenting DTIC's budget in violation of the Economy Act and DoDI 4000.19.

We substantiated the allegation. We found that Mr. Ryan was aware of the fee collection and use, believed it to be permissible, and assented to the continued IAC fee practices. Further, we found that while Mr. Ryan did not initiate this adverse condition, he became accountable for it upon his appointment as Administrator in 2005. Under the Economy Act, Federal agencies are authorized to recoup the actual (direct and indirect) cost of providing a good or service, but are prohibited from augmenting their budget with another Federal agency's appropriated funds.

Under standards established in cases decided by the Merit Systems Protection Board, a finding of gross mismanagement requires that Mr. Ryan's action or inaction created a substantial risk of significant adverse impact upon the agency's ability to accomplish its mission. The evidence established that Mr. Ryan's failure to establish a process for accumulating actual costs,

his assent to the collection of IAC fees, and his use of surplus fees for otherwise unfunded DTIC investment opportunities resulted in a near-term benefit to the agency. However, those actions placed DTIC in violation of the law. By doing so, Mr. Ryan's actions created substantial risk of significant adverse impact on DTIC's ability to perform its mission in the long-term by their potential to damage DTIC's credibility and reputation among its customers, and to jeopardize future appropriations should Congress view the improper augmentation as circumventing Congress' role and budget controls. Therefore, we conclude that Mr. Ryan's actions constitute gross mismanagement.

We did not substantiate the allegation that Mr. Ryan abused his authority. We provide our analysis with respect to that conclusion in Section III, Scope, of this report.

Following our established practice, by letter dated April 30, 2010, we provided Mr. Ryan the opportunity to comment on our initial conclusions. He responded by letter dated May 20, 2010.

Mr. Ryan disagreed with our conclusion regarding gross mismanagement, acknowledging that, in hindsight, his actions "may have constituted simple negligence." He argued that the improper fee collection process did not meet the definition of gross mismanagement, because it did not create sufficient risk of adverse impact on the DTIC mission. Additionally, Mr. Ryan asserted that the DTIC fee management process was well known and tacitly approved by other authorities, remains "debatable" in terms of its propriety, and that fees collected reasonably approximated actual costs. After carefully considering Mr. Ryan's response, we stand by our conclusion in the matter.

This report sets forth our finding and conclusion based upon a preponderance of the evidence standard.

II. BACKGROUND

DTIC manages the DoD IAC program and provides centralized operation of scientific, technical and related Defense Information services, databases, systems, or networks for the acquisition, organization, retrieval, and dissemination of information to support the Defense Community. DTIC also develops and improves DoD Scientific and Technical Information and Defense Information systems through the continuous application of innovative processes, techniques and technologies for information discovery, analysis and dissemination; and assures information security and integrity through the enhancement and application of the latest technologies for system security, user authentication, access control, and single-sign-on.

In 1991, DTIC was realigned from the Defense Logistics Agency to the Office of the Under Secretary of Defense (Acquisition). From 1997 to 2004, the Defense Information Systems Agency (DISA) controlled DTIC and provided legal support during the early stages of the IAC fee policy development. In 2004, DTIC became a DoD Field Activity and was realigned under the Under Secretary of Defense for Acquisition, Technology, and Logistics, reporting to the Director of Defense Research and Engineering (DDR&E). As a Field Activity, DTIC received legal guidance from the Defense Logistics Agency's Office of General Counsel.

Mr. Ryan joined DTIC in 1984 as a project officer in research and development. He later moved through positions of increasing responsibility, including Deputy Administrator from 1989 to 2004, and was appointed Administrator in 2005.

III. SCOPE

We interviewed Mr. Ryan; Mr. Alan Shaffer, Principal Deputy, DDR&E; and the former Director of Resource Management, DTIC. We reviewed DoD IG audit reports and applicable regulations regarding interdepartmental and intragovernmental support. We also reviewed numerous documents such as internal emails and presentations related to the matters under review. We focused our investigation on Mr. Ryan's actions as Administrator.

On December 3, 2009, the DoD IG issued Audit Report D-2010-023, "Review of Defense Technical Information Center Internal Controls," containing responses to the findings of Audit Report D-2010-001 from affected organizations. The report details the remedies each organization intended to take to correct the identified deficiencies. We reviewed the audit reports, their findings, and supporting documentation.

Regarding the alleged abuse of authority by Mr. Ryan, we considered *Ramos v. Department of the Treasury*, 72 M.S.P.R. 235, 241 (1996), which found that abuse of authority occurs when there is an "arbitrary or capricious exercise of power by a federal official or employee that adversely affects the rights of any person or that results in personal gain or advantage to himself or to preferred other persons." Evidence established that Mr. Ryan's improper assent to continuing a long-standing DTIC practice and his failure to assure DTIC captured actual costs did not adversely affect the rights of any person or result in personal gain or advantage to Mr. Ryan. Therefore, we consider the allegation not substantiated.

IV. FINDINGS AND ANALYSIS

Did Mr. Ryan engage in gross mismanagement as DTIC Administrator?

Standards

5 U.S.C. 1213, "Provisions Relating to Disclosures of Violations of Law, Gross Mismanagement, and Certain Other Matters"

Section 1213 protects employees (whistleblowers) who make disclosures of "gross mismanagement," but does not further define that term. Subsequent legal opinions have clarified the definition of gross mismanagement. In *Embree v. Department of the Treasury*, 70 M.S.P.R. 79, 85 (1996) (*Embree*), the Merit System Protection Board (MSPB) concluded:

"Gross mismanagement" is more than de minimis wrongdoing or negligence. It does not include management decisions which are merely debatable, nor does it mean action or inaction which constitutes simple negligence or wrongdoing. ... Gross mismanagement means a

management action or inaction that creates a substantial risk of significant adverse impact on the agency's ability to accomplish its mission.

Also, in *White v. Department of the Air Force*, 391 F.3d 1377, 1381-1382 (Fed. Cir. 2004) (*White*), the Federal Circuit Court clarified "gross mismanagement," stating:

Mere differences of opinion between an employee and his agency superiors as to the proper approach to a particular problem or the most appropriate course of action do not rise to the level of gross mismanagement. . . [F]or a lawful agency policy to constitute 'gross mismanagement,' an employee must disclose such serious errors by the agency that a conclusion that the agency erred is not debatable among reasonable people. The matter must also be significant.

31 U.S.C. 1535, "The Economy Act,"

The Act provides the principal statutory authority for one Federal agency to pay another Federal agency for goods or services. This section states, in part:

Payment may be in advance or on providing the goods or services ordered and shall be for any part of the estimated or actual cost as determined by the agency or unit filling the order. . . Proper adjustment of amounts paid in advance shall be made as agreed to by the heads of the agencies or units on the basis of the actual cost of goods or services provided.

DoDI 4000.19, "Interservice and Intragovernmental Support," dated August 9, 1995

Paragraph 4.6 states, "Interservice and intragovernmental support is reimbursable to the extent that provision of the specified support for a receiver increases the support supplier's direct costs (i.e., incremental direct cost). Costs associated with common use infrastructure are non-reimbursable, except for support provided solely for the benefit of one or more tenants."

U.S. Government Accounting Office, Office of the General Counsel, "Principles of Federal Appropriations Law," 3rd Edition, Vol. II, dated February 2006

Also referred to as the "Red Book," this publication states on page 6-162 that, as a general principle, an agency may not augment its appropriations from outside sources without specific statutory authority. When an agency operates beyond its appropriated funding level with funds derived from another source, the agency is circumventing Congressional budget controls.

Facts

On October 9, 2009, the DoD IG published Report D-2010-001 which determined that during FY 2007 and FY 2008, during Mr. Ryan's tenure as Administrator, DTIC may have overcharged customers in excess of \$20 million in IAC fees above the actual cost of the goods

and services, in violation of the Economy Act and DoDI 4000.19. The audit further determined that because DTIC management did not have a systematic process for accumulating actual indirect (overhead) costs incurred by its IACs, DTIC was unable to calculate a reimbursable fee rate to apply against its estimated reimbursable work.

By memorandum dated August 11, 1994, the Defense Electronics Supply Center Counsel responded to DTIC's request for a legal opinion on the authority of DoD IACs to net bill the Government (recover costs). The opinion stated the issue would be more easily answered if "expressed consent (statutory authority) had been provided by Congress at some point in the time covered by the 25+ years that the IAC and Defense Technical Information services have been provided under DoD's operating authority." The opinion acknowledged that DTIC's authorization to operate under the Defense Business Operating Fund alleviates the problem, but anticipated potential issues that would arise when DTIC returned to the appropriated fund in 1995.

By memorandum dated February 13, 1997, the DTIC IAC program manager requested that the DTIC Administrator authorize implementation of a 2% Task Support Cost fee on Technical Area Tasks, retroactive to January 1, 1997. The IAC program manager justified the request stating that due to the "budget cuts the IAC Program has experienced in FY 95, 96, and the beginning of FY 97, we are not in a position to fund these task support costs that have been shifted from the laboratories to DTIC/IACs." The DTIC Administrator approved the request on February 19, 1997.

In a memorandum dated March 24, 1998, the acting DISA comptroller responded to a DTIC proposal to finance a new IAC (the DoD Information Assurance Information Analysis Center, IATAC) by charging customers an additional 2% fee. The acting comptroller wrote that it "appears to be a questionable case of improper augmentation of appropriations without specific statutory authority." The acting comptroller went on to state his belief that, without specific authorization, "near and long term IATAC requirements should be addressed in the formal Program Objective Memorandum and budget process as an appropriated fund requirement." The acting comptroller forwarded his response to the DISA General Counsel for an official legal opinion.

By memorandum dated April 3, 1998, the DISA Deputy General Counsel responded to the acting comptroller that the fundamental authority to charge user fees to recoup costs was the Economy Act. Counsel wrote that actual costs include all direct costs attributable to providing the goods or services ordered, as well as indirect costs funded out of the performing agency's currently available appropriations that bear a significant relationship to providing goods and services. Counsel continued that indirect costs may be reflected in a standard charge which is calculated to reasonably ensure that the performing agency is reimbursed for its costs without either the ordering or the performing agency augmenting its appropriations. Finally, the DISA Deputy General Counsel opined that an additional 2% user fee, in addition to the existing fee, would result in an augmentation of funds because the additional 2% fee did not bear a significant relationship to the goods and services provided by the IACs charging the fee.

Twice DTIC's supervising organizations established Integrated Process Teams (IPTs) to address the IACs, and IAC fee usage -- once in 1998, as Mr. Shaffer testified, and again in May 2002, as established by Mr. Ryan's testimony and a 2002 DISA-DDR&E MOU. The 2002 IPT specifically convened to "assess the IAC structure, business model, and resource levels needed to ensure the quality and services of the IACs continue." The recommendations of the 2002 IPT were later included in the "Understandings" section of a Director, DISA-DDR&E MOU, effective from October 15, 2002, which outlined the following provisions regarding funding responsibilities for IAC program costs:

- (1) DTIC appropriations and/or the TAT [Technical Area Tasks] surcharge will fund the costs associated with 'Foundational' support and services. 'Foundational' items include costs in the categories of DTIC Program Support, IAC Management & Support, and Information Collection & Processing and allow flexibility to fund some Information Analysis and Dissemination Support.
- (2) IAC Users and/or Other Sponsors will fund the costs associated with 'User-Initiated' services. 'User Initiated' services include costs in the categories of Information Analysis & Dissemination and Other Unique Services.
- (3) IAC Users and/or Other Sponsors may also contribute funds to expand the scope of work associated with 'Foundational' support and services.

By memorandum dated July 26, 2002, the DISA Deputy General Counsel responded to a request from the DISA Comptroller to determine whether DTIC had the authority to raise the Technical Area Task surcharge to 4%; and if so, could DTIC, "use the fees for 'foundation' costs directly to support the individual IAC that collected the fee and to cover costs shared by all IACs." Counsel opined that, "DTIC does have authority to raise the TAT [Technical Area Task] surcharge to cover actual costs. The actual costs to be covered can be costs associated with the specific IAC that collected the costs and costs that are shared by all IACs." Counsel further explained that Comptroller General guidance and the DoD Financial Management Regulation described that indirect costs recovered must have a significant relationship to the payee and that generally overhead is not chargeable on reimbursable customer orders from appropriated fund activities. However, DISA Deputy General Counsel continued that DTIC "is required to budget for core and basic activities of the IACs" and that indirect costs "may be recovered through charging a fee that is calculated to recover actual costs."

On December 3, 2009, the DoD IG issued a final Report D-2010-023, "Review of Defense Technical Information Center Internal Controls," that contained the responses from affected organizations detailing the remedies they intend to implement to address the deficiencies identified in Audit Report D-2010-001. This audit found that "DTIC did not properly use reimbursable fees collected," and that "... DTIC management did not ensure that actual indirect costs (overhead) had a significant relationship to providing the goods or services."

Mr. Ryan testified that he objected to the audit's finding that DTIC's use of IAC fees was improper, stating, "I believed that the way we were operating up until the IG came out with this report, that we were using those fees properly. It was only [the DoD IG Audit] report saying this is our view – of the IG audit team – that this wasn't the proper use that brought that to my attention."

Mr. Ryan testified that he did not change IAC fee policies when he became the DTIC Administrator. He testified that he interpreted the 2002 legal opinion to mean that "indirect costs for DTIC support programs are recoverable under fee, not just the direct costs to IAC bills." He disagreed that the IAC fees were "overcharges," stating, "To me they were vetted uses of the fee." He further testified that he did not seek legal review of IAC fee usage because he "took the DISA legal opinions and the DISA comptroller decisions as still valid. . . I was comfortable in our authority. My boss was comfortable in that authority and I felt that was enough."

During the interview with this Office, when Mr. Ryan was asked if he believed that the use of IAC fees to fund DTIC-specific unfunded investment opportunities was a misuse of Government resources, Mr. Ryan responded:

No. I do not. . . Again, I go back to the IAC program is a piece of DTIC. Anything we fund for DTIC will benefit the IACs either directly or indirectly. So applying those funds, using those funds for the most part across DTIC supported the IAC program. Add in, again, the authoritative guidance that we were following from the IPT and the MOU and DDR&E that said foundational costs were acceptable, legal comptroller opinions, we felt we had sufficient authoritative advice to operate the way we operated. My boss has a lot of financial responsibility for the R&E program and if it was acceptable to him, he sure has more financial experience than I do and it wouldn't occur to me to question him when he says, "Yep, this is good use."

Mr. Ryan stated that Mr. Shaffer, his senior management official, was aware of the manner in which DTIC used IAC funds. Mr. Ryan asserted that Mr. Shaffer, "not only knew the amount of fee, but he knew – we certainly didn't give him the laundry list of things, but we gave him enough of an idea of the uses of that fee that when he told me he concurred and approved, I was comfortable with his direction to me." When asked if Mr. Shaffer ever expressed concerns about the way DTIC used its IAC fees, Mr. Ryan replied, "No. He would even suggest at times items that could be funded through fee." Mr. Ryan testified that Mr. Shaffer was aware that IAC fees funded core DTIC projects.

In an email dated May 4, 2006, Mr. Ryan wrote to Mr. Shaffer expressing his desire that Mr. Shaffer be "comfortable in how we are addressing the use of [IAC] fee dollars." He wrote:

A legal opinion offered at the time stated it was acceptable to fund IAC core operations with fee dollars earned. It was further stipulated that only fee dollars earned for a specific IAC can be used to fund that

same IAC's core operations... I have made the decision not to fund [IAC] core operational costs at 100 percent because I feel it important that at least a portion of core costs come from appropriated dollars. This is the first point that I want to make sure you know and are OK with.

In the same email, Mr. Ryan informed Mr. Shaffer of the two criteria he [Mr. Ryan] used to justify the use of IAC fee dollars to cover DTIC core costs. He continued:

First, is the item to be funded of benefit to an IAC or does it help the IAC do business in a more expeditious manner. Second, we try to make a determination of what percentage of the cost of the budget item is applicable to the IAC program and therefore eligible for being funded by some percentage of fee . . . some basic infrastructure support items are designated to be funded at 100 percent of their cost with fee dollars. It is this last category that I want to be sure that you are aware of our decisions and are comfortable with funding of 100 percent of the cost with fee dollars.

Also in his May 4, 2006 email, Mr. Ryan provided Mr. Shaffer with three examples of DTIC infrastructure support items paid for using IAC fees: (1) Web service systems that will "fundamentally change the way DTIC and the IAC information systems are served to the DoD user community"; (2) DoD Search Support Labor and Maintenance, "[an] infrastructure support tool that touches every public access system and process in DTIC"; and (3) a research and advisory service that "is accessible to DTIC government staff and contractors, including IAC developers. . . ."

Mr. Shaffer testified that he was not aware of any IACs waiting for funding until DTIC unfunded investment opportunities were funded and that he would not have been comfortable with that situation had that been the case. When asked if the loss of appropriated funds through DTIC's IAC overcharging constituted a substantial risk of adverse impact to those organizations that paid the fees, Mr. Shaffer replied, "Honestly? Of course not. No one forced someone to come in [to the contract]. And the contract fees were always done ahead of time, up front. . . So that is a choice that whoever has the appropriated dollars makes."

Mr. Shaffer testified that charging overhead is a standard practice in DoD and that serviced organizations make the decision to use their appropriated funds in that way. He expressed concern that there is still some ambiguity about the correct use of overhead and believed that it would be helpful to get to a sound [legal] basis [for calculating appropriate overhead]. Mr. Shaffer further testified that Mr. Ryan never expressed any concerns to him over IAC fee usage, and stated that if Mr. Ryan had concerns, he should have checked with counsel. Mr. Shaffer stated that he did not feel that he had any approval authority over IAC fee usage and that he gave Mr. Ryan no direction concerning the use of IAC fees. He stated that the overriding principle was to have a legal review of what was or was not being done with the fees.

On May 21, 2008, the Director, Resource Management, DTIC, sent Mr. Ryan an email stating his concerns over IAC fee usage. Mr. Ryan responded the next day that this was “the first time I had heard your belief that we are violating Federal rules and regulations.” Mr. Ryan followed up with another email on June 3, 2008, stating:

I have reviewed various documents related to our fee use policy, including an opinion from DISA legal counsel and additional informational documents. . . Documentation is on file from Mr. Al Shaffer, Acting DDRE, and as Principal Deputy DDRE, approving our decision process and rationale for how we use fees.

After examining these documents, I don't see how our fee use violates any rules as you indicate. Rather, I think that what we're doing is fully consistent with our directions and guidance on the issue.

Mr. Ryan testified that he did not seek a legal opinion regarding the DTIC Resource Management Director's concerns.

The audit also found that in FY 2008, DTIC collected reimbursable fees totaling \$43.1 million and that DTIC's appropriations totaled \$53.0 million. DTIC's reimbursable fees constituted 44.8% of DTIC's total funding of \$96.1 million in FY 2008.

In 2002, prior to Mr. Ryan's appointment as Director, DTIC's IAC fee policies and practices were established based on the recommendations of a DDR&E-directed IPT. The evidence established that Mr. Ryan, while serving as the Administrator, DTIC, acknowledged and assented to DTIC policy to collect IAC fees in excess of and without calculating actual costs to augment DTIC's budget and finance projects unrelated to IAC programs in violation of the Economy Act and DoDI 4000.19.

Discussion

We conclude that Mr. Ryan's actions in administering DTIC's collection and use of IAC fees constitute gross mismanagement. The audit reports established that in FY 2007 and FY 2008 DTIC may have overcharged customers in excess of \$20 million in IAC fees above actual costs because it lacked a systematic process for accumulating actual indirect costs (overhead), in violation of the Economy Act. The audit report also concluded that DTIC used the fee surpluses to augment its budget and finance DTIC-wide unfunded investment opportunities, rather than IAC specific programs, in violation of Federal accounting principles.

The evidence established that the deficient IAC policies and practices were in place before Mr. Ryan assumed the responsibilities of Administrator, and that following Mr. Ryan's appointment as Administrator in 2005, he was aware of and assented to the continued practice and did not establish a systematic process to accumulate actual costs. Mr. Ryan believed, albeit incorrectly, that he was operating within the guidelines of the 2002 DISA Deputy General Counsel legal opinion and the MOU. Additionally, Mr. Ryan did not take action to correct DTIC's IAC fee policy problems when notified about the problems

We conclude that Mr. Ryan's actions in administering DTIC constitute gross mismanagement under 5 U.S.C. 1213.

In considering whether Mr. Ryan's actions rose to the level of gross mismanagement, we reviewed two cases that clarified the definition of "gross mismanagement" as applied under 5 U.S.C. 1213.

In the case of *Embree v. Department of the Treasury*, the MSPB concluded that gross mismanagement is more than de minimis wrongdoing or negligence and "does not include management decisions which are merely debatable, nor does it mean action or inaction which constitutes simple negligence or wrongdoing." Furthermore, "Gross mismanagement means a management action or inaction that creates a substantial risk of significant adverse impact on the agency's ability to accomplish its mission."

In the context of *Embree*, Mr. Ryan's management actions in allowing the continued augmentation of DTIC's appropriation created a substantial risk of significant adverse impact to DTIC. The evidence established that while Mr. Ryan's assent to the collection of IAC fees and to the use of surplus fees for otherwise unfunded DTIC investment opportunities resulted in a near-term benefit to the agency, his actions placed DTIC in violation of the law. By doing so, Mr. Ryan's actions potentially damaged DTIC's credibility and reputation among its customers, and jeopardized future appropriations should Congress view the improper augmentation as circumventing Congress' role and budget controls by obtaining excess funds without Congressional approval.

In the case of *White v. Department of the Air Force*, the Federal Circuit Court clarified that "gross mismanagement" is more than "mere differences of opinion between an employee and his agency superiors as to the proper approach to a particular problem or the most appropriate course of action..." Additionally, "for a lawful agency policy to constitute 'gross mismanagement,' an employee must disclose such serious errors by the agency that a conclusion that the agency erred is not debatable among reasonable people. The matter must also be significant." In this context, we find first, that the collection of \$20 million dollars in excess fees over a 2 year period to be a "significant" error. Second, the evidence obtained by the DoD IG Audit demonstrated that management failed to establish a systematic process for accumulating actual costs, then charged "reimbursable fees" without any established actual cost basis and expended them without assuring the expenditures had a significant relationship to the goods and services provided. The fact that the DoD IG Audit's conclusions are not "debatable" is supported by the concurrence in the Audit's recommendations based on its findings, by the Under Secretary of Defense Comptroller (Program/Budget), Deputy Comptroller, and Principal Deputy Defense Research and Engineering. Finally, DTIC's fee charging was not a "lawful agency policy"; in fact, it was a violation of law, i.e., the Economy Act.

Therefore, we determined that in failing to establish a process for accumulating actual costs and assenting to DTIC's collection and use of IAC fees, Mr. Ryan placed his agency in violation of the law, and in doing so, created sufficient risk of adverse impact as to constitute gross mismanagement under 5 U.S.C. 1213.

Response to Tentative Conclusion

By memorandum dated May 20, 2010, Mr. Ryan responded to our tentative conclusion. Mr. Ryan contended that his actions did not constitute gross mismanagement because DTIC's collection of excess IAC fees was not significant enough to have an adverse impact on DTIC's ability to perform its mission. DTIC's annual appropriated budget is approximately \$50 million. DTIC's IAC funded projects were at least \$20 million for FY07 and FY08, or an amount equivalent to at least 20 percent of the budget. In an email Mr. Ryan provided from Mr. Shaffer to a representative from the Office of the Under Secretary of Defense Comptroller, Mr. Shaffer wrote that without the IAC fees, DoD would have to increase DTIC's appropriated fund \$30-40 million per year or DTIC would "go away." DTIC's reliance on excess IAC fees to perform its mission is demonstrably significant. Further, DTIC's improper augmentation of its appropriation places it at risk of unfavorable Congressional budget action.

Mr. Ryan also asserted that gross mismanagement must be more than just debatable actions, citing *White*. While we acknowledge that most of these policies existed before Mr. Ryan became administrator, and that there has been much discussion about the policies, their legality is not debatable – they were illegal. DTIC's fee policies were in violation of the Economy Act because they were not based on actual costs. The fact that Mr. Ryan's IAC fee policies allowed DTIC to illegally augment its budget in violation of the Economy Act is not debatable. Also, as demonstrated by Tab 7 of his response, the fact that Mr. Ryan's rationale for IAC fees was not based on actual costs, as required by the Economy Act, is not debatable.

Finally, Mr. Ryan wrote in his response that he sought legal counsel after the Director of Resource Management surfaced the IAC fee problems to him. Mr. Ryan's previous sworn testimony to us directly contradicts his assertion. The following exchange demonstrates that Mr. Ryan did not take action to correct DTIC's IAC fee policy problems when notified about the problems:

Q Well when [the Director of Resource Management] surfaced [his concerns over IAC fee misuse] to you, what actions did you take regarding his concerns?

A I tried to lay out for him the various procedures, documentations, DISA Comptroller, DISA General Counsel's opinions that said these were appropriate uses of fee; documents that he already had in his possession. But I again, pointed to these documents as this is not just DTIC saying this. DTIC has gotten legal opinions from DISA General Counsel, concurrence from DISA Comptroller, concurrence from Mr. Shaffer on the use of these fees. So that's the way I approached [the Director of Resource Management].

Q Did you do that in person with him or was that through email?

A Email.

Q And at this time DISA was still providing a legal opinion, is that correct?

A No, by that time we were separated from DISA and had become an independent field activity.

Q So were there legal opinions rendered after the 2002 opinion [DISA legal counsel] gave?

A No. I took the DISA legal opinions and the DISA comptroller decisions as still valid.

Q Did that prompt you to ask for any sort of legal review of IAC usage, IAC fee usage?

A I'm sorry. Did what prompt me?

Q Did his concerns prompt you to ask for any type of legal review or did you feel that that was not necessary?

A Yeah, I did not seek legal review. I was comfortable in our authority. My boss was comfortable in that authority and I felt that was enough.

We considered several factors Mr. Ryan offered in mitigation, including the fact that these practices were in place before he became Administrator and were known by his senior management official. However, we determined those factors did not constitute sufficient basis to alter our conclusions.

V. CONCLUSION

Mr. Ryan's actions in administering DTIC's collection and use of IAC fees constituted gross mismanagement.

VI. RECOMMENDATION

We recommend the Director, Defense Research and Engineering, consider appropriate corrective action with respect to Mr. Ryan.

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Inspector General
Department of Defense

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